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

By: Carl C. Hanemann and Allen E. Frederic, III

### Introduction

The Securities and Exchange Commission recently issued a release adopting amendments to Form D, the notice form for exempt offerings made pursuant to Regulation D of the Securities Act of 1933, and requiring both public and private companies to file the form electronically through the Internet. Beginning September 15, 2008, issuers will be permitted to file the new Form D electronically, or they may continue to use the current version of Form D in paper format. Starting March 16, 2009, all Form Ds (including amendments to Form Ds previously filed) must be filed electronically using the new Form D. Issuers will continue to be required to file a Form D within 15 days of the “date of the first sale” of the securities.

Adopted in 1982, Regulation D includes rules providing exemptions from federal registration requirements for certain offers and sales of securities. Form D serves as the official notice of an offering of securities made without registration under the Securities Act in reliance on an exemption provided by Regulation D.

The new rules are designed to ease the costs and burdens of preparing and filing Form D information, and to make the Form D information more readily available to regulators and members of the public.

Electronic filings will be made through an online filing system currently under development. Issuers will input data into requested fields on the system and the information collected will be available on the SEC’s website for downloading and viewing. To make an electronic filing, an issuer must have an EDGAR access code and a “Central Index Key” (“CIK”) number (the same codes currently required for EDGAR filers). An issuer that does not already have an EDGAR filing code and CIK number may obtain them by filing a Form ID electronically. Within two days before or after filing a Form ID, an issuer must provide a notarized copy of a manually signed Form ID by facsimile, containing a statement that the issuer confirms the authenticity of the Form ID filed on its behalf.

### Revisions to Form D Information Requirements

The revisions to Form D reorganize the information requirements from five sections to sixteen numbered categories of information. Changes to Form D include the following:

- With respect to multiple issuer offerings, all issuers may be identified in a single Form D filing.
- Owners of 10% or more of a class of the issuer’s equity securities are no longer required to be identified as “related persons.”

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- The current requirement to provide a business description of the issuer is replaced with a requirement to classify the issuer by industry from a pre-established list of industries.
- Issuers are required to provide revenue range information, or net asset value range information in the case of hedge funds, subject to an option to decline to disclose if regarded as confidential.
- More specific information on the registration exemption claimed by the issuer in the Form D notice is required, as well as any exclusion claimed from the definition of “investment company” under the Investment Company Act of 1940.
- The date of the first sale of the offering must be reported.
- New Form D specifies when amendments to a previously filed Form D notice are required.
- Issuers are required to report whether the offering is expected to last over one year.
- Reporting of the minimum investment amount accepted in the offering is limited to the amount accepted from outside investors, so as not to affect employee stock incentive plans adversely.
- CDR numbers will be required for both individual recipients of sales compensation and associated broker-dealers.
- The current requirement to disclose information on a wide variety of expenses and applications of proceeds is replaced with a requirement to report expenses only as to amounts paid for sales commissions and, separately stated, finders’ fees, and to report use of proceeds only as to the amount of proceeds used to make payments to executive officers, directors, and promoters.
- Current federal and state signature requirements are replaced by 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 the exemption claimed.
- The new Form D permits a limited amount of free writing in “clarification” fields to the extent necessary to clarify certain information provided.

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### Filing Amendments to Form D

The adopting release amends Rule 503 and the instructions to Form D to require amendments to Form D only in the following three instances:

- 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;
- to correct a mistake of fact or error in the previously filed notice as soon as practicable after discovery thereof only when such mistake is material; and
- to reflect a change in information provided in a previously filed notice (as soon as practicable after the change), except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely with respect to the following information:
  - i) the address or relationship to the issuer of a related person (Item 3);
  - ii) an issuer's revenues or aggregate net asset value (Item 5);
  - iii) any increase, or a decrease of not more than 10%, in the minimum investment amount (Item 11);
  - iv) any change in address or state(s) of solicitation (Item 12);
  - v) any decrease, or an increase of not more than 10%, in the total offering amount (Item 13);
  - vi) a change in the amount of securities sold or remaining to be sold in the offering (Item 13);
  - vii) the number of non-accredited investors who have invested in the offering, provided such number does not exceed 35 (Item 14);
  - viii) total number of investors (Item 14); and
  - ix) amount of sales commissions, finders' fees, or use of proceeds for payments to executive officers, directors, or promoters if the change results in any decrease, or an increase of no more than 10% (Items 15 and 16).

### Federal and State Uniformity

The SEC and the North American Securities Administrators Association ("NASAA"), the organization of state securities regulators, are currently exploring the possibility of establishing a "one-stop" filing system. Under this system, issuers could file information with the SEC and the states they designate in one electronic filing. Although the SEC does not anticipate that "one-stop" filing capability will be available by March 16, 2009, when electronic filing of the Form D with the SEC becomes mandatory, the SEC is working with the NASAA in order to achieve this capability as soon as practicable. Once developed, the "one-stop" filing system is expected to reduce the costs and burdens associated with preparing and filing the Form D with the SEC and state securities regulators.

*Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities Practice Group:*

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