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SEC Adopts Revisions to Form D and Requires Electronic Filing

In an effort to streamline the reporting process relating to private placements, the Securities and Exchange Commission has revised Form D and adopted rules requiring Form Ds to be electronically filed.

What is Form D and What Will Change?

SEC rules require that a Form D be filed within 15 days of each private placement of securities completed under certain exemptions from registration under Regulation D under the Securities Act of 1933. Until now, Form D has been a manually prepared, paper-filed fill-in-the-blank document requiring extensive information about the private placement, as well as the issuers, brokers and investors involved. This information was supposed to give the SEC and public valuable data and assist regulators in monitoring their rules, but in reality has devolved into a nuisance with little utility. In order to ease the burden on issuers preparing Form Ds and to collect more relevant data, the SEC has revised the required contents of Form D, effective September 15, 2008.

In order to clarify, eliminate or limit previously required disclosures, Form D will be simplified to:

- Permit filers to identify all issuers in a multiple-issuer offering in a single Form D filing;
- Delete the current requirement to identify owners of 10% or more of a class of the issuer's equity as a related party;
- Replace the requirement to describe the issuer's business with a choice from a pre-established list of industries;
- Specify when amendments are required (for example, to correct errors of material fact and on the anniversary of the offering should it continue for more than a year);
- Require the issuer to report the minimum investment amount only with respect to outside investors;
- Limit the items required to be disclosed as expenses and use of proceeds;
- Replace the separate State and Federal signature pages with a combined signature page, which will also incorporate a consent to service of process and contain undertakings to provide certain additional information upon request; and

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- Permit a limited amount of free writing in fields to allow for clarification of certain information.

On the other hand, Form D will become more onerous by requiring:

- Contact information without a “care of” address or P.O. box;
- Revenue range information for the issuer (net asset value range information in the case of hedge funds), though with an option to decline to provide this information;
- More specific information on the registration exemption claimed by the issuer;
- The date of the first sale in the offering;
- Reporting of whether the offering is expected to continue for more than a year;
- Disclosure of whether the offering is in connection with an acquisition; and
- Central Registration Depository (CRD) numbers for both individual recipients of sales compensation and associated broker-dealers.

How Will Electronic Filing of Form D Work?

Currently, SEC rules require that issuers file multiple paper copies of Form D for each offering. Under the new rules, paper copies of Form D will not be accepted, though the issuer must maintain a manually signed copy in its records for at least 5 years. Instead, issuers will be required to file Form Ds through a new SEC online filing system which, in theory, will be easy to understand and use. The online filing system will be accessible from any computer with internet access. As of now, however, many states will still require paper copies under their applicable “blue sky” rules. The SEC is actively discussing conforming changes with state regulators. As a planning matter, companies contemplating electronic filings will need to obtain special codes and passwords from the SEC in advance, which can take up to a few days.

Once a Form D has been filed, it will be readily findable and searchable by the investing public. The SEC has clarified that an electronically filed Form D would not be considered violative of a prohibition under Regulation D against “general solicitation” or “general advertising”.

Transition

The revisions to the rules provide that issuers may voluntarily file Form Ds electronically with the SEC beginning on September 15, 2008. Issuers will be permitted to continue filing paper copies of Form D using either the current form or the revised form during the transition period beginning September 15, 2008 and ending March 15, 2009. Beginning March 16, 2009, all issuers will be required to electronically file the revised Form D.

The summary above is intended to describe the major changes to the form and filing process for Form Ds as a result of the SEC’s new rules. For a more comprehensive analysis of these changes, or for further information about the impact of these and other recent SEC changes impacting capital raising activities, please contact the lawyer at Sullivan & Worcester LLP with whom you regularly consult, or the lawyers listed above.

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