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Electronic Filing of Form D Mandatory on March 16

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Regulation D provides a set of safe-harbor rules that exempt private placements of securities from registration under the Securities Act of 1933 ("Securities Act"). Rule 503 of Regulation D requires any issuer relying on a Regulation D exemption for a private offering of securities to file with the Securities and Exchange Commission ("SEC") a Form D, in paper format, no later than 15 days after the first sale of securities.¹ **Beginning March 16, 2009, all Form D filings with the SEC must be made electronically online using the EDGAR System.**² In addition, a Form D must be electronically filed on an annual basis whenever continuous offerings are involved. This new requirement for annual amendments does not relieve an issuer of its duty to update its Form D throughout the year. Finally, the information on the electronic Form D will differ in certain respects from what is currently reported on the paper version.

Electronic Filing on EDGAR

As noted above, electronic filing and amendment of Form D will be made through the SEC's EDGAR system. In order to access EDGAR, a company will need to have a unique ten-digit CIK number and a set of password-like EDGAR access codes. Whether a company needs to take steps to obtain a CIK number and EDGAR access codes depends on whether the company currently submits SEC filings electronically or has previously filed Form D or other SEC forms in paper format. The filing cannot be made until the

codes are received from the SEC. Once filed through EDGAR, the Electronic Form D will be available to the public online and will be fully searchable.

Differences between the Paper and Electronic Versions

The electronic Form D requires disclosure of much of the same information about the offering as the current paper version except that the electronic version does not require an issuer to report all 10% beneficial owners. However, the electronic Form D requires *additional* information that has not previously been required, including among other things:

- Addition of date of first sale³
- Relevant Securities Act and Investment Company Act exemptions
- A requirement to report the CRD number of any individual who has been or who will be paid directly or indirectly any commission or other compensation in connection with sales of securities in the offering, including finders
- Undertaking to file offering materials to SEC upon request
- Indication of whether the offering will last over a year

- Revenue range for operating companies and net asset value range information for hedge funds (subject to an option to decline to disclose)
- Requirement to provide industry group information from a pre-established list

New Rules regarding Amendments to Form D

Currently the Form D need only be amended if there is a “material change” in the facts, without any particular time period specified for the amendment filing. In contrast, the electronic Form D is subject to more specific amendment requirements and must be amended as soon as practicable after discovery of the need for the change. **As of March 16, 2009, the new amendment requirements will apply to all issuers with ongoing offerings (even for those issuers who have not yet filed a Form D electronically with the SEC).**

Specifically, as of March 16, 2009, an amended electronic Form D must be filed in the following instances⁴:

- (i) to correct a material mistake of fact or error in the previously filed notice (as soon as practicable after discovery of the mistake or error); and
- (ii) to reflect a change in the information provided in a previously filed notice (as soon as practicable after the change), except that no amendment is required to reflect a change that occurs after the offering terminates.

Examples of information that would need to be reported under (ii) above include the addition of executive officers, directors and promoters and increases in the offering amount, if the increase is in excess of 10% of the amount reported in the last filing. If an amendment of any kind is required, all reported information in the form must be brought current.

Annual Update Requirement

Every issuer who has filed a Form D with the SEC and who is engaged in an ongoing, or continuous, offering pursuant thereto, must amend its Form D annually on or before the first anniversary of the original filing of the Form D with the SEC or the filing of the most recent amendment with the SEC, as applicable. Thus, every issuer engaged in an ongoing, or continuous, offering will be required to make at least an annual electronic filing with the SEC, even if no information has changed on the Form D that necessitates the filing of a materiality amendment.

