

SEC'S Changes To Form D Take Effect: New Disclosure and Filing Requirements For Issuers

by **Theodore Polin** and **Hylan Fenster**

October 2008

On September 15, 2008, amendments to the disclosure and filing requirements of Form D became effective, following their adoption earlier this year by the Securities and Exchange Commission. A Form D is filed for private placements of securities seeking to comply with one of the exemptions from registration under Regulation D promulgated under the Securities Act of 1933.

The changes are intended to modernize the form and eliminate certain information required to be disclosed. For example, issuers will no longer be required to name beneficial owners or provide details regarding the use of offering proceeds. The new Form D will require certain new information, however, including disclosure on the recipients of sales commissions or finders' fees.

From September 15, 2008, through March 15, 2009, electronic filing of Form D on the SEC's EDGAR electronic filing system may be made on a voluntary basis. Through this transition period, filers will be able to file either the old version of Form D with minor changes (such as the number of copies to be filed) on paper or the new version of Form D on paper or electronically. Beginning March 16, 2009, the SEC will require that all filers submit Form D filings electronically, including amendments to a Form D previously filed with the SEC.

Revisions To Form D Information Requirements

The new version of Form D, as does the old version of Form D, requires the issuer to provide: (i) basic information about the issuer of the securities, (ii) the nature of the issuer's business, (iii) the type of security being issued, (iv) the number of investors, and (v) the particular securities law exemption that is being claimed.

Form D changes include:

- allowing filers to list multiple issuers in one Form D filing;
- replacing a business description of the issuer with a requirement to classify the issuer by a pre-determined industry list;
- adding the disclosure of the revenue range for the issuer, or aggregate net asset value for hedge funds, though the issuer may choose a “decline to disclose” or “not applicable” option;
- requiring more specific information on the claimed exemption under Regulation D and any exclusion claimed under the Investment Company Act of 1940;
- requiring the date of first sale in the offering and whether the offering is intended to last more than one year;
- requiring CRD numbers (which correspond with the broker’s or broker-dealer’s record in the Financial Industry Regulatory Authority’s database) for individuals receiving sales compensation as well as associated broker-dealers;
- requiring the number of investors who have purchased in the offering and the number of non-accredited investors, if any;
- eliminating the requirement to identify owners of 10% or more of a class of the issuer’s securities as “related persons”; and
- simplifying disclosure regarding the amount of proceeds used for sales commissions, finders’ fees and payments to related persons.

When Are Amendments to Form D Required?

The new rules clarify that amendments to Form D are required:

- to correct a material error or mistake of fact;
- to provide an update annually, on or before the anniversary of the filing of the Form D or most recently filed amendment to the Form D, if the offering is continuing at that time; and
- to reflect a material change in information previously filed.

The following information DOES NOT require an amendment::

- termination of the offer;
- change in the address or relationship of a related person;
- change in the issuer’s revenues or aggregate net asset value (if the issuer has opted to report this information);
- an increase in the minimum investment amount, or a decrease of less than 10% from the original minimum investment amount;
- change in any address or state(s) of solicitation of a recipient of sales compensation;

- a decrease in the total offering amount, or an increase of less than 10% from the original offering amount;
- change in the amount of securities sold or remaining to be sold;
- change in the number of non-accredited investors that have purchased securities;
- a change in the amount of sales commissions, finders' fees or payments to executive officers, directors or promoters if the change is a decrease or an increase of less than 10% from the originally reported amount.

One-Stop Filing – Uniformity and Coordination of Federal and State Filings

The SEC and the representatives of the North American Securities Administrators Association (“NASAA”), the organization of state securities regulators, are attempting to establish a “one-stop” filing system that would link the SEC’s site with a NASAA-sponsored site and thereby enable filers to submit their Form D to the SEC and states designated by the issuer in one electronic transmission. The SEC believes the system would enhance uniformity and coordination among the SEC and the states. The SEC is working with NASAA to achieve this capability as soon as feasible. A paper copy of the Form D would still need to be used for state filings if “one-stop” filing is not available by March 16, 2009, when electronic filing of Form D with the SEC becomes mandatory.

Electronic Filing of Form D

Form D is available via the Securities and Exchange Commission’s Web site or at: <http://www.sec.gov/info/smallbus/cfformd.htm>.

In order to file a Form D electronically, users need EDGAR filing codes from the SEC. One of these codes is known as the Central Index Key (CIK), which is a unique ten digit number assigned to issuers that file with the SEC. If the issuer has previously made SEC or Form D filings, whether on paper or electronically, that issuer will already have been assigned a CIK number. If the issuer has not previously filed a Form D, that issuer must apply for a CIK number. Other EDGAR filing codes include a CCC number (or CIK Confirmation Code), a password to ensure that whoever is sending a submission to EDGAR is authorized to do so and a PMAC number which is used to authorize a change of password.

An issuer that has not previously made electronic filings will need to obtain EDGAR codes from the SEC before making its first electronic filing. The issuer must file its request on EDGAR Form ID, which is available online at: <https://www.filermanagement.edgarfiling.sec.gov/>. Once a CIK is assigned or if an issuer has already been assigned a CIK number, a passphrase will be generated upon filing the Form ID. A passphrase permits an EDGAR filer to use the filer management website to manage and obtain all of its filing codes.

Once the issuer has received its EDGAR codes, it may use the same codes for all future electronic filings with the SEC. However, the issuer's password will expire in one year. There is no fee to obtain EDGAR codes or the password.

The electronic filing requires an undertaking to provide offering materials to regulators, a consent to service of process and a certification that, if the issuer claims an exemption under Rule 505, the issuer is not disqualified from relying on Rule 505 for specified reasons. The issuer is required to keep an original signed copy of Form D for five years and present it to the SEC upon request.

For more information about this Client Alert, please contact:

Theodore Polin
New York
212-351-4522
Tpolin@ebglaw.com

Hylan Fenster
New York
212-351-3783
Hfenster@ebglaw.com

* * *

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.-

© 2008 Epstein Becker & Green, P.C.

Attorney Advertising

ATLANTA • CHICAGO • HOUSTON • LOS ANGELES • MIAMI
NEW YORK • NEWARK • SAN FRANCISCO • STAMFORD • WASHINGTON, DC

www.ebglaw.com

