



SEC ADOPTS RULES MANDATING ELECTRONIC FILING AND REVISION OF FORM D

The Securities and Exchange Commission (the “SEC”) is adopting rule amendments that both will require issuers to file the Form D¹ electronically by March 19, 2009, and will change the information required to be provided on the form.²

A. Electronic Form D Filing

On September 15, 2008, the SEC’s new Form D electronic filing system will become available for electronic filing on a voluntary basis from any computer with Internet access. On March 19, 2009, Form D electronic filing will become mandatory.³ During the intervening transition period, issuers that choose not to file electronically may use either the current Form D or a paper version of the new electronic form. Regardless of the method of filing, the SEC will continue to require Form D filing within 15 days of an issuer’s first sale under one or more of the exemptions provided in Regulation D or Section 4(6) of the Securities Act.

To access the SEC’s system, an issuer will need the same codes required to access the SEC’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”): (1) a user identification number, called a Central Index Key (“CIK”); (2) a CIK Confirmation Code (“CCC”); and (3) a password. To obtain a CIK, an issuer must file with the SEC: (a) a Form ID electronically at <https://www.filermanagement.edgarfiling.sec.gov>; and (b) a signed and notarized document authenticating the Form ID by fax within two business days before or after filing the Form ID.

An issuer will be able to both submit and amend the Form D for its offering through EDGAR. The system will require data field entries in response to discrete requests for each item on the form, and will check those entries for errors and consistency with entries in other fields.⁴ For reference, links to instructions and other helpful information will accompany most data entry fields. EDGAR will also require that necessary Form D data fields be completed prior to accepting the Form D for filing, thus reducing the possibility of incomplete filings. Before submission, an issuer will have an opportunity to verify the accuracy of the information. After submission, the issuer will be able to download and print a copy of the Form D, and EDGAR will indicate receipt of the filing.

The SEC will make the information collected from the electronic Form D available to the public on its Internet site, www.sec.gov, where the data will be searchable and downloadable into other

¹ The SEC requires an issuer to file a Form D to apply for limited offering exemptions under Rules 540, 505, and 506 of Regulation D and Section 4(6) of the Securities Act of 1933.

² Securities Act Release No. 8891, (Feb 6, 2008), File No. S7-12-07, available at www.sec.gov/rules/final.shtml.

³ Regulation S-T will be amended to make hardship exemptions unavailable for Form D filings.

⁴ For example, an issuer claiming an exemption under Rule 505 or 506 in response to Form D Item 6 that specifies more than 35 non-accredited investors in response to Item 14 will receive a warning message from the system that only 35 non-accredited investors are permitted under those offering exceptions.

computer applications, as is the case with current EDGAR filings. Currently, Form D information is available only by mail or by visiting the SEC's Public Reference Room.

The SEC hopes the transition to electronic filing will lead to "one-stop filing," whereby issuers will be able to file Form D information with both the SEC and applicable state agencies in one electronic transmission. The SEC is collaborating with the North American Securities Administrators Association ("NASAA") to realize this goal as soon as practicable, and NASAA is considering establishing its own electronic filing system that would receive applicable state filings and fees and interface with the SEC's Form D system. However, the dawn of "one-stop filing" is still far over the horizon.

B. Revisions to Form D's Information Requirements

In conjunction with its implementation of electronic Form D filing, the SEC has revised Form D's information requirements. Those changes include:

- ◆ Permitting filers to identify all issuers in a multiple-issuer offering in one Form-D filing;
- ◆ Deleting the current requirement to identify as "related persons" owners of 10 percent or more of a class of the issuer's equity securities;
- ◆ Replacing the current requirement to provide a business description of the issuer with one to classify the issuer by industry from a provided list of industries;
- ◆ Requiring revenue range information for the issuer, or net asset value range information in the case of hedge funds;
 - ▶ However, all issuers will be given the option to "Decline to Disclose" that information or to specify that such information is "Not Applicable;"
- ◆ Requiring more specific information on the registration exemption claimed by the issuer;
 - ▶ Unlike the current Form D, there will be no option to claim a Uniform Limited Offering Exemption;
- ◆ Requiring reporting of the date of first sale in the offering;
 - ▶ The revised Form D's instructions will state that the date of first sale is the date on which the first investor is irrevocably contractually committed to invest;
- ◆ Requiring reporting of whether the offering is expected to last over a year;
- ◆ Specifying that amendments to a previously filed Form D only will be required:
 - ▶ To correct a material mistake of fact or error in the previously filed notice;
 - ▶ Where there has been a material change in information provided in a previously filed notice (with some exceptions⁵); or
 - ▶ Annually, on or before the first anniversary of the filing of the Form D, or the filing of the most recent amendment, if the offering is continuing at that time;
- ◆ Limiting reporting of the minimum investment amount accepted in the offering to the amount accepted from outside investors, so as not to adversely affect employee stock ownership incentive plans;
- ◆ Requiring Central Registry Depository numbers for both individual recipients of sales compensation and associated broker-dealers;
- ◆ Replacing the current requirement to disclose information on a wide variety of expenses and applications of proceeds with one to report:
 - ▶ Expenses only as to amounts paid for sales commissions and, separately stated, finders' fees; and
 - ▶ Use of proceeds only as to the amount of proceeds used to make payments to executive officers, directors and promoters; and
- ◆ Replacing the current federal and state signature requirements with a combined signature requirement, including the issuer's: (i) commitment to provide offering documents to regulators on request (subject to applicable law); (ii) a consent to service of process; and (iii) certification that the issuer is not disqualified by rule from relying on a claimed exemption.

⁵ Securities Act Release No. 8891 at 32. An amendment will not be required solely because an issuer wishes to file with an additional state or states.

What to Do?

While the new rules represent an opportunity to enhance and streamline the Form D filing process, advance planning is key. Although electronic filing of Form D is not mandated until 2009, companies should begin preparing now for this new requirement, including obtaining all necessary EDGAR filing codes if they have not already done so.

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The WT&P Securities Practice Group is available to assist you in addressing any questions that you may have regarding the matters discussed in this Alert. You can also visit our Website at www.wtplaw.com.

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