

Update on the Mandatory Electronic Filing of Form D and New SEC Guidance on Regulation D Rule 506 Offerings

In 2008, the SEC adopted substantial changes to Form D, including electronic filing and updating requirements, which became effective on March 16, 2009. On January 26, 2009, the SEC issued guidance on Rule 506 of Regulation D offerings. The following summarizes key changes to Form D and the filing process and the implications of the SEC's recent guidance.

Form D

Form D is used to report offerings exempt from the registration requirements of the Securities Act of 1933 (the 1933 Act) pursuant to SEC Regulation D, including Rule 506. Substantive state regulation of Rule 506 offerings is preempted by the National Securities Markets Improvement Act of 1996 (NSMIA). However, states still retain authority to require notice filings and related fees. For this reason, many states require a copy of Form D to be filed if securities are sold to investors in that state in reliance on Rule 506.

Electronic Filing of Form D with the SEC. Electronic filing of Form D with the SEC, voluntary since September 15, 2008, became mandatory on March 16, 2009. Issuers are required to file new Form D electronically through the new online filing system accessible from any computer with Internet access. Each issuer is required to obtain EDGAR access codes and a user identification or "Central Index Key" number by completing a Form ID on the SEC's website. Issuers must then fax to the SEC (or submit as a PDF attachment) a notarized document containing the same information as contained in the Form ID application within two (2) business days before or after the electronic filing of the Form ID. Each issuer will receive its own identification number, confirming code and password to use on the new online system. The information in electronic Form D will be publicly available on the SEC's website. Previously, Form Ds were only available in the SEC's public reference room and from private service companies.

Paper Filing of Form D with State Securities Administrators. Electronic filing of Form D with the SEC does not satisfy current state filing requirements. Therefore, states will continue to require the filing of paper copies of Form D until a "one-stop filing" system is developed.

Revised Form D. The SEC has revised the information requirements of Form D. The major changes include:

- Reporting the date of first sale;
- Replacing the current requirement to provide an issuer business description with industry group information from a pre-established list;
- Requiring optional revenue range information for operating companies and net asset value range information for hedge funds;
- Requiring more specific information on the 1933 Act exemption being claimed in the Form D and any exclusion claimed from the definition of "investment company" under the Investment Company Act of 1940;

- Requiring a CRD number for each recipient of compensation from the sale of securities (CRD is an on-line registration data bank and application processing facility used by FINRA, state regulators and the SEC in connection with the registration and licensing of broker-dealers and broker-dealers' personnel); and
- Eliminating disclosure of certain information about the use of proceeds and expenses and about 10 percent or more owners of the issuer's equity securities.

Annual Amendment Filing Requirement. Previously, issuers were only required to amend Form D to report material changes in the information provided. As a result of the amendments to the form, issuers engaged in "continuous offerings" must annually file an amendment on or before the first anniversary of the original filing, or the filing of the most recent amendment. Continuous offerings are offerings lasting more than a year. Every issuer engaged in a continuous offering is required to make at least annual Form D amendment filings, even if no information on Form D has changed.

Sales Compensation/Finders. New Form D requires issuers to disclose CRD numbers for recipients of sales compensation. Many issuers retain "finders" to help obtain financing and locate investors, but finders are generally not registered broker-dealers and therefore do not have a CRD number. Their unregistered status will be apparent on the face of the new Form D. The adverse consequences of failing to comply with broker-dealer registration requirements can be severe for both the unregistered broker-dealer and the issuer.

New Guidance Regarding Rule 506 Offerings

Under federal securities laws, the Form D filing is not a condition to the availability of the Rule 506 exemption; therefore, late filing of Form D does not invalidate a Rule 506 offering or federal preemption under NSMIA. However, in the past, certain state securities regulators have taken a contrary position, namely that a late filing (or a non-filing) with the state meant the issuer was not entitled to federal preemption. On January 26, 2009, the SEC updated its "Compliance and Disclosure Interpretations," available at www.sec.gov, and confirmed that "covered security" status under Section 18 of the Securities Act is not conditioned upon the filing of a Form D with the SEC or any state securities regulator.

Conclusion

To comply with the new Form D requirements, issuers should ensure that sales and other offering information are promptly reported to counsel. To avoid late filings, and any potential consequence of a late filing, issuers should allow for extra time prior to filing deadlines to obtain the proper filing codes and should establish procedures to ensure that the person responsible for state and federal filings is informed about the details of the offering in time to prepare initial filings, annual filings for continuous offerings and amendments to reflect material changes to the offering.

If you have questions about compliance with the new Form D filing requirements, please contact one of the attorneys listed below or your regular Ropes & Gray contact.

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