

SEC Adopts Amendments to Form D and Mandates Electronic Filing

Amendments to Form D ("Adopting Release"), the form required to be filed by issuers making private placements in the United States in reliance on Regulation D promulgated under the Securities Act of 1933, as amended ("Securities Act"), were adopted by the Securities and Exchange Commission ("SEC") on February 6, 2008.¹ The amendments revise the information issuers are required to furnish in Form D and mandate the electronic filing of Form D through the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. Electronic filing of a temporary version of the revised Form D will begin on a voluntary basis on September 15, 2008, with electronic filing becoming mandatory on March 16, 2009.

Revisions and Amendments to Form D

Issuers completing the online form will find that this form will be "smart" in the sense that it does not allow incomplete filings and will prevent inconsistent answers. The Adopting Release details all of the changes to Form D. Some of the most significant changes affecting investment companies ("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 using their administrator as a mailing address.

- Revised Form D will allow for the identification of multiple issuers in multiple-issuer offerings. Because each issuer will be separately "tagged" in the field, Form D will be electronically retrievable by searching for any one issuer involved in a given multiple-issuer offering, obviating the need to file duplicates to cover each issuer.
- Identification of the name of the offering will no longer be required.
- Issuers that are limited partnerships will no longer have to specify whether they are "formed" or "to be formed."
- 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.
 - Revised Form D continues to require issuers to list anyone who functions as an executive officer or director of the issuer, or anyone who acted

¹ Electronic Filing and Revision of Form D, SEC Release No. 33-8891 (February 6, 2008). See *Dechert OnPoint: SEC Revises Form D and Mandates Electronic Filing* ([February 2008](#)).

directly or indirectly as a promoter² of the issuer, within five years of the earlier of the filing of the form or the sale necessitating the filing. The instructions to Form D and the commentary in the Adopting Release make clear that this requirement is intended to capture all of an issuer's principal policymakers, regardless of their title.

- Issuers will be required to identify their industry group from a specified list instead of providing a description of their business. The list includes the category "Pooled Investment Fund" and the subcategories "hedge fund," "private equity fund," "venture capital fund," and "other investment fund."
- 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," although funds may elect to choose "Decline to Disclose" or "Not Applicable" options. Issuers that identify themselves as private equity or venture capital funds are not subject to this requirement.
- Hedge funds and other privately placed investment funds will be required to identify the exemptions and exclusions being claimed for the offering (i.e., Rule 504, 505, or 506 of Regulation D and Section 4(6) of the Securities Act, as applicable). Such funds will also be required to identify the specific paragraph of Section 3(c) of the Investment Company Act of 1940, as amended (the "Investment Company Act"), that

² 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.

the funds claim for an exclusion from the definition of "investment company" under the Investment Company Act.

- Issuers will be required to disclose the minimum investment amount per investor with respect to investors that are not employees, officers, directors, general partners, trustees, consultants, advisors, or vendors of the issuer, its majority-owned subsidiaries, its parent company, and the parent company's majority-owned subsidiaries.
- 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, including, if available, the Central Registration Depository ("CRD") number of such persons.³ The Adopting Release notes that this disclosure requirement only extends to offers and sales made in reliance on Regulation D; it does not extend to foreign sales (securities offered and sold outside the United States) made solely in reliance on Regulation S.⁴
- Issuers will be required to divulge the total number of investors. If the issuer has sold or may sell interests to non-accredited investors, the issuer will be required to provide the number of non-accredited investors invested in the fund.
- Issuers 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.

³ The requirement extends to entities that are not natural persons and to "finders," regardless of whether they have a CRD number. Such disclosure may galvanize the registered broker-dealer versus "finder" debate and lead to commentary in the near future regarding how forthcoming issuers will be in disclosing the use of unregistered placement agents and what actions the SEC may take against issuers and their unregistered placement agents.

⁴ See Adopting Release at note 123 and accompanying text ("Form D's requirements . . . will apply to foreign sales to the extent the issuer seeks to rely on an exemption under Regulation D for such foreign sales").

- 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 the offerees in accordance with applicable law;
 - 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 provision does not preclude states from requiring issuers to submit Form U-2 (Consent to Service of Process).
 - addresses of anyone compensated for solicitation (Item 12);
 - a decrease in the total offering amount or an increase of 10% or less of the total offering amount (Item 13);
 - an increase in the total number of investors (Item 14); 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 is an increase of 10% or less (Items 15 and 16).

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

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) (Item 3);
 - an issuer's revenues or aggregate net asset value (Item 5);
 - an increase in the minimum investment amount or a decrease of 10% or less (Item 11);
 - states of solicitation (Item 12);

Electronic Filing

On March 16, 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.⁵ Issuers should take note that the phrase "date of first sale" is 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.

First You Need to Obtain a CIK Code

Use of the online filing system requires a filer to have a "Central Index Key" ("CIK") code.⁶ Issuers that do

⁵ Rule 503 requires a Form D filing no later than 15 days after the first sale of securities made in reliance on Rules 504, 505 or 506 of Regulation D.

⁶ 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.

not have a CIK code will need to file a Form ID electronically⁷ and to fax a “notarized authenticating document,” which is a manually signed Form ID with a statement to the effect that the issuer confirms the authenticity of the Form ID filed on its behalf.

Note that if the Form D filing is made on behalf of multiple issuers, each issuer will be required to have its own CIK code and a confirming code referred to as a “CIK Confirmation Code (CCC).”

One-Stop Filing and Greater Transparency

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 EDGAR system 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 in the near future.

