

Reminder: New Electronic Filing Requirement for Form D takes full effect March 16, 2009

March 2009

In September 2008, the Securities and Exchange Commission (the "SEC") expanded its Electronic Data Gathering, Analysis, and Retrieval website (EDGAR) by enabling it to accept electronic Form D submissions (Form D serves as the official notice of an offering of securities made by either a public or a private company without registration under the Securities Act of 1933, as amended (the "Securities Act"), in reliance on an exemption under Regulation D or the exemption contained in Section 4(6) of the Securities Act). Between September 15, 2008 and March 16, 2009, issuers could choose to file either electronically or by paper. *See* Burns & Levinson's Client Update from October 2008 discussing the changes at the time; it is available at http://www.burnslev.com/apps/uploads/publications/Securities_Oct08.pdf. Beginning on March 16, 2009, however, all Form D filings must be submitted online using the EDGAR website. This move is intended to greatly reduce the administrative time spent processing and reviewing Form D filings, in addition to enhancing the public's access to these filings by automatically publishing them online and making them easily searchable.

TECHNICAL AND LOGISTICAL CHANGES

Since September, when the SEC first began allowing non-mandatory electronic filings, programmers have identified several minor glitches in the online systems, which for the most part have been corrected. Users have been generally satisfied with the online system's performance, noting that the largest obstacle to using the system is obtaining identifying credentials and passwords necessary to access the online system.

The access requirements are strictly enforced to ensure that those people making online filings and signing documents electronically are actually authorized to do so. While the applications and forms are not very complex, the process of submitting them for approval can be. To enable attorneys and other filing

agents to apply for access codes and to electronically sign on behalf of their clients, the SEC requires a manually signed Power of Attorney be submitted along with the filer's initial access application. As a result, Burns & Levinson will be contacting clients to obtain their authorization to make future Form D filings on their behalf, which will ultimately streamline the process for clients.

SUBSTANTIVE CHANGES

In addition to the logistical changes associated with filing the Form D electronically, rather than on paper, the SEC has also taken this opportunity to amend certain substantive filing requirements. It appears that these recent changes are aimed at enhancing filing compliance and broker-dealer accountability and reducing the need for filing superfluous information. As a result, the SEC will now require:

- Reporting the date of first sale of the offering and whether the offering is expected to last longer than one year (this allows for simplified enforcement of the requirement to make filings within 15 days after the first sale);
- Filing annual amendments for all offerings that remain open longer than one year and interim amendments for changes to an offering that occur during the offering period, such as a change in officers, directors, promoters, or those entitled to receive any sales commissions; and
- Reporting the CRD (a broker-dealer Central Registration Depository) number for each person listed on Form D as receiving compensation from the sale of securities (if the listed person has a CRD number, but such persons must be listed in any case).

In eliminating certain superfluous information, the new Form D will no longer require:

- Disclosure of certain information about the intended use of proceeds and an accounting of offering expenses;
- Identifying the owners of 10% or more of the issuer's equity securities; and
- Use of an appendix listing the states in which the securities are sold (but filers must still identify states where sales commissions are paid).

The new form also includes options to add multiple issuers (each of which must have its own online credentials) to the same offering and to include additional supporting explanations for some questions. Additionally, the signature block on the new form has been amended to include certain consents, which aim to eliminate supplemental forms and filings often required by state regulators.

STATE REGULATIONS

For the most part, state security registration filings will remain unchanged. States have generally adapted their notice requirements, enabling filers to submit printed copies of their online Form D submissions to the SEC. Many have also agreed to accept an electronically signed (as opposed to manually signed) version of Form D, and many have abandoned the requirement for filing a supplemental designation for service of process based on the language contained within the new Form D signature block. Working together with the SEC, the North American Securities Administrators Association ("NASAA") hopes to one day allow for a single electronic filing that will simultaneously be transmitted to both federal and state authorities.

This Securities Update was written by Tal M. Unrad, an Associate in Burns & Levinson's Corporate Group.

Explanatory Notes:

This update is intended to call your attention to a number of rule interpretations of possible interest and relevance to you, but it is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you.

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In the securities compliance area, we advise our clients on corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance. Specifically, we assist our clients in fulfilling their ongoing SEC and stock exchange reporting obligations, managing sensitive disclosure issues internally and with industry analysts, preparing proxy statements and handling stockholder meetings, structuring employee benefit plans and executive compensation packages under the SEC's "short-swing profit" reporting and liability rules, effecting sales of securities in the public trading markets under

the SEC's Rule 144, and advising boards of directors and board committees concerning the requirements and restrictions imposed on their actions by the securities laws and corporate governance laws such as Sarbanes-Oxley. We have served as special securities counsel to the Boards and Audit Committees of publicly traded companies looking for opinions or advice of counsel other than their regular outside counsel.

We have counseled clients both domestic and international, from high technology and life sciences to emerging growth companies, and are positioned to provide clients with timely, expert, efficient and cost effective advice that they need to meet their business objectives. We take a practical and proactive approach to the rapidly changing securities disclosure and corporate governance laws, providing our clients with timely updates, identifying specific situations in which the new laws will impact particular clients either operationally or structurally, and working with clients to implement the changes that are either required or advisable to comply with the new regulatory schemes and investor sentiment.

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