

New Form D Filing Requirements

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Introduction

Issuers file a Form D with the Securities and Exchange Commission (“SEC”) when securities are sold without registration under the Securities Act of 1933 based on a claim of exemption under Rule 504, Rule 505, or Rule 506 of Regulation D or Section 4(6) of the ’33 Act.¹ Form D must be filed within fifteen days after the first sale of securities in an offering. The date of first sale is the date on which the first investor becomes irrevocably contractually committed to invest. If the date of first sale falls on a Saturday, Sunday, or holiday it is considered to be the next business day.

Previously, filing of Form D was a paper filing. The SEC, however, has issued new regulations amending Form D and the way in which it is filed. Many states also require filing of Form D and state rules will have to be complied with in addition to filing a Form D with the SEC.²

Summary of New Form D Requirements

The SEC recently adopted new rules amending Form D.³ The new rules are intended to ease the costs and burdens of preparing and filing Form D information, make information disclosed through Form D better available to the public, unify federal and state filing, and aid in the collection of data for rulemaking and enforcement purposes. The new rules eliminate some of the disclosure required by the current version of Form D in some areas and require new disclosure in others. More importantly, the new Form D rules amend the filing process to introduce, and ultimately mandate, electronic filing. In sum, the new rules:

- Permit filers to identify all issuers in a multiple-issuer offering in one Form D filing;

¹ U.S. Securities and Exchange Commission, Regulation D Offerings, <http://www.sec.gov/answers/regd.htm> (last visited Nov. 10, 2008).

² For information of state requirements for Form D filings, see North American Securities Administrators Association, <http://www.nasaa.org/home/index.cfm> (last visited Nov. 10, 2008).

³ Electronic Filing and Revision of Form D, Exchange Act Release No. 33-891, 17 CFR Parts 230, 232, and 239, (Feb. 6, 2008), *available at* <http://www.sec.gov/rules/final/2008/33-8891.pdf>.

- Require the issuer to select its industry group from a pre-established list, instead of writing its own description;⁴
- Request revenue range information for the issuer, or net asset value range information in the case of hedge funds;
- Require reporting of whether the issuer expects the offering to last longer than one year; and
- Require the issuer to provide the name of every recipient of sales compensation and finders fees, the states in which they intend to solicit investors, and CRD numbers if the recipient is a registered broker-dealer.

In addition to the new requirements, the revisions to Form D omit several requirements. For example, the revisions eliminate the current requirement to identify 10% or greater beneficial owners of a class of the issuer's equity securities. Moreover, the revisions eliminate the need to disclose information regarding the use of proceeds and expenses of the offering. In addition, the new Form D has a single signature block for both federal and state filing purposes.

Electronic Filing of Form D

The new online filing system for Form D became available on September 15, 2008 when the amendments to Form D adopted by the SEC became effective. Between September 15, 2008 and March 15, 2009, there is a six month transition period during which companies will have three options for filing Form D: (i) filing the old version of Form D on paper, (ii) filing the new version of Form D on paper, or (iii) filing the new version of Form D electronically. Effective March 16, 2009, the old version of Form D will be eliminated, and electronic filing of the new version of Form D will be mandatory.⁵

The electronic Form D will be similar to the online filing system currently in use for Section 16 filings, and the SEC continues to require filing of Form D within fifteen days of an issuer's first sale in an offering in which the issuer is relying on the safe harbor exemption under Regulation D. For each electronically submitted Form D, a duly authorized person must, on behalf of the issuer, sign with a typed signature and manually sign a signature page or other document authenticating, acknowledging or otherwise adopting the signature that appears in typed form in the Form D filing. The manually signed signature page is not required to be submitted to the SEC. Rather, each issuer must retain the manually signed document for five years and provide a copy of the manually signed document to the SEC staff upon request.

⁴ The industry groups for Form D will be the same as the industry groups used by the SEC for Standard Industrial Classifications. For a listing of these codes, see U.S. Securities and Exchange Commission, Division of Corporation Finance, Standard Industrial Classification (SIC) Code List, <http://www.sec.gov/info/edgar/siccodes.htm> (last visited Nov. 10, 2008).

⁵ For access to both the old and new version of Form D, see U.S. Securities and Exchange Commission, Form D, <http://www.sec.gov/info/smallbus/cfformd.htm> (last visited Nov. 10, 2008).

A filer of Form D may file both the original form and any amendments electronically. A filer may file an amendment to a previously filed notice at any time but must do so in the following circumstances: (1) 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; (2) to reflect a change in the information provided in the previously filed notice (with certain exceptions) as soon as practicable after the change; and (3) to provide an annual update, either on or before the anniversary of the most recently filed Form D or amendment to Form D, for offerings lasting longer than one year.

