

## **SEC Adopts Final Rules Mandating the Electronic Filing and Revision of Form D**

**September 26, 2008**

In June 2007, the SEC proposed amendments mandating the electronic filing of Form D together with substantive revisions to the form. In February of this year, those amendments were adopted almost entirely as proposed. Although these final rules embody both substantive and procedural changes, Form D retains its primary purpose as an initial notice form.

### **Phase-in Period Followed by Mandatory Electronic Filing of Form D**

On September 15, 2008, the SEC's Form D electronic filing system went online. From that date until March 15, 2009, companies have the option of filing Form D information electronically through the EDGAR system or using a paper Form D. If using the paper form, filers have the option of using the old Form D or the new Form D, which has been revised to include the new information requirements discussed below. However, beginning on March 16, 2009, the SEC will no longer accept paper filing of the Form D, regardless of which form is used.

### **Changes to Form D's Information Requirements**

The final rules alter Form D's information requirements by:

- 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 a requirement to classify the issuer by industry from a pre-established list of industries;
- requiring 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);
- requiring more specific information on the registration exemption claimed by the issuer in the Form D notice as well as information on any exclusion claimed from the definition of "investment company";
- requiring reporting of the date of first sale in the offering;
- requiring reporting of whether the offering is expected to last more than a year;
- limiting reporting of the minimum investment amount accepted in the offering to the amount accepted from outside investors;
- requiring Central Registration Depository ("CRD") 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 a requirement to report expenses only as to amounts paid for sales commissions and, separately stated, finders' fees, and report use of proceeds only as to the amount of proceeds used to make payments to executive officers, directors and promoters;
- replacing the current federal and state signature requirements with a combined signature requirement that includes an undertaking to provide offering documents to regulators on request (subject to applicable law), a consent to service of process and a certification that the issuer is not disqualified by rule from relying on an exemption claimed; and
- permitting a limited amount of free writing in "clarification" fields to the extent necessary to clarify certain information provided.

## Amendments to Form D Filings

Under revised Rule 503 under Regulation D, a filer still may amend a previously filed notice at any time; however, a filer must file an amendment to a previously filed Form D:

- to correct a material mistake of fact or error;
- to reflect a change in the information provided in a previously filed form; and
- annually, beginning March 16, 2009, if an offering is continuing at that time.

Pursuant to recent guidance by the SEC, no amendment is required under the second category if the change in information occurs after termination of the offer to sell securities or is a change solely of:

- the address or relationship to the issuer or a related person identified on Form D;
- an issuer's revenues or aggregate net asset value;
- the minimum investment amount, if the change is an increase, or if the change, together with all other changes since the previously filed notice, does not result in a decrease of more than 10%;
- any address or state of solicitation for a person receiving sales compensation;
- the total offering amount, if the change is a decrease, or if the change, together with all other changes since the previously filed notice, does not result in an increase of more than 10%;
- the amount of securities sold in the offering or the amount remaining to be sold;
- the number of non-accredited investors who have invested in the offer, as long as the change does not increase the number to more than 35;
- the total number of investors who have invested in the offering; and
- the amount of sales commissions, finders' fees, or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes since the previously filed notice, does not result in an increase of more than 10%.

## Mechanics of Electronic Filing and Amending

Companies will be required to use the SEC's EDGAR system to file the electronic Form D and subsequent electronic amendments. Prior to filing online, each company must obtain two numbers to the extent not previously obtained: the Central Index Key ("CIK number") and the CIK Confirmation Code ("CCC number"). Companies should apply for the CIK and CCC numbers at <https://www.filermanagement.edgarfiling.sec.gov>.<sup>1</sup>

The timing and mechanics of filing amendments to a previously filed Form D are the same as those for filing the form itself. The same phase-in period, in which both electronic and paper filings will be accepted, applies to initial filings and amendments. Companies should use the SEC's EDGAR system both for the filing of an initial Form D and for amendments to that form.

## For Further Information

If you have any questions regarding the final rules, including how they may affect your company, please contact one of the [members](#) of the [Securities Law Practice Group](#) or the lawyer in the firm with whom you are regularly in contact.

## Footnote

1. Applying for the CIK and CCC numbers requires a company to complete a basic-information form, have the form notarized and fax it to the SEC. Therefore, companies that anticipate that they may raise capital in the near future may want to consider applying for their CIK and CCC numbers at the earliest possible time.