

SEC Requires All Form D Filings to Be Made Online via the EDGAR System Beginning March 16, 2009

January 23, 2009

Beginning March 16, 2009, all Form D filings with the Securities and Exchange Commission (SEC) must be made online using the EDGAR System. In addition, the information required to be provided on an electronically filed Form D will differ in certain respects from what is currently required on the paper version.

A Form D is normally filed with the SEC and applicable state securities administrators within 15 days after the first sale in an offering in order to perfect a private placement exemption under the Securities Act of 1933, as amended. Offerings made only to “accredited investors” such as institutions and high-net-worth individuals are usually made in accordance with Rule 506 of Regulation D. In a Rule 506 offering, individual state private placement requirements are preempted and a state may only require a copy of the federally filed Form D to be filed as a notice.

Electronic Filing on EDGAR

Since September 15, 2008, issuers making Form D filings with the SEC have had the option of filing either a paper copy of Form D or submitting an electronic filing. Starting March 16, paper copies will no longer be accepted. In order to file online, issuers will need to obtain EDGAR access codes, including a CIK number and password. Because this process can take several days, issuers are strongly advised to apply for EDGAR numbers as soon as possible if it is anticipated that it will be necessary to file a Form D on or after March 16.

Once the online filing has been made, a copy of the Form D will be accessible to the public on the SEC’s website in the same manner as other public filings, such as registration statements and periodic reports. While paper copies of filed Form Ds have previously been available to the public, it had been necessary to submit a request to the SEC’s Public Reference Room for a hard copy of the filing.

Mandatory Amendment of a Previously Filed Form D

Under the revised Regulation D, an amended Form D must be filed (i) to reflect changes in material information on the Form D, and/or (ii) annually in the case of a continuing offering (such as an offering of fund interests), on or before the anniversary date of the initial filing (or amendment filing, as the case may be). *The SEC has indicated that all Form Ds filed prior to March 16, 2008 must be amended by March 16, 2009 if the offering is continuing.* Amendments filed on or after March 16, 2009 must be filed electronically, whether the original filing was made on paper or online; however, if the amendment is filed prior to March 16, 2009, a paper filing will still be accepted. The annual amendment would reflect

any changes in the offering as well as list the current number of investors and the dollar amount sold as of a current date.

Changes in Information Required on Form D

While much of the basic information required by the current paper Form D—such as identification of executive officers, directors, and general partners—will also be required on the electronic version, there are some significant new disclosures that will be required.

As amended, the Form D requires disclosure of the date of first sale in the offering. The revised instructions to Form D state that 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.” Consequently, it is no longer appropriate under most circumstances to use the closing date of an offering as the first date of sale.

As on the current paper Form D, the electronic version calls for disclosure of all persons receiving selling commissions in connection with the offering; however, a new requirement has been added that necessitates providing the CRD numbers of such persons (CRD numbers are assigned by the Financial Industry Regulatory Authority to broker-dealers and representatives of broker-dealers).

State Filing Requirements

As of the date of this LawFlash, only a small number of state securities regulators have announced revised filing requirements to coordinate with the new federal electronic filing mandate. It is assumed that for the foreseeable future, state administrators will continue to require paper Form D filings, which typically consist of a manually signed Form D, a consent to service of process, and a filing fee. The North American Securities Administrators Association, the organization of state securities regulators, anticipates the eventual development of a “one stop” filing system pursuant to which a filer will be able to go to a single website and file in each relevant state by checking the appropriate state boxes and submitting either credit card or funds transfer information.

A copy of the SEC’s Rule adopting the electronic filing requirement can be found at <http://www.sec.gov/rules/final/2008/33-8891fr.pdf> for your reference.

For additional information about the new Form D filing requirements, please contact the following Morgan Lewis attorney.

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