

[Home](#) | [Print](#)**02/28/08*****Mandated Electronic Filing of Form D; Revisions to Form D***

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The U.S. Securities and Exchange Commission (the "Commission") recently adopted rule amendments mandating the electronic filing a Form D Notice of Exempt Offering of Securities and making some changes to the information required in the form. The amendments also clarify when amendments to Form D must be filed and provide some additional interpretive guidance with respect to certain information required by the form, including when the "first sale" in an offering is considered to take place for Form D filing purposes.

Companies that conduct a private placement of securities pursuant to Regulation D under the Securities Act of 1933 ("Securities Act") are required to file a Form D with the Commission to report certain information about the offering within 15 days of the first sale of securities in the private placement. The Form D must also be filed with most state regulators when an exempt private placement is conducted within that state.

The amendments are effective September 15, 2008, but include a transition period such that electronic filing becomes mandatory on March 16, 2009.

**I. Electronic Filing System**

After the amendments are effective and electronic filing becomes mandatory, issuers will file Form D information using an online filing system that will be accessible from any computer with Internet access; Form Ds will not be filed through the system that is currently used to file periodic reports and registration statements. Once filed, the Form D information will be available on EDGAR. The information required by the revised form will be entered by responding to discrete information requests. In most cases, issuers will provide the relevant information by checking the appropriate

box or choosing from choices provided in a drop-down menu or similar "list selection feature." The data entry fields will contain links to the relevant instructions of the form and "other helpful information" intended to assist filers with completing the Form D information. Thus, issuers will not complete a Form D that will be filed either in paper or, for example, by e-mailing or uploading the completed form, but rather will simply respond to the information requests which will later be presented in a cohesive manner on EDGAR.

According to the adopting release, the online filing system will "capture and tag data items" so that the data in the Form D will be "interactive and viewable in an easy-to-read format."

#### **A. "One-Stop Filing"**

It is the Commission's intent that issuers will eventually be able to file their Form D information using the Commission's electronic filing system and have that information automatically sent to the state(s) in which it is claiming an exemption from state securities laws which requires the filing of the Form D with that state's applicable securities regulator. While the Commission has been actively working with the North American Securities Administration Association ("NASAA") to achieve this goal, this capability will not be available when the electronic filing system becomes available, and issuers will be required to continue filing paper copies of their Form D with the states where such filing is required in connection with a state exemption from registration. The adopting release indicates that the Commission "expect [s] that some states may permit issuers to file a printed copy of a new Form D filed with" the Commission. It is not clear at this time in what form individual states will accept the Form D or what other information may be required to be filed, for example, whether or not state regulators will continue to request the appendix that is part of the current form or the information that is included in the appendix. We anticipate that this will be clarified as we move closer to the amendments' effective and/or mandatory filing date.

#### **B. Technical Issues**

Hardship exemptions will not be available for

Form D filings, as the Commission "assume[s] that issuers have access to a computer and the Internet." Issuers must obtain CIK and CCC codes (and a separate password) in order to electronically file a Form D, just as issuers must do so in order to file a registration statement with the Commission. Each issuer needs its own EDGAR access codes in order to file a Form D; an issuer's law firm may of course assist an issuer in obtaining such codes and may complete the Form D information for them using the new filing system, but the firm cannot simply obtain its own set of codes and use them to file Forms D on behalf of all of its clients. Issuers can obtain the necessary codes by filing a Form ID electronically and, in paper by fax within two business days, a notarized authenticating document manually signed over the applicant's typed signature containing the information in the Form ID and confirming its authenticity. The Commission plans to consider ways to simplify this process by the time electronic filing of Form D becomes mandatory.

The online filing system will automatically time-out and end the session if the filer does not enter information for a certain amount of time; the adopting release indicates that a filing session will time-out no less than an hour following the last activity, and that the session can be extended with any keystroke. The Commission anticipates that the system will provide a way to "save" already-entered information so that not all information on the form would have to be entered in a single session and so that it would not be necessary to re-enter information after a time-out.

Issuers and/or those filing on their behalf will be able to download and print the Form D filing before and after submission, and the system will indicate receipt of the filing once submitted. The system will not, however, permit a filing to be made if the issuer has not responded to each required data field.

The amendments clarify that if a Form D's filing due date falls on a weekend or holiday, the form will be due the next business day. The adopting release also states that, as with most Commission filings, the filing deadline is 5:30 P.M. Eastern time. Form D filings made after 5:30 will receive a filing date of the next

business day.

