

# Recent Changes to Form D and the Electronic Filing Requirements

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## Introduction

Under Regulation D of the Securities Act of 1933, public and private companies engaging in private placements of their securities are required to file Form D in order to claim the safe harbor exemption from registration.

The Securities and Exchange Commission (the "SEC") has recently adopted amendments that (i) require the electronic filing of Form D beginning on March 16, 2009 (companies will be permitted to file Form D information electronically on a voluntary basis beginning September 15, 2008,) (ii) revise the requirements clarifying when, how and why an amendment to a Form D must be filed, and (iii) revise the information issuers are required to furnish.

The most significant amendments are highlighted below. The requirement to electronically file Form D could have two important results not discussed by the SEC. First, the availability of the complete Form D filings on the SEC website could lead to increased State regulation of private offerings. State securities regulators have not previously had such easy access to information contained in Federal Form D filings. This access will allow State regulators to more easily monitor whether any aspect of private offerings, such as, finders and placement agents identified in the Form D, are subject to State regulation. Second, the availability of Form D filings by issuers on the EDGAR database will allow the general public to more readily access information on such issuers.

## Revisions to the Information contained in Form D

The following revisions to the information requirements of Form D become effective September 15, 2008. The most notable changes to Form D are the following:

1. Requiring issuers to categorize themselves by revenue or net asset value. The SEC will provide hedge funds, which are not intended to produce revenue, but rather to seek asset appreciation, with the option to select "Not Applicable" on the revised Form D or the option "Decline to Disclose";
2. Identifying the persons or entities paid in connection with the sale of securities (including finders) and the amount of direct and indirect, cash and non-cash compensation;
3. Requiring issuers to report the amount of gross proceeds paid to related persons (i.e., officers, directors, and promoters) for expenses in connection with the offering process. Issuers are permitted clarification where necessary to prevent the information supplied from being misleading. This may be particularly tricky in a continuous offering where directors or promoters fees may be difficult to calculate;
4. Required reporting of the "date of first sale" in the offering. This clarifies the SEC's position that the date of first sale is the date on which the first investor is irrevocably contractually obligated to invest. Issuers should pay close attention to when an investor becomes irrevocably bound under the subscription agreement which, based on the term of the offering, could be when the issuer receives the subscription agreement, when the issuer accepts the subscription or when the issuer cashes the check;
5. Requiring the classification of issuers by industry from a pre-established list of industries, instead of a description of the issuer's business;
6. Post office box numbers and "care of" addresses are not acceptable to identify an individual's or entity's place of business. Issuers, such as offshore funds, which may operate out of an offshore administrator's or another entity's office, may be directly affected by this change; and
7. Issuers are no longer required to include information regarding owners of 10% or more of a class of the issuer's equity securities.

## When Issuers must file an Amendment to Form D with the SEC

Current Rule 503(d) and the current instructions to Form D state that amendments to Form D "need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B." As such, neither Rule 503 nor the instructions to Form D currently require the filing of an amendment to Form D.

The SEC revised Rule 503 and the instructions to the Form D to require amendments to Form D in two 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 a continuous offering at that time. Issuers, particularly open-ended funds that have not recently filed a Form D, should be aware that this annual filing requirement takes effect September 15, 2008 so that funds which have not filed a Form D since September 14, 2007 will be in violation of the new amendment filing requirements; or
- A material mistake of fact or error in a previously filed notice is discovered.

The SEC has also provided guidance that changes involving any of the following (among other things), do NOT require an amendment to Form D to be filed:

- An issuer's revenues or aggregate net asset value;
- The minimum investment amount if the change is an increase, or if the change does not result in a decrease of more than 10% (together with all changes in that amount since the last filed notice); and
- An increase in the total number of investors.

### Electronic Filing Requirements

In order to electronically file Form D, an issuer must obtain a "Central Index Key" (CIK) number, CIK Confirmation Code (CCC), and Password prior to the date on which the filing is due. Issuers should also be aware of the following:

- Notwithstanding the electronic filing requirements, issuers are still required to keep paper copies;
- States still require the filing of paper copies, although the SEC is attempting to integrate its electronic filing system to allow for electronic filing with some or all of the 50 states; and
- Even though the revised Form D will no longer have the state appendix, each state may continue to require the sales information typically found in the appendix.

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