Form ID and EDGAR Access Codes

Electronic filing of Form D will be done using the EDGAR filing system. Thus, before an issuer can file electronically with the SEC, it must become an EDGAR filer with authorized access codes. The process to become an EDGAR filer can be conducted by the filer or a filing agent (e.g. a law firm), and is detailed below:⁶

- Each issuer must determine if the SEC has assigned it a Central Index Key (“CIK”) number - a unique ten digit number assigned to companies which file with the SEC. If an issuer has been assigned a CIK number but does not remember this number, the issuer can locate it on the SEC website.⁷
- Each issuer who has not previously been assigned a CIK number must create a Form ID and submit it for authorization to the SEC in order to obtain its own CIK number and a passphrase. Upon acceptance, the issuer will receive a unique CIK via e-mail.
 - Go to: <https://www.filermanagement.edgarfiling.sec.gov/> to create a Form ID.
 - Click on “Press Here to Begin”.
 - Click on “Apply for EDGAR Access (New)”.
 - Fill out the form.
 - Fax a copy of the form with an original, notarized signature to the SEC within two business days before or after the electronic filing of the Form ID. The signatory must be a company partner, president, treasurer, corporate secretary, officer or director or an attorney for the company, provided the attorney is duly authorized by the company or acting under a power of attorney.

⁶ For more detailed information, see U.S. Securities and Exchange Commission, Information for EDGAR Filers, <http://www.sec.gov/info/edgar.shtml> (last visited Nov. 10, 2008).

⁷ U.S. Securities and Exchange Commission, EDGAR Company Search, <http://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Nov. 10, 2008).

- The turn around time to receive the CIK code and passphrase is 2 days/48 hours from the receipt of the authentication documentation.
- There is no fee for obtaining this code.
- If an issuer has a CIK number from previously filing Form D on paper, the issuer will must obtain an access code to file electronically. Upon acceptance, the issuer will obtain access codes.
 - Go to: <https://www.filermanagement.edgarfiling.sec.gov/>.
 - Click on “Convert Paper Only Filer to Electronic Filer”
 - Fill out the form.
 - Fax a copy of the form with an original, notarized signature to the SEC within two business days before or after the electronic filing of the Form ID. The signatory must be a company partner, president, treasurer, corporate secretary, officer or director or an attorney for the company, provided the attorney is duly authorized by the company or acting under a power of attorney.
- The issuer will then need to use the CIK number and passphrase to create its EDGAR access codes.
 - Return to <https://www.filermanagement.edgarfiling.sec.gov/>.
 - Click on “Press Here to Begin”.
 - Click on “Generate Access Codes (New/ Replacement)”.
 - Enter the CIK code and the passphrase and click “Generate Access Codes”.
 - A dialog box appears asking for confirmation. After the issuer clicks “OK”, the access codes appear. The issuer should record these codes because there is no way to recover them after the page is closed.
 - There is no fee for obtaining this code.
 - Once the issuer has received its codes, it may use the same codes for all future electronic filings (including electronic Form D filings).

After receiving all access codes to log on to the EDGAR system, an issuer may electronically file Form D by choosing “Form D” under “Make a Filing.” The SEC provides

item-by-item instructions on completing the form as well as links to definitions of key terms⁸ and helpful hints for completing the form.⁹

Impact of Electronic Filing

The SEC expects these amendments to benefit issuers, regulators, and members of the public by modernizing the information collection process. In particular, the amendments should ease filing burdens, increase public availability of Form D information, promote federal and state uniformity¹⁰, and improve collection of data for SEC enforcement and rulemaking efforts. While there may be initial costs incurred with adapting to the electronic filing system, the SEC expects that these costs will be minimal and will be outweighed by the benefits of an electronic filing system. Moreover, the SEC expects that the simplification and restructuring of Form D filings to an electronic system may decrease legal fees and perhaps allow more issuers to file a Form D without the assistance of a law firm.

⁸ U.S. Securities and Exchange Commission, Guide to Definitions and Terms Used in Form D, <http://www.sec.gov/info/smallbus/formddefinitions.htm> (last visited Nov. 10, 2008).

⁹ U.S. Securities and Exchange Commission, Division of Corporation Finance Guidance of Form D Filing Process, <http://www.sec.gov/divisions/corpfin/formdfunding.htm> (last visited Nov. 10, 2008).

¹⁰ The North American Securities Administrators Association is considering establishing its own electronic system that would interface with the SEC system making federal and state filings even more efficient and create substantial savings. Exchange Act Release No. 33-891, *supra* note 3, at 76–77.