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SEC Adopts Electronic Filing and Revisions to Form D

On February 6, 2008, the Securities and Exchange Commission (the "Commission") published rule amendments on revisions to Form D, the official notice used in connection with private placements in the United States in reliance on Regulation D under the Securities Act of 1933, as amended (the "Securities Act"). The proposed rules simplify the information requirements of Form D and mandate electronic filing of the form through a new online filing system (the "System"). The rules are primarily designed to ease filing burdens, allow for better public availability of Form D information and promote uniformity and coordination between federal and state securities regulation.

Electronic Filing of Form D

Currently, issuers filing a Form D must send paper copies, including a manually signed original, to the Commission. Under the new rules, paper filings will be eliminated and issuers will be required to file and amend the information required by Form D electronically through the System. Highlights of the System are as follows:

- **Time of Filing.** Issuers will continue to be required to file the information required by Form D within 15 days of its first sale of securities.
- **Mechanics of Electronic Filing.**
 - *Broad Accessibility.* The System will be designed to be accessible from any computer with Internet access. Issuers will be able to both submit and amend Form D filings through the System.
 - *Access to the System.* To access the System, issuers will need the same codes as are currently required to make filings on the Commission's EDGAR filing system.
 - *Easier Access to Issuer Information.* The information collected by the System will be publicly available on the Commission's website (www.sec.gov) for viewing, downloading and searching. Furthermore, upon filing the Form D with the Commission, state securities regulators will be able to identify on the Commission's website Form D filings that specify their states.

Amendments to Information Requirements of Form D

While Form D currently requires presentation of preliminary and other information in five sections, the amendments organize the information requirements around sixteen numbered "items" or categories of information. Furthermore, the Form D information requirements will be simplified to:

- Delete the requirement that issuers identify any person who owns 10% or more of a class of its equity securities;
- Permit multiple issuers in a multiple issuer filing to be identified on a single Form D;
- Replace the current requirement to provide a business description of the issuer with a requirement to classify the issuer's industry from a pre-established list of industries;

- Require specification of the date of first sale or indication that the first sale has not yet occurred;
- Require reporting of whether the offering is expected to last over a year;
- Require more specific information on the registration exemption claimed by the issuer as well as information on any exclusion claimed from the definition of "investment company" under the Investment Company Act of 1940, as amended;
- Elicit revenue range information for the issuer, or net asset value range information in the case of hedge funds, (subject to an option to decline to disclose for proprietary or confidentiality reasons);
- Require that the issuer provide information on the amounts paid for sales commissions and finders' fees and amounts paid to its related persons; and
- Combine federal and state signature requirements into a single signature requirement and incorporate the consent to service into the signature block.

New Amendment Filing Requirements

Currently, the Commission requires amendments in ongoing offerings where there has been a material change in information filed about the offering and where basic information previously submitted about the issuer has materially changed. Under the new rules, amendments to a previously filed Form D will be required in the following three instances only:

- To correct a material mistake of fact or error in the previously filed notice (as soon as practicable after discovery of the mistake or error);
- To reflect a change in the information provided in a previously filed notice (as soon as practicable after the change), except that no amendment is necessary for changes specifically excluded by the rule, including, but not limited to, changes in an issuer's revenues or net asset value, the amount of securities sold in the offering, or the total number of investors who have invested in the offering; and
- 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.

Furthermore, issuers must update all of the information on Form D whenever an amendment is filed, regardless of the reason for which the amendment was filed.

State Coordination

The Commission expects and hopes that the System can be a "one-stop" filing center for Regulation D notice filings with the states. However, while the Commission has been working to achieve "one-stop" filing, such capability will not be available when electronic filing of Form D begins. Therefore, it is likely that the filing of paper copies of Form D will be required by a number of states for some time after all Commission filings are done electronically.

Effective Date and Transition Period

The Commission anticipates that the System will be available to receive filings beginning on September 15, 2008 (the "Availability Date"). Electronic filing will not be required for all filings until on or after March 16, 2009 (the "Mandatory Date"). From the Availability Date to the Mandatory Date (the "Transition Period"), electronic filing is voluntary. Issuers that choose not to file electronically during the Transition Period may use either the current paper format or a paper version of the new Form D. Similarly, the Commission will permit an amendment to be filed in paper format using either version of the form during the Transition Period.

If you should have any questions regarding these rules, please contact any of the following members of the Public Companies Practice Group.

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