

The SEC Publishes Final Rules for Electronic Filing and Revision of Form D under the Securities Act of 1933

February 15, 2008

At its open meeting on December 11, 2007, the Securities and Exchange Commission adopted provisions mandating the electronic filing of Form D, the notice form for exempt offerings made pursuant to Regulation D of the Securities Act of 1933.¹ Electronic filing of Form D may be made on a voluntary basis during a six-month transition period starting September 15, 2008 and will become mandatory on March 16, 2009. The SEC also adopted amendments to the information required to be disclosed on Form D. The changes are meant to update, clarify and simplify the form's requirements, improve the collection of data provided in the form and make the form more accessible to regulators and the public. The final text of the amendments was published in an adopting release on February 6, 2008.²

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Overview

Regulation D comprises a set of rules providing exemptions from federal registration requirements for limited offerings and sales of securities. It is intended to facilitate capital raising by small businesses and to help harmonize exemptions under federal and state securities laws for limited offerings. When the SEC adopted Regulation D in 1982, it stated that the Form D notice filings were intended to serve as an important data collection tool to help the SEC evaluate the effectiveness of Regulation D as a capital-raising device. In 1996 the SEC considered eliminating the Form D filing requirement but decided to retain it on the basis that it was still useful "in conducting economic and other analyses of the private placement market." In the adopting release for the new rules, the SEC reaffirmed its view that Form D provides useful information to both regulators and the public. Moreover, electronic filing will, in the SEC's view, make the information more readily available and reduce issuers' compliance costs.

Summary of Adopted Amendments

I. Filing of Form D

Once the changes are fully implemented, all Form Ds (initial filings and amendments) must be filed electronically through a new online filing system that will be accessible (for both filing and review) from any computer with internet access. The online filing requirement and other changes to the rule are subject to transition rules, as described below.

¹ See SEC press release at <http://www.sec.gov/news/press/2007/2007-259.htm>.

² See Securities Act Adopting Release No. 33-8891 (February 6, 2008) <http://www.sec.gov/rules/final/2008/33-8891.pdf>.

Prior to September 15, 2008, issuers must continue to make Form D filings on current Form D.

During the transition period -- starting September 15, 2008 and ending March 15, 2009 -- electronic filing will be voluntary. Issuers may submit the new Form D through the SEC's online filing system, or they may file on paper the current version of Form D. A third option -- making a paper filing of new Form D -- is also available.

Starting on March 16, 2009, all Form Ds, as well as amendments to Form Ds previously filed (whether on paper or electronically), must be filed through the SEC's online filing system. There will be no "hardship exemption" to permit paper filings.

The online submission will require a consent to service of process, an undertaking to provide offering materials to regulators and a certification that, if the issuer is claiming a Rule 505 exemption, the issuer is not disqualified from relying on Rule 505 for specified reasons. A manually executed copy of Form D must be kept by the issuer for five years and made available to the SEC on request.

To make a Form D filing electronically, issuers will need EDGAR access codes and a user identification, or "Central Index Key," number. Issuers that do not have these codes must obtain them by filing a Form ID electronically at <https://www.filermanagement.edgarfiling.sec.gov>. The Form ID filing must be followed within two days by faxing to the SEC a manually executed and notarized authenticating document. The SEC is considering ways to simplify this process.

II. Revisions to Form D Information Requirements

In conjunction with requiring electronic filing, the SEC has revised the information required to be included in Form D, simplifying certain items and deleting others that it considers either outdated or of no substantive value. Changes include:

- permitting filers to identify all issuers in a multiple-issuer offering in one Form D filing;
- replacing the current requirement to provide a business description of the issuer with a requirement to classify the issuer by industry;
- requiring disclosure of the range of revenue for the issuer, or net asset value in the case of hedge funds (subject to an option to decline to disclose);
- requiring more specific information on the exemption being claimed in the Form D and any exclusion claimed from the definition of "investment company" under the Investment Company Act of 1940;

- requiring reporting of the date of first sale in the offering and whether the offering is expected to last longer than a year;
- specifying when amendments to a previously filed Form D notice are required to be filed;
- requiring a CRD number³ for both individual recipients of sales compensation and associated broker-dealers;
- deleting the current requirement to identify as "related persons" owners of 10% or more of a class of the issuer's equity securities; and
- streamlining disclosure regarding expenses and anticipated use of proceeds.

Federal and State Coordination — One-Stop Filing

The staff of the SEC and representatives of the North American Securities Administrators Association ("NASAA"), the organization of state securities regulators, are exploring the establishment of a "one-stop" filing system that would link the SEC's site to a site sponsored by NASAA, enabling Form D filers to make their SEC and state filings simultaneously. The SEC, although acknowledging that "one-stop" filing capability will not be available when electronic filing of Form D with the SEC begins, is working with NASAA to achieve that capability as soon as practicable. If "one-stop" filing is not available by March 16, 2009 when electronic filing of Form D with the SEC becomes mandatory, a printed copy of the online Form D would be used for state filings.

³ A CRD number corresponds to a broker's or broker-dealer's record located in a database maintained by the Financial Industry Regulatory Authority.

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This client alert is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations.

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