

# Securities Briefing Vol. 7, No. 3

**May 01, 2008**

## **TOPICS IN THIS SECURITIES BRIEFING:**

This Securities Briefing provides an overview of the SEC's final rules:

- Revising Form D, including mandating the electronic filing of Form D; and
- Amending the procedures for payment of SEC filing fees.

This Securities Briefing is intended only as a summary of the SEC rules discussed and you are encouraged to review the full text of the final rules.

## **FINAL SEC RULES REVISING FORM D AND MANDATING ELECTRONIC FILING**

### **OVERVIEW**

The SEC has adopted final rules amending Form D, Regulation D and Regulation S-T to impose a mandatory requirement to electronically file the Form D effective March 16, 2009. Companies may begin electronically filing Form D on a voluntary basis beginning on September 15, 2008. A Form D filing is required by any company making a private offering in reliance on the exemptions available under Regulation D or Section 4(6) of the Securities Act of 1933, referred to as the Securities Act. The final rules also include a number of changes to the Form D to simplify, update and revise its content. The revised Form D will be filed with the SEC on a new online system that will be accessible from any computer with Internet access. The Form D information filed electronically will be available on the SEC's web site in an "interactive and easily searchable" format for use or review by regulators and any one else that wishes to access the data.

In the adopting release, the SEC indicated that mandating electronic filing of Form D could "promote uniformity between federal and state securities regulation" of private offerings and assist the regulators with better monitoring of those offerings. SEC plans for the future include upgrading the Form D filing system to accept "one-stop" filing of the Form D with the SEC and one or more states. As discussed further below in "Changes to Form D – Identification of claimed exemptions or exclusions and type of filing – Item 7," this capability will not be available when the new Form D first becomes effective. The SEC believes that converting to an electronic filing of Form D will create a useful database to assist the SEC in its enforcement efforts, and its evaluation of the effectiveness of exemptions under the Securities Act "in order to facilitate capital formation in a manner consistent with investor protection."

### **EFFECTIVE DATES**

The final rules are effective on September 15, 2008 at which time issuers may begin voluntarily filing the new Form D electronically. Beginning March 16, 2009, the new Form D must be filed electronically by all issuers. During the transition period of September 15, 2008 to March 16, 2009, issuers may make initial or amended paper filings of the Form D on either the current or new Form D.

### **ELECTRONIC FILING PROCEDURE**

The new online filing system for Form D will be accessible from any computer with Internet access. Both the initial filing of the Form D and any required amendments to it will be made through the new system. The SEC expects that the Form D will have drop-down menus and other guidance functions to assist with the completion of the Form D.

The Form D will continue to be due within 15 days of the first sale of the issuer's securities in reliance on one or more of the exemptions available under Regulation D or Section 4(6) of the Securities Act. The final rules revise Rule 503(a)(1) to clarify that when the filing date falls on a weekend or holiday, the Form D will be due the next business day. The final

rules also clarify when an amendment to Form D must be filed (discussed below in “Changes to Form D Content – Identification of claimed exemptions or exclusions and type of filing – Item 7”).

The proposed rules indicated that the online Form D filing system would not have a way to save an incomplete Form D online from session to session. In response to comments about the burden placed on issuers to assemble all information for the Form D before going online so that it could be prepared and filed in one session, the SEC anticipates that the filing system will permit issuers to either prepare the filing offline and submit it online or to save an incomplete Form D online for multiple sessions occurring over a short period of time. Data entry will need to occur at a pace that will prevent a time-out from occurring during the session. The SEC currently expects that time-outs will occur one hour following a user’s last activity on the system. Issuers will be able to correct errors and verify the correctness of information provided in the Form D before filing it. A company will be able to download and print the Form D before and after it is filed. Once the filing is made, the system will indicate receipt of the filing and provide an “accession number” (or unique number assigned to the filing) in an email notification to the filer. A company will be able to view its Form D on the SEC’s web site shortly after it is filed with the SEC.

## OBTAINING EDGAR ACCESS CODES FOR ELECTRONIC FILING

A company electronically filing a Form D will need the same access codes as are required to file on the SEC’s EDGAR system. If a company does not have these EDGAR access codes, it must obtain them by electronically filing a Form ID at <http://www.sec.gov/edgar.shtml> and filing, in paper by fax within two business days before or after filing of the Form ID, a notarized authenticating document. The EDGAR access codes include the following:

- Central Index Key (CIK) Code which is the company’s identification number;
- CIK Confirmation Code (CCC) which is the company’s confirming code for validation purposes;
- Password; and
- Password Modification Authorization Code (PMAC).

