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## SECURITIES REGULATION AND COMPLIANCE ALERT

### **ELECTRONIC FILING AND AMENDMENTS TO FORM D**

Earlier this year, the Securities and Exchange Commission (“SEC”) adopted amendments to its rules to simplify and restructure Form D, to update and revise the information sought by Form D and to mandate electronic filing through the Internet. The final rule became effective on September 15, 2008, except that the mandatory electronic filing requirement is delayed until March 16, 2009. The new Form D electronic filing system became available on September 15, 2008, at which time companies were permitted to file Form D information voluntarily online.

Form D is required to be filed by issuers making private placements of securities in the United States in reliance on Regulation D of the Securities Act of 1933 (the “Act”). Regulation D permits the sale of securities by issuers without registration under the Act and establishes safe harbor provisions for the private placement of securities under the Act. An issuer relying on an exemption provided by Regulation D is currently required to file a paper copy of Form D with the SEC not later than 15 days after the first sale of securities.

The amendments are intended to ease the costs and burdens of preparing and filing Form D and to make filed information more readily available to regulators and members of the public.

#### ***Amendments to Form D***

The revised Form D is organized into 16 numbered categories of information. As with current Form D, the new version of Form D will require the company issuing securities to provide basic information about itself, the type of security being issued, the nature of the company’s business, the number of investors, and the securities law exemption being claimed.

Significant differences between the requirements of current Form D and new Form D include the following:

- Eliminating the current requirement to identify 10% owners of a class of equity securities.
- Requiring the company to select its industry group from a pre-determined list, instead of writing its own description.
- Requiring revenue range information; the company may choose a “decline to disclose” option.
- Requiring disclosure of whether the company expects an offering to last longer than one year.
- Modifying the current requirement to provide information on sales compensation by adding a requirement 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.

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Finders and others receiving sales compensation or finders' fees who are not registered brokers or dealers will not be required to obtain a CRD number to receive the compensation, but must nevertheless be listed on the Form D.

- Requiring reporting of the date of first sale in the offering.
- Limiting reporting of the minimum investment amount accepted in the offering to the amount accepted from outside investors, so as not to affect employee stock ownership incentive plans adversely.
- Modifying the current requirement to provide use of proceeds information, so that the company will only have to provide the amount of proceeds used for sales commissions, finders' fees and payments to related persons.
- Replacing the current federal and state signature requirements with a combined signature requirement that includes an undertaking to provide offering documents to regulators on request, a consent to service of process and a certification that the issuer is not disqualified by rule. The SEC has noted that states may not routinely ask for offering materials, but may do so in the exercise of their anti-fraud powers.
- Permitting a limited amount of free writing in clarification fields in the Form D to the extent necessary to clarify certain information otherwise required to be provided.

The SEC amended Rule 503 in order to clarify when, how, and why an amendment to a Form D may or must be filed. An Amended Form D must be filed *only* in the following three instances:

- 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).
- To reflect a change in the information provided in a previously filed notice (as soon as practicable after the change) other than a change occurring after the offering terminates, or other specified changes.<sup>1</sup>
- Annually, on or before the first anniversary of the filing of the Form D or the filing of the most recent amendment, if the offering is continuing at that time.

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<sup>1</sup> A change in the following information does not necessitate the filing of an amendment as soon as practicable after the change: (1) the address or relationship of the issuer to an executive officer, director or promoter identified in Form D, (2) the issuer's revenues or aggregate net asset value, (3) the minimum investment amount, if the change is an increase, or if the change does not result in an aggregate decrease in minimum investment amount of more than 10 percent, together with all other decreases, (4) any address or state of solicitation, (5) the total offering amount, if the change is a decrease, or if the change does not result in an aggregate increase in the total offering amount of more than 10 percent, together with all other increases, (6) the amount of sales commissions, finders' fees or proceeds of the offering directed to executive officers, directors or promoters, if the change is a decrease, or if the change does not result in an aggregate increase in such amount of more than 10 percent, together with all other increases, (7) the amount of securities sold in the offering or remaining to be sold, (8) the number of non-accredited investors who have invested in the offering so long as an increase does not increase the number to more than 35, or (9) the total number of investors in the offering.

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If an issuer is required to amend its Form D, it will have to provide current information with respect to all previous responses in its Form D regardless of the reason for the amendment. Beginning March 16, 2009, the amended rules will apply to all Regulation D filings, even those filed with the current paper Form D. Issuers making continuous offerings will need to consider whether previous filings need to be amended under the new rules.

### ***Mandatory Electronic Filing***

Beginning September 15, 2008, issuers will have the option of filing Form D either in paper form or electronically. If a paper form is used, the issuer may use either the current form or a printed version of the new electronic form. Beginning March 16, 2009, every Form D must be filed with the SEC electronically. The SEC included a safe harbor to ensure that the electronic availability of the Form D would not, in and of itself, be deemed to be a form of general solicitation or advertising activities which are prohibited under Regulation D.

Rule 503 will continue to require the filing of Form D no later than 15 days after the first sale of securities. Issuers should note that "date of first sale" is defined as the date on which the first investor is irrevocably contractually committed to invest. Therefore, to the extent the subscription agreement creates an irrevocable commitment to invest once executed, the date of first sale occurs when the first subscription agreement is received and first funds are deposited in escrow, and issuers must plan accordingly to ensure timely filing of the Form D.

The online filing system will be accessible from any computer with Internet access. To file a Form D electronically, issuers will need to obtain EDGAR filing codes. If an issuer does not already have Central Index Key (CIK) and CIK Confirmation Code (CCC) codes for electronic filing on EDGAR, it will need to obtain the codes from the SEC by electronically filing a Form ID and filing, in paper by fax, a manually signed notarized authenticating document. The SEC is considering ways to simplify the authentication process to eliminate the need for a manually signed fax and hopes to have a more simplified process available by the time the electronic filing of the Form D becomes mandatory.

The online filing system will automatically capture and tag data items. The data will be interactive and searchable through the Internet. The software will require that filers address each required data field in the form and will not allow for submittal of an incomplete form. Unlike the current paper filings, which are only available to the public in person in the SEC's public reference room, through a mail request or through third party provider, information filed electronically will be able to be easily viewed online on the SEC's web site or downloaded. Companies that have avoided public announcements of their financings in the past should be aware that Form Ds will be more readily available once electronic filing becomes mandatory.

The new searchable electronic database will enable both federal and state securities regulators to more effectively monitor the exempt securities transaction market. State securities regulators will be able to access the information on the SEC's web site. At this time, the SEC's filing

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system will not collect fees on behalf of any states and issuers will continue to make filings with the various states in connection with their private offerings as required by each particular state's securities regulators. However, in an effort to provide "one stop filing" which would enable companies to file Form D information with the SEC and various states in one electronic transaction, the SEC is coordinating with the North American Securities Administrators Association (NASAA) to allow filing of Form D and payment of related fees electronically with state securities regulators through a web site that would interface with the SEC's filing system. Once implemented, such a "one stop filing" could result in substantial savings in time and money for companies filing Form D information.

***The Securities Regulation and Compliance Alert is intended to keep readers current on matters affecting securities regulation and compliance and is not intended to be legal advice. For more information, please contact any of the following attorneys in the firm's Securities and Corporate Finance Practice Group:***

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