



## Legal Risk Management Tip February 2009

### NEW FORM D REQUIREMENTS EFFECTIVE MARCH 16, 2009

Form D is a notice required to be filed by any unregistered securities offering relying upon a Regulation D exemption under Rule 504, 505 or 506 of the Securities Act of 1933, or Section 4(6) of such statute. Form D serves many purposes, such as, but is not limited to: data collection for federal and state rulemaking, regulation enforcement, business research and as an information resource for investors. Recently, the Securities and Exchange Commission (“SEC”) released a final rule amending Form D requirements and procedures (“Final Rule”).<sup>1</sup> This Final Rule implements various amendments to the information disclosed on Form D, and most notably, will require Form D to be filed electronically.

#### **Electronic Filing Required**

On March 16, 2009, the SEC will require electronic filing of Form D through its online system, Electronic, Data Gathering Analysis and Retrieval (“EDGAR”). Since September 15, 2008, issuers of such offerings have been allowed to continue to file paper versions of Form D or to file electronically via EDGAR during this transition period. To file online, issuers must have EDGAR access codes that consist of an identification number (“CIK”), a confirmation code (“CCC”) and a password. EDGAR access codes can be obtained by filing a Form ID online at <https://www.filermanagement.edgarfiling.sec.gov/>. Form D must be filed within 15 days after the first sale of the offering and annually thereafter, or annually from the most recent amendment as long as the offering has not terminated. Additionally, amendments to Form D must be made as soon as practicable in the event of a material change or edit to a previously filed Form D.<sup>2</sup> Although the Final Rule does not provide details on what is “material,” it does give guidance on what is *not* material, and therefore would not require Form D to be amended prior to its annual filing. Such non-material changes may include, but are not limited to: the total number of investors invested in the offering, an issuer’s revenues or aggregate net asset value, the amount of securities sold in the offering or the amount of securities remaining to be sold in the offering.<sup>3</sup>

#### **Form Content Amendments**

The revised Form D contains approximately sixteen (16) items in number sequence, including hyperlinks to instructions, a signatory submission and sections that allot for limited free writing. For example, Item 1 now requests information for multiple issuers as applicable. On Item 5, which pertains to hedge funds or pooled investment funds (other than venture capital and private equity funds), asks for aggregate net asset value range information with options to “decline to disclose” or list as “not applicable.” Many requirements for expenses and use of proceeds have been deleted while the remaining are incorporated into Items 15 and 16, such as amounts for sales commissions, finder’s fee and gross proceeds for payment to related persons.

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<sup>1</sup> Securities and Exchange Commission, *Release No.33-8891*, Sept. 15, 2008, available at <http://www.sec.gov/rules/final/2008/33-8891.pdf>

<sup>2</sup> *Id* at 31-32.

<sup>3</sup> *Id* at 31-33.

The SEC hopes that the implementation of electronic filing and form changes will be an “easy-to-use filing process that will deliver accurate information quickly, reliably and securely.”<sup>4</sup> Primarily, the SEC believes these changes will create efficient data collection for enforcement and rulemaking efforts consistent with investor protection. The SEC is using these new requirements to monitor exempt securities more effectively by attempting to ease filing burdens through streamlining costs and simplifying preparation, make information more readily available to the public and develop uniformity with state regulators. Currently, the SEC and North American Securities Administrators Association (“NASAA”) are working together to establish a system whereby Form D will be filed federally and with issuers designated state(s) in one electronic filing transaction. Until such system is available, issuers must contact their designated state regulator(s) to file additional required notifications for exempt securities.

If you need any assistance in relating to the filing of Form D, we would be happy to assist and may be reached at (619) 298-2880. Additionally, please contact the SEC and/or the appropriate state regulator(s) for more information.

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<sup>4</sup> *Id* at 9.