

Venture Capital Alert: Revisions to Form D and Mandatory Electronic Filing Requirements for Form D for all Issuers

2/3/2009

Effective March 16, 2009, all issuers of securities, including those without a class of securities registered under the Securities Exchange Act of 1934, as amended, will be required to make Form D filings electronically through the U.S. Securities and Exchange Commission's (SEC or the Commission) Electronic Data Gathering Analysis and Retrieval (EDGAR) filing system, making such forms accessible from any computer with Internet access. In addition, the SEC has made a number of changes to Form D itself and clarified the circumstances under which amendments to Form D will be required.¹ State securities filings (also known as "blue sky" filings) are presently not required to be made electronically and will continue to be required in paper format (or any other format required by state regulators) for the foreseeable near term.²

Form D is a federal notice filing with the SEC, filed in connection with a private placement of securities without registration under the Securities Act of 1933, as amended, pursuant to the exemption safe harbors under Rules 504, 505, or 506 of Regulation D. The new regulations will make Forms D more easily accessible to the general public. As a result, information about private offerings by private company issuers, such as the aggregate amount offered and raised, will be more readily available to the public and more broadly disseminated. In addition, all issuers, including private companies, will be required to have obtained EDGAR filing codes prior to the submission of a Form D. Form D itself will be completed through a new electronic version of the Form D that is available on the SEC's Web site, www.sec.gov.

The SEC also has made a number of changes to Form D. The Commission eliminated the requirement to list 10% or greater owners of a class of the issuer's equity securities, which means an issuer will no longer be required to disclose the names of its largest investors on Form D as filed with the SEC. Instead of providing their own business description, issuers will choose the most relevant classification of their businesses from a preestablished list of industries and will have to check the specific exemption utilized for their offerings within Regulation D. The Commission added a new section to Form D, requiring operating issuers to provide a revenue range (and for hedge funds, net asset value); however, private companies may select the option to "decline to disclose" if such issuers consider their revenue information confidential.

Form D now requires disclosure of the "date of first sale" of securities in the offering, and the form must be filed no later than 15 days following the date of first sale. According to the SEC guidance in its release, in a rolling, minimum-maximum offering, the date of first sale may be earlier than the date on which the minimum is reached and prior to the initial closing. Form D also will permit issuers in a multiple-issuer offering to submit a combined filing on one Form D. Other changes include:

- requiring CRD (Central Registration Depository) numbers for brokers (individuals and associated broker-dealers) receiving sales commissions from the offering;
- simplifying the fees and expenses disclosure;
- clarifying that any "minimum amount" required to be reported is the minimum amount from outside investors and not an issuer's affiliates;
- requiring reporting of whether the offering is expected to last for a period longer than a year; and
- replacing the current federal and state signature requirements with a combined signature requirement that includes an undertaking to provide offering documents to regulators upon request (subject to applicable law), a consent to service of process, and a certification that the issuer is not disqualified under Regulation D from relying on the exemption claimed.

The SEC also clarified when a subsequent amendment to a Form D is required:

- to correct a material mistake of fact or error in a previously filed Form D as soon as practicable after discovery of the mistake or error;
- to reflect a change in the information previously filed (with certain exceptions described below) as soon as practicable after the change; or
- annually, on or before the first anniversary of the most recent previously filed notice, if the offering is continuing for more than a year.

An amendment is *not* required for a change that occurs either after the termination of the offering or during the offering to the following information:

- the address of any related person to the issuer named in Form D or the relationship of such persons to the issuer (e.g. an individual is no longer an officer of the issuer);
- an issuer's revenue range;
- the minimum investment amount by an investor if the change is an increase or an overall decrease of not more than 10%;
- the address of any individual or firm receiving a sales commission or the state(s) in which such individual or firm solicited sales;
- the total offering amount if the change is a decrease or an overall increase of not more than 10%;
- the amount of securities actually sold in the offering or the amount remaining to be sold;
- the number of non-accredited investors participating in the offering so long as the change does not increase the total number to more than 35;
- the total number of investors who have invested in the offering; or
- the amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease or an overall increase of not more than 10%.

If you have any questions about the revised Form D or the electronic filing requirements, please call your Mintz Levin attorney or any of the attorneys listed on this Alert.

Endnotes

¹ See SEC Release No. 33-8891 (Feb. 6, 2008), available at www.sec.gov/rules/final/finalarchive/finalarchive2008.shtml

² The SEC is continuing discussions with the North American Securities Administrators Association, which is the organization of state securities regulators, to further revise requirements to enable "one-stop filing," pursuant to which companies would be able to file the Form D with the SEC and applicable states on one electronic transmission.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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