Once electronic filing begins, information in the Forms D about an issuer will be easily searchable through a publicly accessible internet database. Entered data would be “tagged” and searchable by field; thus, for example, state securities regulators could search for all electronic Form D filings that identified their states in response to Items 1 (jurisdiction of incorporation/organization), 2 (principal place of business and contact information), 3 (related person addresses), and 12 (addresses of recipients of sales compensation). From a regulator’s perspective, the system will also allow greater state monitoring of exempt securities transactions and federal/state cooperation.

Safe Harbor 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 re-

quired by Form D to become more freely available to the public, commentators to the proposed amendments⁸ expressed concerns that these prohibitions would be violated by the public availability of the data included in the amended Form D, thus precluding an issuer from relying on Regulation D. 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.

“Free writing” with respect to clarification of Items 3, 10, 13, 15, and 16 will also be within the safe harbor. However, the amendments seek to limit the amount of free writing by allowing for only explanatory or “textual” responses. Furthermore, the use of Form D in an attempt to shield activity intended to create interest in an offering would not be within the safe harbor.

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 that they must disclose and when they must disclose it. The financial industry should expect further commentary and clarification from both the SEC and state regulators on how to complete and submit amended Form D before September 2008.

We will monitor and alert you on any further developments.



This update was authored by Steve Bier (+1 212 698 3889; stephen.bier@dechert.com), Roderick Cruz (+1 212 698 3644; roderick.cruz@dechert.com), and Alan Rosenblat (+1 202 261 3332; alan.rosenblat@dechert.com). Research assistance was provided by Chris Carlson (+1 202 261 7722; christopher.carlson@dechert.com).

⁷ To complete Form ID, the issuer should go to <https://www.filermanagement.edgarfiling.sec.gov>.

⁸ Electronic Filing and Simplification of Form D, SEC Release No. 33-8814 (June 29, 2007).

Practice group contacts

For more information, please contact the authors, one of the attorneys listed, or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/financialservices.

Margaret A. Bancroft
New York
+1 212 698 3590
margaret.bancroft@dechert.com

Allison R. Beakley
Boston
+1 617 728 7124
allison.beakley@dechert.com

Sander M. Bieber
Washington, D.C.
+1 202 261 3308
sander.bieber@dechert.com

Stephen H. Bier
New York
+1 212 698 3889
stephen.bier@dechert.com

Susan M. Camillo
Boston
+1 617 728 7125
susan.camillo@dechert.com

Daphne T. Chisolm
Charlotte
+1 704 339 3153
daphne.chisolm@dechert.com

Christopher D. Christian
Boston
+1 617 728 7173
christopher.christian@dechert.com

Elliott R. Curzon
Washington, D.C.
+1 202 261 3341
elliott.curzon@dechert.com

Douglas P. Dick
Washington, D.C.
+1 202 261 3305
douglas.dick@dechert.com

Ruth S. Epstein
Washington, D.C.
+1 202 261 3322
ruth.epstein@dechert.com

Susan C. Ervin
Washington, D.C.
+1 202 261 3325
susan.ervin@dechert.com

Joseph R. Fleming
Boston
+1 617 728 7161
joseph.fleming@dechert.com

Brendan C. Fox
Washington, D.C.
+1 202 261 3381
brendan.fox@dechert.com

Wendy Robbins Fox
Washington, D.C.
+1 202 261 3390
wendy.fox@dechert.com

David M. Geffen
Boston
+1 617 728 7112
david.geffen@dechert.com

David J. Harris
Washington, D.C.
+1 202 261 3385
david.harris@dechert.com

Robert W. Helm
Washington, D.C.
+1 202 261 3356
robert.helm@dechert.com

Jane A. Kanter
Washington, D.C.
+1 202 261 3302
jane.kanter@dechert.com

Stuart J. Kaswell
Washington, D.C.
+1 202 261 3314
stuart.kaswell@dechert.com

Geoffrey R.T. Kenyon
Boston
+1 617 728 7126
geoffrey.kenyon@dechert.com

George J. Mazin
New York
+1 212 698 3570
george.mazin@dechert.com

Jack W. Murphy
Washington, D.C.
+1 202 261 3303
jack.murphy@dechert.com

John V. O'Hanlon
Boston
+1 617 728 7111
john.ohanlon@dechert.com

Fran Pollack-Matz
Washington, D.C.
+1 202 261 3442
fran.pollack-matz@dechert.com

Jeffrey S. Poretz
Washington, D.C.
+1 202 261 3358
jeffrey.poretz@dechert.com

Jon S. Rand
New York
+1 212 698 3634
jon.rand@dechert.com

Robert A. Robertson
Newport Beach
+1 949 442 6037
robert.robertson@dechert.com

Keith T. Robinson

Hong Kong
+1 852 3518 4705
keith.robinson@dechert.com

Alan Rosenblat

Washington, D.C.
+1 202 261 3332
alan.rosenblat@dechert.com

Frederick H. Sherley

Charlotte
+1 704 339 3100
frederick.sherley@dechert.com

Patrick W. D. Turley

Washington, D.C.
+1 202 261 3364
patrick.turley@dechert.com

Brian S. Vargo

Philadelphia
+1 215 994 2880
brian.vargo@dechert.com

David A. Vaughan

Washington, D.C.
+1 202 261 3355
david.vaughan@dechert.com

Anthony H. Zacharski

Hartford
+1 860 524 3937
anthony.zacharski@dechert.com

Kathleen Ziga

Philadelphia
+1 215 994 2674
kathleen.ziga@dechert.com



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