Commencing March 16, 2009, this annual amendment requirement will apply to all issuers with ongoing offerings. The required filing dates for these annual updates for ongoing offerings are as follows:

- **If the most recent Form D (including any amendment thereto) was filed prior to March 16, 2008, the annual amendment on electronic Form D must be filed on or before March 16, 2009⁵**
- If the most recent Form D (including any amendment thereto) was filed between March 16, 2008 and March 16, 2009, the annual amendment on electronic Form D must be filed on or before the anniversary date of that filing (unless an amendment is otherwise required prior to such date)⁶
- All Form Ds filed on or after March 16, 2009, will be filed electronically via the Internet and annual amendments will be required to be filed on or before the anniversary of the filing (unless an amendment is otherwise required prior to such date)

State Filing Requirements

Under Section 18(b)(4)(D) of the Securities Act, any private placement made in accordance with Rule 506 of Regulation D will preempt the operation of state securities laws relating to the registration or qualification of securities. However, states may still require “notice filings”, including a copy of the Form D, in connection with Rule 506 offerings. The SEC has indicated that its new Form D electronic filing system could also be a one-stop filing center for Regulation D notice filings with the states. However, there is currently no organized electronic filing system to coordinate filing of Form D with states. Until such filing system is in place and accepted by states, issuers will still be required to submit paper filings to the states to the extent required by applicable law.

Practical Concerns

- In order to make the first electronic Form D filing, issuers must obtain EDGAR codes and access to the SEC’s EDGAR site. Because this process can take several days, issuers are strongly advised to apply for EDGAR numbers as early as possible in order to avoid potential problems complying with the timing requirements of Regulation D.
- Once the online filing has been made, a copy of the electronic Form D will be accessible to the public. Issuers should be aware of the Internet availability of their filings and the potential risk of regulatory scrutiny from state regulators,

who will have access to information such as the date of first sale. Although a late filing of a Form D should not result in the loss of the Rule 506 exemption under the Securities Act or the preemption of state securities registration, a number of states impose fines for late filings.

- Issuers conducting ongoing offerings should be aware of the annual and other amendment requirements and adopt appropriate compliance procedures.
- A Fund or other issuer with an ongoing offering which filed a Form D for such offering prior to March 16, 2008, and wishes to delay an electronic Form D filing should consider filing an amendment to such filing on the paper version of the Form D prior to March 16, 2009.
- Issuers should be aware of the SEC’s clarification of the definition of “date of first sale” and the 15-day filing deadline, and plan accordingly. Funds may consider revising their offering procedures such that (i) investors are not permitted to submit executed subscription documents and/or funds to the issuer until the relevant closing date and/or (ii) the application materials or subscription documents state that the investor is not irrevocably contractually committed. Another option would be to pre-file the Form D prior to the start of the offering period.

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¹ While not a condition of Regulation D, failure to comply with the Form D filing requirement may disqualify an issuer from relying on Regulation D if it or any of its predecessors or affiliates has been subject to an order, judgment, or decree of a court of competent jurisdiction temporarily, preliminarily or permanently enjoining it for failure to comply with Rule 503, although the SEC may determine, upon a showing of good cause, that it is not necessary under the circumstances to deny the exemption.

² EDGAR is the Electronic Data Gathering Analysis and Retrieval System by which documents are filed electronically with the SEC.

³ The SEC has clarified that, for purposes of the Form D filing requirements, 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.

⁴ No amendment is required to reflect a change in the following information: (i) change in the amount of securities sold in the offering or the amount that remains to be sold; (ii) a change in the total number of investors, or in the number of non-accredited investors, as long as the change does not increase the number of non-accredited investors to more than 35; (iii) a change in the address or relationship of a related person; (iv) a change in the company's revenues or aggregate net asset value; (v) an increase in the minimum investment amount, or a decrease from the original minimum of less than 10%; (vi) a change in the states in which an individual who is receiving sales compensation or finders' fees intends to solicit investors; (vii) a decrease in the total offering amount, or an increase from the original offering amount of less than 10%; or (viii) a decrease in the amount of sales commissions, finders' fees, or payments to related parties, or an increase in any of these payments of less than 10%.

⁵ An issuer in this situation can avoid filing the new electronic Form D by March 16, 2009, if it files a new amendment to its Form D with the SEC by paper prior to March 16, 2009. In such a situation, the annual amendment would be due one year from the date of such filing, if the offering is to continue beyond such anniversary date, unless an amendment is otherwise required.

⁶ For example, if the issuer filed an original Form D on April 1, 2006, and an amendment to this Form D on February 3, 2009, it would not need to file an annual updating amendment on electronic Form D until February 3, 2010, unless it otherwise needed to amend its Form D to correct information prior to February 3, 2010.