DechertOnPoint

February 2008 / Issue 5

A legal update from Dechert's Financial Services Group

SEC Revises Form D and Mandates Electronic Filing

The U.S. Securities and Exchange Commission ("SEC") recently adopted amendments to Form D ("Adopting Release"), the form required to be filed by issuers making a private placement in the United States in reliance on Regulation D under the U.S. Securities Act of 1933, as amended ("Securities Act"). The amendments revise the information issuers are required to furnish in Form D and mandate the electronic filing of Form D. Electronic filing of a temporary version of the revised Form D will begin on a voluntary basis on 15 September 2008, with electronic filing becoming mandatory on 16 March 2009.

Revisions and Amendments to Form D

The Adopting Release details all of the changes to the Form D. Some of the most significant changes affecting funds are discussed below.

- Instructions to the revised Form D will state that post office box numbers and "care of" addresses are not acceptable as a place of business information because the purpose of this information, according to the SEC, is to allow securities enforcement authorities to determine the location of the issuer's operations and the personnel responsible for the offering. This may pose a particular problem for offshore funds utilising their administrator as a mailing address.
- Related Persons
  - Citing privacy concerns, the SEC is eliminating the requirement that issuers list investors that own more than 10% of a class of their securities. The Adopting Release does note, however, that investors "should" normally have access to this information in a (confidential) private placement memorandum or other information made available from the issuer, if such information is material.
  - Still required is listing of anyone who functions as an executive officer or director of the issuer, or anyone who acted directly or indirectly as a promoter[1] of the issuer within five years of the earlier of the filing of the form or the sale necessitating the filing. The instructions to the Form D make clear that this requirement is intended to capture all of an issuer's principal policymakers, regardless of their title.
- Hedge funds and other investment funds will be required to disclose the range of their aggregate net asset value "as of the most recent practicable date". Funds may elect to choose the "Decline to Disclose" or "Not Applicable" option.
- Issuers will be required to provide information about the amount and recipients of any direct or indirect cash or non-cash compensation paid in connection with the sale of securities in the offering.

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1 The term "promoter" includes

(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organising the business or enterprise of an issuer; or

(ii) Any person who, in connection with the founding and organising of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organising the enterprise.

- Issuers now will be required to list the amount of gross proceeds used for payments to related persons (e.g., directors' fees, promoters' fees, etc.). The amount may be estimated and issuers will be permitted to clarify their response to prevent the information from being misleading.

- The federal and state signature blocks will be combined and will provide, among other things, that each issuer signatory has read the Form D, knows its contents to be true and has duly caused the Form D to be signed on its behalf. The issuer, in signing the form, also:

  - promises to furnish to the SEC or the States in which the offering is to be made the information provided to offerees in accordance with applicable law; and

  - irrevocably appoints as agents for service of process the Secretary of the SEC, the securities administrator(s) of the State in which the issuer maintains its principal place of business and those of the States where the Form D is to be filed, with respect to certain actions and proceedings. This appointment of an agent for service of process does not preclude States from requiring Form U-2 (Consent to Service of Process).

When Amendments to Form D are Required to be Filed

The Adopting Release lists specific instances in which an amendment to a previously filed Form D is required. Amendments are only required where:

- a year has passed since the filing of the Form D or the most recent amendment, if the offering is continuing;

- a material mistake of fact or error in a previously filed notice is discovered; or

- a change in information occurs other than a change involving, inter alia:

  - the address or relationship to the issuer of a related person (executive officer, director or promoter);

  - an issuer's revenues or aggregate net asset value;

  - an increase in the minimum investment amount or a decrease of 10% or less;

  - States of solicitation;

  - addresses of anyone compensated for solicitation;

  - a decrease in the total offering amount or an increase of 10% or less of the total offering amount;

  - an increase in the total number of investors; and

  - amount of sales commissions, finders' fees or use of proceeds for payments to related persons, if the change is a decrease or if the change in an increase of 10% or less.

Once an event that triggers the filing of an amendment occurs, however, an issuer is required to provide current information as to the entirety of Form D. For continuous offerings, this means that all information in Form D will be required to be updated on an annual basis.

Electronic Filing

On 16 March 2009, issuers will be required to file Form D electronically within 15 calendar days of the "date of first sale" of securities in a Regulation D offering. Issuers should take note that the phrase "date of first sale" has been defined as the "date on which the first investor is irrevocably contractually committed to invest" and is designed to focus on when the investor makes an investment decision and commits to purchase the securities offered. To the extent that an issuer's application materials create an irrevocable commitment to invest once executed and submitted, but prior to the dealing day, this definition may affect the issuer's deadline to file Form D.

The electronic filing process raises the possibility of a "one-stop" filing system that would also satisfy state law requirements that parallel Regulation D. Because the SEC's online filing system, EDGAR, will not collect fees on behalf of states that charge for such filings, the North American Securities Administrators Association is actively working with the SEC to establish its own system that may "interface" with EDGAR to provide such one-stop filing capability. Issuers would likely realize significant time and cost savings should this happen.

Once electronic filing begins information in the Forms D will be easily searchable though a publicly accessible internet database. The system will also allow greater state monitoring of exempt securities transactions and federal/State cooperation.

Use of the SEC's EDGAR system requires codes and passwords obtained from the SEC. If you do not currently have these, Dechert can assist in obtaining the necessary codes and passwords.

Safe Harbour from the "General Solicitation" and "General Advertising" Prohibitions

Rule 502(c) of Regulation D under the Securities Act requires that issuers relying on most Regulation D exemptions for private placements refrain from "general solicitation" and "general advertising" as the SEC has interpreted those terms. With the information required by Form D now more freely available to the public, people who commented on the rule proposal expressed concern that these prohibitions would be violated by the public availability of the data included in the Form D, thus precluding use of the exemptions. Rule 502(c) will be amended to provide that if an issuer makes reasonable efforts to comply with the requirements of Form D and provides the required information in good faith, no general solicitation or advertisement has occurred. The use of Form D in an attempt to shield activity intended to create interest in an offering, however, would still be prohibited and not within the safe harbour.

Conclusion

The adopted amendments do much to simplify, clarify and modernize the Form D filing process. Issuers, however, should be aware of how changes in requirements, instructions and definitions may affect the information they must disclose and when they must disclose it.

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This update was written by Jennifer O. Epstein and Patrick W. Dennis.

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