### **C. "Form D Filing Not a "General Solicitation"**

The private placement exemptions provided by Regulation D under the Securities Act prohibit general solicitation and general advertising in connection with such exempt offerings. The amendments revise Rule 502(c) of Regulation D to add a safe harbor from these general solicitation and general advertising prohibitions for information provided in a Form D filed with the Commission "if the information is provided in good faith and the issuer makes reasonable efforts to comply with the requirements of Form D." Thus, the filing of the Form D, by itself, will not cause the issuer to violate the general solicitation and advertising restrictions of Regulation D.

## **II. Revisions to Form D Informational Requirements**

The amendments revise Form D in connection with the electronic filing requirement. The amendments also revise some of the informational requirements and restructure Form D in order to simplify, revise and update the form. This memorandum focuses on the revisions to Form D and in general does not discuss informational requirements that are not being changed as a result of the amendments.

### **A. Basic Issuer Information; Related Persons**

Items 1 through 5 of amended Form D will require basic identifying information about the issuer similar to that required in Part A of the current form. The amended form will, however, specifically permit filers to identify all issuers in a multiple-issuer offering in one Form D filing. Unlike the proposed amendments, however, the amended form will permit (but not require) place of business and telephone contact information for other than the lead issuer in multiple-issuer offerings. The proposal to provide the issuer's Commission file number, if any, was not adopted.

Current Form D requires issuers to indicate the month and year of their formation and

indicate whether this is the actual or an estimated date. The amended form will require established issuers to indicate only whether they were formed within the last five years or more than five years ago, and the year of their organization if formed within the last five years. Issuers also may indicate that the entity is "yet to be formed."

With respect to required place of business and contact information, the revised form will clarify that post office box numbers and "care of" addresses are not acceptable as place of business information required by the form. The adopting release states that this information is collected not for mailing purposes, but to allow securities enforcement authorities to determine the location of the issuer's operations and personnel responsible for the offering. Issuers must make arrangements to provide acceptable place of business and contact information in cases where lease restrictions or other practical concerns would make PO boxes or care of addresses preferable.

The amendments also replace the current Form D requirement to provide a business description with a requirement to indicate the issuer's "industry group" from a pre-established list of industries. The adopting release indicates the Commission's belief that "selecting an industry group classification from a pre-established list is less burdensome for issuers and more useful for the regulatory purposes underlying the Form D filing requirement." If an issuer indicates that it is a "pooled investment fund," pop-up or other data fields will require that the issuer select from among additional options designating a specific type of pooled investment fund and indicate whether it is registered as an investment company under the Investment Company Act of 1940 (the "Investment Company Act").

The amendments adopted the proposal that the amended form require revenue range information from the issuer (net asset value range in the case of hedge funds or other investment funds) as of the most recent practicable date. The information should be provided as of the last fiscal year or, if the issuer has not existed for a fiscal year, to date. Issuers may, however, choose to

"decline to disclose" this information. Issuers that do not intend to produce revenue may indicate instead that this information is "not applicable."

Finally, the amendments delete the current requirement to identify as "related persons" owners of 10% or more of a class of the issuer's equity securities. The amended Form D requires only that executive officers, directors (or general and managing partners for partnerships and managing members for limited liability companies) and promoters be so identified. The adopting release notes that this information should continue to be available, if material, in any private placement memorandum "customarily supplied to [investors] or in other information made available through the issuer." Amended Form D will continue to clarify that the listing of executive officers and directors should be based on the functions individuals perform for the issuer as opposed to formal titles. The form will also indicate that promoters must be included whether they act "directly or indirectly." Therefore, the Commission expects that "the requirements should result in public reporting of all of a company's principal policymakers."

## **B. Information About the Offering**

### **i. Claimed Exemption**

Current Form D requires that issuers indicate the exemption(s) from Securities Act registration applicable to the offering – Rule 504, 505 or 506 of Regulation D, Section 4(6), or the Uniform Limited Offering Exemption ("ULOE"). The amendments generally retain this provision but require issuers to indicate the specific paragraph and subparagraph of any Rule 504 exemption they are relying on. The amended form will also require information, if applicable, with respect to the paragraph of Section 3(c) of the Investment Company Act that the issuer claims for an exclusion from the definition of an "investment company." Finally, the amendments eliminate the ULOE exemption reference. The adopting release indicates that this choice was confusing and that most

ULOE offerings are also exempt pursuant to Rule 505.

