

SEC ADOPTS ELECTRONIC FORM D

At an open meeting on December 11, 2007, the Securities and Exchange Commission (the “SEC”) voted to revise the content and require the electronic filing of Form D, which is filed with the SEC fifteen calendar days after the first sale of securities in unregistered offerings under Regulation D. On February 6, 2008, the SEC issued rules and rule amendments specifying the disclosure items in the new version of Form D (“New Form D”) and mandating electronic filing after a transition period.¹

Electronic filing of Form D will begin on September 15, 2008 with a phase-in period during which filers can voluntarily elect to file the New Form D electronically or file either Temporary Form D (which is almost identical to the current Form D) or New Form D as a paper filing. Electronic filing using only New Form D is mandatory on and after March 16, 2009, through an online system that will be accessible from any computer with Internet access, will capture and tag data items, and will make the filed information available on the SEC’s Web site.

The SEC has also specified circumstances requiring an amendment to prior filings and will require an updating amendment every 12 months for continuous offerings.

Background

Form D is used to provide the SEC with notice of reliance on a number of safe harbor exemptions from securities registration requirements pursuant to Regulation D and Section 4(6) of the Securities Act of 1933 (the “Securities Act”). Rule 506 of Regulation D sets out requirements specific to the safe harbor for private placements of securities under Section 4(2) of the Securities Act for offerings “not involving any public offering” and is relied on by many issuers including hedge funds.

Since the passage of the National Securities Markets Improvement Act of 1996 (“NSMIA”), reliance on Rule 506 has also provided a preemption of securities registration requirements under state securities laws. Many states, as allowed by NSMIA, require a copy of Form D to be filed as a notice with them in connection with sales of securities made in reliance on Rule 506 to investors located in the state, together with a fee and a Consent to Service of Process form.

¹ SEC Release No. 33-8891, (Feb. 6, 2008) (the “Release”) The Release is available on the SEC website at <http://www.sec.gov/rules/final/2008/33-8891.pdf>.

New Form D

After considering comments on its previously proposed revisions, the SEC adopted New Form D, which revises and modifies the information requirements of the current Form D. The changes include:

- reporting the date of first sale;²
- replacing the current requirement to provide a business description with a requirement to provide industry group information from a pre-established list;
- requiring revenue range information for operating companies and net asset value range information for hedge funds (subject to an option to decline to disclose);
- in addition to the issuer stating the exemption being claimed under the Securities Act for the offering, requiring the specific subsection of Section 3(c) of the Investment Company Act of 1940 to be provided if the issuer claims an exclusion from being an “investment company” under that Act;
- requiring a CRD (a broker/dealer Central Registration Depository) number to be listed for each person listed on Form D as receiving compensation from the sale of securities; and
- eliminating disclosure of certain information about the use of proceeds and expenses and about owners of 10% or more of the issuer’s equity securities.

New Form D or Temporary Form D may be used as of September 15, 2008. On and after March 16, 2009, only New Form D will be accepted.

New Amendment Filing Requirements

The SEC will require an updating amendment to New Form D updating all the information on the form at least once a year for offerings lasting more than one year. The SEC has also specified when an amendment to New Form D would otherwise be required:

- to correct a material mistake of fact in the previous filings (as soon as practicable after discovery of the mistake);

² Form D does not currently ask for the date of first sale. Some states ask for the date of first sale and provide for higher filing fees for filings made later than 15 days after the first sale in the state. The filing of Form D later than 15 days does not take away the safe harbor under Regulation D, since the filing of the form is not a condition to availability of the exemption. The SEC has also added instructions to New Form D providing that the date of first sale is the date on which the first investor is irrevocably contractually committed to invest. Such date, 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.

- to reflect changes in the information provided, including additions to the issuer's executive officers or directors. No amendment would be required to reflect a change that occurs after the offering terminates. The SEC has also listed a number of specific changes which would not trigger an amendment including changes in the issuer's revenues or net asset value, the amount of securities sold in the offering or the total number of investors who have invested in the offering.

The issuer must update all of the information on New Form D whenever an amendment is filed, regardless of the reason for which the amendment was filed.

After the transition period ends on March 16, 2009, the new amendment rules will apply to all Regulation D offerings, not just those filed on New Form D. Therefore, issuers making continuous offerings filed several years ago with the SEC would need to consider whether an amendment was required under these new rules and otherwise file an amendment at least once a year.

Easier Access to Issuer Information

Currently, five paper copies of Form D, one of which must be manually signed, are filed with the SEC. Someone currently wishing to review a filed Form D must go to the SEC's Public Reference Room, or request a copy by mail or from private service companies that copy filings in the Public Reference Room and then provide copies to customers for a fee. The information in New Form D filings will be accessible by the public on the SEC's website.

State Coordination

Currently, manually signed copies of Form D are filed with states, together with state filing fees and a Consent to Service of Process form, to perfect the federal preemption of state securities law for offerings under Rule 506 of Regulation D. The SEC hopes that the electronic system can also be a one-stop filing center for Regulation D notice filings with the states. However, there is currently no organized electronic system to coordinate filing of Form D with the states. Therefore, it is likely that the filing of paper copies of New Form D will be required by a number of states for some time after all SEC filings are done electronically.

Filing Offering Materials

The SEC will also combine the current Form D federal and state signature requirements and incorporate the Consent to Service of Process form, which is required by the states, into the signature block. Additionally, in response to requests by state regulators, New Form D requires the issuer to undertake to provide to the states any information provided to offerees, if requested in writing and if "in accordance with applicable law." This is a noteworthy additional item in New Form D in that offering materials are not currently filed with the SEC or the states. However, even though this could be interpreted by state regulators as providing the basis for regularly requesting such materials, the Release reiterates that NSMIA would preempt state requirements to file offering materials in Regulation D Rule 506 private placement offerings,

unless the state regulator were asking for the materials pursuant to its anti-fraud authority, which is preserved under NSMIA. Therefore, even though the SEC has determined that New Form D will have the new undertaking, the SEC has indicated that pursuant to NSMIA, state regulators would not be able to “routinely” request copies of offering materials from Rule 506 Regulation D filers.

Filing Mechanics

In order to file New Form D electronically, issuers will need the same codes as are required to file on the SEC’s EDGAR system, and to obtain the codes by filing an electronic Form ID and sending a notarized authenticating document.

Practical Concerns

In addition to allowing extra time prior to filing deadlines to obtain the proper filing codes and become familiar with the filing procedures required to comply with the new mandatory electronic system, issuers making continuous offerings, even offerings beginning before September 15, 2008, should have procedures in place to ensure the reporting of any changes to the offering required to be reflected in an amendment, and should otherwise be prepared to update all the information on New Form D at least once a year.

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If you have any questions regarding this memorandum, please contact Martin R. Miller (212-728-8690, mmiller@willkie.com) or the attorney with whom you regularly work.

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