In response to comments, the SEC plans to consider ways to simplify the issuer authenticating process and hopes to implement these changes on or before the date electronic filing of Form D becomes mandatory.

It is possible that a nonreporting company that has filed a Form D since early 2002 has already been assigned a CIK code by the SEC even though the company has not completed the Form ID application process. Nonreporting companies should avoid having multiple CIK codes assigned, and should check the SEC’s website to determine if a CIK code has already been assigned to it. Please contact your GPM Securities Team member (see contact information listed at the end of this Securities Briefing) if you need assistance in obtaining your EDGAR access codes or verifying whether or not a CIK code has already been assigned.

## CHANGES TO FORM D CONTENT

In general, the SEC’s final rules adopt the changes to Form D substantially in the form proposed. The final rules reorganize and simplify the Form D into 16 numbered items. There will be instructions at the end of the new Form D to explain the requirements for each item. Among other things, the new Form D reduces the amount of information on the use of proceeds and expenses of the offering because this information is not needed to evaluate whether the claimed exemption is available to the issuer.

**Basic identifying and contact information.** Items 1-3 of the new Form D essentially reflects the information required by the current Form D:

- **Item 1** lists the issuer’s current and previous names, jurisdiction of incorporation or organization, entity type and year of incorporation or organization. The new Form D will permit the issuer to be identified as “yet to be formed”. Unlike the current Form D, Item 1 of the new Form D expressly provides for the identification of multiple issuers for multiple-issuer transactions.
- **Item 2** lists the company’s address and telephone number of its principal place of business. Post office boxes and “care of” addresses will not be permitted. In response to comments on the proposed rules, Item 2 of the new Form D

will permit, but not require, that the principal place of business address and telephone number for issuers other than the primary issuer in a multiple-issuer offering be provided.

- **Item 3** lists the name, relationship to company and address of the company's executive officers, directors and promoters. Note that, as proposed, the new Form D eliminates the current requirement to identify owners of 10% or more of a class of the company's securities.

As proposed, the new Form D also eliminates the requirement to provide a name of the offering because the current requirement is unclear and is outdated.

**Information about the issuer.** Items 4 and 5 of the new Form D cover information about the issuer:

- Item 4 identifies the industry group of the issuer which is selected from a dropdown menu. This item replaces the current requirement to provide a brief description of the issuer's business. The SEC believes that industry group classification will be less burdensome and provide more useful information for regulatory purposes. Issuers that can be categorized in more than one industry group should select the industry group that most accurately reflects "the use of the bulk of the offering proceeds."
- Item 5 identifies the revenue range of the issuer for the most recently completed fiscal year to help the SEC determine the size and types of issuers that rely on the Regulation D and Section 4(6) exemptions. A "decline to disclose" option will be available if a private company considers its revenue range confidential information. If the issuer has been in existence less than one year, the issuer will identify its revenues to date. In response to comments, if the issuer is a hedge fund or a pooled investment fund (other than venture capital and private equity), the issuer will provide its aggregate net asset value range as of the most recent practicable date under Item 5 rather than its revenue range. A "decline to disclose" option will also be available to these issuers.

**Identification of claimed exemptions or exclusions and type of filing.** Items 6 and 7 cover additional information required by the current form with some changes:

- **Item 6** identifies the exemption(s) from the Securities Act or exclusion(s) from the definition of "investment company" under the Investment Company Act that the issuer is relying upon for the offering using a check-the-box format. Changes from the current Form D include specifying the paragraph or subparagraph of Rule 504 that is being claimed by the issuer for any Rule 504 exemption, and eliminating a check box to claim the Uniform Limited Offering Exemption, referred to as ULOE.

The SEC wants this more detailed information on Rule 504 offerings to support its "policymaking and rulemaking efforts in various areas."

As proposed, the final rules eliminate all references to ULOE in the new Form D because it believes the ULOE box and appendix in the current Form D is confusing and does not result in a significant amount of useful information.