## **ii. Date of First Sale; Duration**

Amended Form D requires that issuers report the date of the first sale in the offering. Issuers may, however, indicate that the first sale is yet to occur and as such may continue to file Form D with the Commission prior to the date of first sale. The instructions to the amended form indicate that, for Form D filing purposes, the date of first sale is "the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or check." The adopting release also clarifies that in a minimum-maximum offering where subscription proceeds are held in escrow pending receipt of the minimum amount of subscriptions, the date of first sale "occurs when the first subscription agreement is received and first funds are deposited into escrow." The adopting release explains that this interpretation "appropriately focuses on when the purchaser makes an investment decision and commits to purchase the securities offered." Therefore, for example, if the offering and/or subscription agreement indicate that subscription agreements are irrevocable, the date of first sale should be the date the issuer receives the first subscription agreement in the offering or, if earlier, the funds relating to a subscription agreement.

The amended Form D also requires issuers to indicate whether the offering is expected to last more than one year.

## **iii. Offering and Sales Amounts**

Amended Form D simplifies the format for reporting the dollar amount of the offering. In the amended form, issuers will report solely the total dollar amount of the offering, the amount sold as of the filing date, and the amount remaining to be sold. Issuers may also

indicate that the total offering amount and amount remaining to be sold is "indefinite" if the amount of the offering is not determined or cannot be calculated when filing the Form D (for example, in an exchange offer where the exchange value is not known); if the amount is definite but difficult to calculate "without unreasonable effort or expense," issuers must provide a good faith estimate of the amount of the offering. The amended form also permits a limited amount of "free writing" to clarify the issuer's responses in this section, if necessary.

#### **iv. Expenses; Proceeds; Compensation**

Pursuant to the amendments, issuers will be required to list and provide CRD numbers for each person or entity that receives sales compensation in the offering, if they have CRD numbers. <sup>1</sup> If both an individual and that person's associated broker-dealer will receive compensation, then both of their CRD numbers must be provided. <sup>2</sup>

In addition, the amended form replaces the current requirement that issuers disclose a wide variety of expenses in connection with the offering, including printing, accounting and legal fees, with a requirement to disclose only amounts paid for sales commissions and, separately, finders' fees.

Finally, with respect to use of proceeds disclosure, instead of reporting the use of all the adjusted proceeds (after expenses) from the offering, the majority of which is usually allocated to "working capital" or "general corporate purposes," amended Form D will require issuers to report only the amount of gross proceeds used to make payments to executive officers, directors and promoters. The Commission had proposed eliminating all information with respect to expenses and use of proceeds.

#### **v. Other Offering Information**



The amendments delete the requirement that issuers provide the name of the offering, if any, on Form D. It is not common today for issuers to name an offering, although this was more common prior to the 1986 tax reforms.

The amendments also expand the choices in the current requirement to indicate the securities being offered (such as debt or equity), and will, as currently, allow "free writing" for issuers to explain the type of security when they choose "other."

Where Form D currently requires issuers to indicate whether the offering is part of an exchange offer, the amended form asks whether the offer is in connection with a business combination transaction, whether an exchange or tender offer, merger or acquisition.

In addition, under the amendments issuers will indicate on the Form D whether securities in the offering may be sold to non-accredited investors and the total number of investors to date. Currently, issuers indicate only the number of accredited and non-accredited investors to date, and therefore if only accredited investors have invested to date the Form D would not be clear as to whether the offering was open to non-accredited investors.

Finally, where current Form D requires information with respect to the minimum investment in the offering, the amended form asks for the minimum that will be accepted from outside investors. This was done so as to not adversely affect employee stock ownership incentive plans.

#### **vi. Signature; Appendix**

Amended Form D combines the current federal and state signature block into a single signature requirement that includes (1) an undertaking to provide to regulators upon request the offering documents, such as the private placement memorandum, offering

circular or other information furnished to potential investors, (2) a consent to service of process (similar, although not identical, to the Form U-2 Consent to Service of Process required by many states<sup>3</sup>), and (3) a certification that, if relying on a Rule 505 exemption, the issuer is not disqualified by the Rule from so relying on such exemption. The adopting release acknowledges that states may continue to require the Form U-2.

