

Client Advisory

February 17, 2009

Electronic Filing of Form D and Amendments Becomes Mandatory on March 16

A Form D is required to be filed with the SEC and the states for private offerings of securities under Regulation D and Section 4(6) of the Securities Act of 1933, as amended. It is most commonly used for offerings made under the Rule 506 safe harbor to accredited investors. While the filing of a Form D is not a condition to the exemption, it is a legal requirement pursuant to SEC Rule 503.

Beginning March 16, 2009, Form D filings are required electronically on EDGAR.¹ To make those filings, an issuer must have EDGAR filing codes. Issuers engaging in ongoing private placements under Reg. D or currently contemplating a Reg. D offering should apply for EDGAR filing codes right away.²

The Form D and Reg. D amendments now require an annual amendment to any Form D filing for ongoing offerings lasting longer than one year. **Form D filers that made a paper filing on or before March 16, 2008 (either an original filing or the most recent paper amendment) and that are continuing the same offering must file the newly required annual amendment on or before March 16, 2009. Until March 16, 2009, the required amendment may be made on a paper Temporary Form D³ or electronically. A filer that made its Form D filing or most recent amendment after March 15, 2008, must file its newly required electronic annual amendment no later than the anniversary of that initial filing or amendment.**

New Requirements

In addition to the above-described requirements which may require immediate attention, other rule changes affect the timing and substance of the Form D information. The following is a summary of these new rules:

- The date of first sale must be reported on Form D and will be strictly construed as the date on which the first investor is irrevocably contractually committed to invest. Depending on the terms and conditions of the contract, this could be the date on which the issuer receives the investor's subscription agreement or a check for payment of the applicable purchase price. The Form D is due 15 days after date of first sale.
- The EDGAR filing system will require each issuer to get a CIK number, a CIK Confirmation Code and a Password prior to gaining access. The filing cannot be made until the codes are received from the SEC.
- New disclosure requirements in Form D include:
 - relevant Securities Act registration and Investment Company Act exemptions;
 - a statement as to whether the offering is expected to last longer than one year;
 - the issuer's size or revenue range, i.e., up to \$1,000,000, \$1,000,001 to \$5,000,000, etc., or aggregate net asset value ("as of the most recent practicable date") for hedge funds and other investment funds, though issuers may decline to respond to this item; and
 - a Central Registration Depository (CRD) number when reporting recipients of sales compensation, who must also be appropriately licensed.

1 SEC Release 33-8891: www.sec.gov/rules/final/2008/33-8891.pdf; <http://www.sec.gov/divisions/corpfin/formdfunding.htm>

2 Link to EDGAR Filing Codes: <https://www.filermanagement.edgarfiling.sec.gov/>

3 Temporary Form D: <http://www.sec.gov/about/forms/formdtemp.pdf>; SEC's Form D Compliance Guide: <http://www.sec.gov/info/smallbus/secg/formdguide.htm>

- The events and changes in the offering that trigger an amended Form D filing have been significantly revised and clarified (in addition to the annual amendment requirement discussed above). For example, amendments will be required for:
 - material mistakes in fact, as soon as practicable after the discovery of the mistake;
 - increases in the offering amount or amounts paid to executive officers, directors or promoters, if the increase is in excess of 10% of the amount in the last filing or a decrease of more than 10% in the minimum investment in the last filing; and
 - the addition of executive officers, directors and promoters.

Once an amendment is required, then all of the information in the amended filing must be confirmed as current.

- Examples of changes or events that do **not** require an amendment include: changes in number of investors in the offering; changes to an issuer's revenues or aggregate net asset value; the address or relationship to the issuer of an identified related person; and the amounts of the total offering, 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 in the said amount since the last filing) is not an increase of more than 10%.
- Note that nearly every state requires a Form D notice filing whenever an investor from that state participates in a Rule 506 offering. While it is envisioned that filers will one day be able to conveniently file with the states and pay the state filing fees simultaneously using the electronic SEC Form D system, none of the states is expected to be online with the system on March 16, 2009. Therefore, for an indefinite period of time, filings will have to be made both electronically with the SEC and in paper form with the states.
- While a filed Form D has always been a publicly accessible document, the paper filing was difficult to obtain and its contents were not indexed. After March 16, 2009, all electronic filings will be publicly available and searchable on the SEC website (www.sec.gov).

Practical Considerations

- The new electronic format was intended in part to increase the ease with which the SEC and state regulators will be able to spot compliance problems in private offerings.
- Preparation for Form D filings should commence sufficiently in advance of filing to account for the newly required additional steps prior to accessing the online filing system.
- Form D filers should plan in advance for the filing deadline, which, generally, will be 15 days after the date on which the issuer receives the first investor's subscription agreement or the first investor's check (whichever occurs first).
- Form D filers in ongoing offerings should adopt compliance systems to comply with the annual and other amendment requirements.
- Form D filers should be cognizant of the Internet availability and searchability of their filings and provide information accordingly.
- Form D filers should also be aware of the federal and state regulatory enforcement implications of the Form D data being readily available to the regulators. For example, whenever placement commissions are contemplated, an issuer should obtain the proposed recipient's CRD number in advance to confirm that the placement agent is properly registered with the SEC and with any state in which it intends to make solicitations. There is little doubt that the states (and possibly also the SEC) will be screening this aspect of the filing for persons acting in a placement capacity without appropriate licensure.

Katten attorneys have been actively engaged in the transition to the new electronically filed Form D by providing feedback and commentary to the SEC on the changes and steps for implementation. We have also been working with state regulators through the North American Securities Administrators Association (NASAA) to promote efficiency and simplicity with respect to the coordination with state securities filing requirements. We are available to apply that experience toward counseling you through any of the implications of these regulatory changes for you and your offerings.

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