- **Item 7** identifies whether the filing is a new one or an amendment to a previously filed Form D. Item 7 includes a new requirement to indicate either the date of first sale or that a first sale has not yet occurred.

The SEC has added language to the instructions of new Form D to clarify that 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."

For a minimum-maximum offering with an escrow account, this means the date of first sale occurs when the first subscription agreement is received and first funds are deposited into the escrow account.

Item 7 in the new Form D differs from the proposed Item 7 in that it will not permit the issuer to designate the states to which the Form D is directed because the filing system will not have this capability when the new Form D becomes effective. However, the SEC is working with the North American Securities Administrators Association to achieve this capability in the future in an effort to achieve "one-stop filing" for the Form D.

The SEC's final rules make changes to Rule 503 to clarify the circumstances under which an amendment to Form D is required. An amendment to Form D will be required in the following three cases:

- To correct a material mistake of fact or error in the previously filed Form D.
- To reflect a change in the information provided in a previously filed Form D. No amendment is required to disclose changes that occur after the offering terminated or a change that involves any of the following:
  - the address or relationship to the issuer of a related person identified in Item 3 of the Form D;
  - an issuer's revenues or aggregate net asset value;
  - the minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed Form D, does not result in a decrease of more than 10%;
  - any address or state(s) of solicitation shown in Item 12 of the Form D;
  - the amount of securities sold in the offering or the amount remaining to be sold;
  - the total offering amount if the change, together with all other changes in that amount since the previously filed Form D, does not result in an increase of more than 10%;
  - the number of non-accredited investors investing in the offering so long as this number is not more than 35;
  - the total number of investors who invest in the offering; or
  - the amount of sales commissions, finders' fees or use of proceeds payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed Form D, does not result in an increase of more than 10%.
- To update annually, on or before the first anniversary of the most recently filed Form D or amendment, information about the offering if the offering is continuing at that time.

Under the revised Rule 503, any amended Form D must provide current information for each item of the amended Form D regardless of why the amendment was filed.

**Information about offering.** In general, Items 8-16 expand on the information required about the offering:

- **Item 8** identifies whether the offering is intended to last more than one year. This item has been included to assist regulators with compliance issues.
- **Item 9** identifies the type of securities offered. The new Form D includes additional categories such as "option, warrant or other right to acquire another security," "security to be acquired upon exercise of option, warrant or other right to acquire security" and "pooled investment fund interests."
- **Item 10** identifies whether the offering is being made in connection with a business combination transaction. This item will allow issuers to clarify their responses, if needed. This is another item included to assist regulators with compliance issues.
- **Item 11** identifies whether there is a minimum investment amount for outside investors. An outsider is defined as someone who is not an employee, officer, director, general partner, trustee if the issuer is a business trust, consultant, advisor or vendor of the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of its parent.
- **Item 12** identifies each person that is (or will be) a "compensation recipient" with respect to the offering, and the states that person has or intends to solicit sales. New item 12 also requires disclosure of the CRD number for each person and the person's associated broker-dealer to facilitate checking the broker's or broker-dealer's records. To address comments, the final rules for Item 12 contain a number of clarifying instructions such as the following:
  - Compensation triggering a reporting requirement under this item can be cash or other consideration;
  - A finder or other compensation recipient that does not have a CRD number need not apply for one in order to be listed in the Form D;
  - A finder or other compensation recipient must be listed regardless of whether the finder or other person has a CRD number;
  - If there are more than five individuals that are associated persons of the same broker or dealer, only the broker or dealer need be listed; and

- There is information on how to locate CRD numbers on the Internet to assist issuers in preparing the Form D (CRD numbers can be found by visiting <http://brokercheck.finra.org> or by calling FINRA's public disclosure hotline at 1-800-289-9999).
- **Item 13** identifies the total offering amount, the amount of sales as of the Form D filing date, and the amount remaining to be sold as of the Form D filing date. This item will allow issuers to clarify their responses if, for example, the offering amount is indeterminate at the time of filing.
- **Item 14** identifies whether or not the offering will be made to non-accredited investors and if so, the number of non-accredited investors who have invested in the securities as of the Form D filing date. This item also identifies the total number of investors who have invested in the offering as of the Form D filing date.
- **Item 15** identifies the amount paid for sales commissions and finders fees. If the total amount to be paid is not known at the time of filing, an estimate must be provided. This item will also allow issuers to clarify their responses, if needed.
- **Item 16** identifies the amount of the gross proceeds the issuer used or proposes to use for payments to its related parties (executive officers, directors and promoters) identified in response to Item 3. If the amount is unknown at the time of filing, an estimate must be provided. This item will also allow issuers to clarify their responses, if needed.