The amended Form D does not include the appendix of the current form, which provides certain information about the offering on a state-by-state basis. The appendix is currently filed only with state regulators and not with the Commission. The adopting release indicates that state regulators would still be able to require this type of information in appropriate circumstances and that states that require filing of appendix information may continue to do so. The Commission is exploring with NASAA how this information may be provided as part of a one-stop filing system.

#### **vii. "Free Writing"**

The amendments permit a limited amount of free writing in "clarification" fields in Form D to the extent necessary to clarify certain information provided in the form. Unlike as proposed, this will not be a general free writing section, but limited only to five requests for information in the form:

- Item 3 – Related Persons;
- Item 10 – Business Combination transactions;
- Item 13 – Offering and Sales Amounts;
- Item 15 – Sales Commissions and Finders' Fees Expenses; and
- Item 16 – Use of Proceeds.

### III. Amendments to Form D

The amendments clarify when an amendment to Form D must be filed. The adopting release notes that Commission staff currently interprets Rule 503 under Regulation D to require a Form D amendment in ongoing offerings where there has been a material change in the information filed about the offering and where basic information previously submitted about the issuer has materially changed. Under the amendments, an amendment to a Form D must be filed only:

- To correct a *material* mistake of fact or error in the previously-filed notice, as soon as practicable after discovery of the mistake or error;
- To reflect a change in the information provided in the previously-filed notice, as soon as practicable after the change, unless the change occurs after termination or relates solely to:
  - The address or relationship to the issuer of a related person identified in the Form D (the addition of a new related person will, however, trigger an amendment);
  - The issuer's revenues or aggregate net asset value;
  - The minimum investment amount if the change is an increase, or if, together with all other changes since the previously-filed notice, does not result in a decrease of more than 10%;
  - Any address or state(s) of solicitation show for recipients of sales commissions in the offering;
  - The total offering amount if the change is a decrease, or if the change, together with all other changes since the previously-filed notice, constitutes an increase of 10% or less;
  - The amount of securities sold in the offering or remaining to be sold;

- The number of non-accredited investors who have invested in the offering, as long as not more than 35 total;
  - The total number of investors in the offering; and
  - The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if a decrease or if an increase of 10% or less together with all changes since the previously-filed notice; and
- Annually, on or before the anniversary of the filing of the Form D or most recent amendment, if the offering has not terminated at such time. Under the proposals, an annual amendment would have been required every year between January 1 and February 14, regardless of when the original Form D or latest amendment thereto was filed.

Further, amendments to the Form D will not be required solely because the issuer files the form with additional states. The adopting release also clarifies that an amendment is not required to report the termination of the offering.

Amendments to Form D must provide current information in response to all of the Form D items regardless of why the amendment is filed. When filing an amendment, the online filing system will display the current items of the Form D so an issuer need only change the information that is different, and need not re-enter any information that has not changed.

#### **IV. Effectiveness and Transition Period**

The amendments are effective September 15, 2008, except that issuers may file the Form D in either paper form or electronically (and, if in paper, may file either the current or amended version of the form) until March 16, 2009, when electronic filing (using the amended form) becomes mandatory. During the transition period, amendments should be filed on the same version of Form D that the original Form D was filed on. In other words, if an issuer files the current version of Form D in paper for an offering before or during the transition

period, any amendments to that Form D filed during the transition period also must be filed in paper using current Form D. Amendments to Form D filed on or after March 16, 2009 must be filed electronically on the new amended version of the form, even if the original filing was filed on paper and/or on the current form, which will be designated as Temporary Form D as of the effective date of the amendments.

This memorandum contains only a general summary of the amendments with respect to Form D and should not be construed as providing legal advice. The adopting release with respect to the amendments, including the text of the amendments, is available at <http://www.sec.gov/rules/final/2008/33-8891.pdf> . If you have any questions about the information in this Memorandum, please contact Frank C. Bonaventure at **410-347-7305** or via e-mail at [fcbonaventure@ober.com](mailto:fcbonaventure@ober.com) or Penny Somer-Greif at **410-347-7341** or [psomergreif@ober.com](mailto:psomergreif@ober.com).

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## NOTES

<sup>1</sup> A CRD number is the broker or broker-dealer's record number in the Central Registration Depository database of brokers and broker-dealers maintained by the Financial Industry Regulatory Authority.

<sup>2</sup> If more than five persons to be listed are associated persons of the same broker or dealer, however, only the broker or dealer need be listed.

<sup>3</sup> Form U-2 also requires consent to jurisdiction and venue as well as service of process and, unlike Form D, must be notarized.

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