**Signature and submission of Form D.** The new Form D combines the federal and state signature sections into one signature block that also incorporates portions of the current Form U-2 consent to service of process provisions; it includes a consent to service of process but omits a consent to jurisdiction and venue. The combined signature block also includes an undertaking to furnish copies of offering materials to the SEC and each state in which the notice is filed upon a written request if the request is in accordance with applicable law. The new combined signature block omits the undertaking to provide a Form D to state administrators and a representation regarding the ULOE. Each issuer in a multiple-issuer offering will be required to sign the Form D. If all issuers authorize the same person to sign the Form D on their behalf, however, only that person must sign the Form D.

**General Solicitation and General Advertising.** Comments on the proposed changes to Form D raised the issue that electronic availability of the Form D might prompt some issuers to use it as a marketing document to generate interest in the offering. The SEC believes this tactic would be contrary to the Regulation D prohibition against the use of general advertising and general solicitation applicable to most Regulation D offerings. In response to this concern, the SEC has revised Rule 502(c) to provide a safe harbor from the prohibition against general solicitation and general advertising for information included in the new Form D "if the information is provided in good faith and the issuer makes reasonable efforts to comply with the requirements of Form D." The safe harbor language attempts to address the legitimate needs to provide adequate information responsive to the Form D requirements and impermissible efforts to generate interest in the offering through the Form D.

**Free Writing.** As proposed, the Form D did not permit any place where "free writing" could occur to limit the ability of issuers to use the Form D as a marketing document. In response to comments, the new Form D permits issuers to engage in a limited amount of free writing to clarify responses to the following items:

- Item 3 – list of related persons (executive officers, directors and promoters);
- Item 10 – business combination transactions;
- Item 13 – offering and sales amounts;
- Item 15 – sales commissions and finder fees; and
- Item 16 – use of proceeds.

## COPY OF FINAL SEC RULES REVISING FORM D AND MANDATING ELECTRONIC FILING

A copy of the final SEC rules revising Form D and mandating electronic filing is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Final Rule: Electronic Filing and Revision of Form D or by going to <http://www.sec.gov/rules/final/2008/33-8891.pdf>

## FINAL SEC RULES AMENDING PROCEDURES FOR PAYING SEC FILING FEES

Effective February 4, 2008, the SEC has switched the bank providing lockbox depository services from Mellon Bank, N.A. to U. S. Bank, N. A. In addition, the SEC has amended rules under the Securities Act of 1933, Securities Exchange Act of 1934 and Investment Company Act of 1940 to clarify that SEC filing fees may be paid by wire transfer, certified check, bank cashier's check, United States postal money order or bank money order and to eliminate the ability to pay these fees by cash or personal check.

Information on how to pay the SEC's filing fees by wire transfer is available on the SEC's website at <http://www.sec.gov/info/edgar/fedwire.htm>.

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A copy of the final SEC rules amending the procedures for paying SEC filing fees is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Final Rule: Amendment of Procedures for Payment of Fees or by going to <http://www.sec.gov/rules/final/2008/33-8885.pdf>

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## MEMBERS OF GRAY PLANT MOOTY SECURITIES PRACTICE TEAM

### Attorneys on the Securities Team include:

J.C. Anderson (612) 632-3002

Lindley S. Branson (612) 632-3024

Maxwell J. Bremer (612) 632-3056

Christopher A. Carlisle (612) 632-3033

Barry F. Clegg (612) 632-3220

Jean M. Davis, Chair (612) 632-3048

Gene H. Hennig (612) 632-3202

Alyssa J. Hirschfeld (612) 632-3316

Inchan Hwang (612) 632-3310

Julia S. Offenhauser (612) 632-3067

Douglas M. Ramler (612) 632-3324

Michael P. Sullivan, Jr. (612) 632-3350

Daniel R. Tenenbaum (612) 632-3050

Mark D. Williamson (612) 632-3379

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