



GlobalNote®

ELECTRONIC FILING OF FORM D

To: Clients and Friends of Tannenbaum Helpern Syracuse & Hirschtritt LLP¹

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I. Introduction

As a result of changes adopted by the SEC last year, issuers of privately placed securities - including sales of interests in hedge funds, venture funds, private equity funds and similar pooled investment vehicles - sold in reliance on Regulation D under the US Securities Act of 1933 (the “Act”), will, beginning March 16, 2009, be required to electronically file the SEC’s newly created version of Form D – Notice of Exempt Offering of Securities. Currently, such issuers have the option of filing the current version of Form D in paper format or filing the new electronic Form D adopted by the SEC, either electronically or by hard copy. Beginning on March 16, 2009, all issuers selling securities in reliance on Regulation D must file new Form D electronically with the SEC, using the SEC’s EDGAR system. This note summarizes these new requirements and provides a brief description of the new electronic filing process.

II. Background

Issuers of securities sold in private, unregistered offerings often rely on the safe harbor provided in Regulation D under the Act to permit sales of such securities without registration of the offering with the SEC. Most commonly, such offerings are sold specifically in reliance on Rule 506 of Regulation D. Rule 506 contains a number of conditions, including limitations on the number and types of investors and the manner in which such offerings may be made. In addition to providing an exemption from registration under the Act, reliance on Rule 506 provides relief from state securities, or “blue sky” laws, since offerings complying with the provisions of Rule 506 qualify the securities sold as “covered securities” under Section 18(b)(4)(D) of the Act. Since

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covered securities are not subject to state securities registration or qualification requirements, issuers of privately placed securities sold in reliance on Rule 506 of Regulation D may satisfy state 'blue sky' filing requirements by 'notice filing' a copy of Form D with states in which securities are sold, thereby streamlining state law compliance.

III. New Form D Requirements

A. What is Form D?

Under Rule 503 of Regulation D, issuers relying on Regulation D for the sale of securities are required to file a Form D with the SEC within 15 days of the first sale of securities in the offering. Until March 16, 2009, issuers relying on Regulation D may file with the SEC either existing Form D (which has been revised slightly by SEC rules adopted in 2008 and is now referred to as 'Temporary Form D') in paper format or the new electronic version of Form D, which form can be filed either in paper format or electronically. Beginning on March 16, 2009, Temporary Form D will be repealed and all filings under Regulation D must be made using the SEC's new electronic version of Form D (copy attached) using the SEC's electronic filing system, 'EDGAR'.

B. How is the New Form D Different?

In addition to the electronic filing requirement – and elimination of paper-only filings - the new Form D differs from the current Form D in a number of significant ways:

- 'date of first sale' now required to be stated in the form;
- elimination of the requirement to disclose beneficial owners of an issuer's securities;
- addition of new information disclosure categories – including identifying whether the issuer is a 'hedge fund' or 'other pooled investment vehicle' and reporting revenues or asset values;
- elimination of detailed information for uses of proceeds;
- for fund issuers - disclosure of the exclusion from Investment Company Act registration relied on; and
- more specific information about soliciting broker-dealers and finders used in the offering.

The new Form D rules also significantly revise the requirements for filing amendments to already filed Form Ds. Currently, a Form D must be amended if there are 'material changes' to the information on file with the SEC, with no particular time period specified for filing such an amendment. New SEC rules adopted to implement the new electronic Form D now specify the circumstances under which amendments are required to be filed and also mandate an annual renewal filing requirement. The annual filing requirement represents a major departure from existing rules under Regulation D, since current Form D is not subject to any annual amendment or final amendment filing

requirement. Amendments to new Form D will be required under the following circumstances:

- to correct a ‘material mistake of fact or error’ in a previously filed notice;
- to reflect a change in information previously provided in a filed notice; and
- annually, on or before the anniversary of the filing of Form D or the most recent amendment, if the offering is continuing.

In addition to limiting the circumstances under which new Form D must be amended, the SEC has advised that amendments *are not* required to correct changes to the following information contained in a filed notice:

- increases in the number of investors or the amount of securities sold;
- the address of the issuer or the relationship to the issuer of a related person;
- minimum investment amount (so long as if amount decreases, it does not drop more than 10% below previously reported amount);
- number of non-accredited investors (so long as the number does not exceed 35);
- states where investors are solicited;
- revenues or aggregate net asset value;
- increase in the aggregate offering amount if it does not exceed 10% of amount previously reported; and
- amount of sales commissions/finders fees (so long as if totals increase, they do not exceed 10% of amounts previously reported).

C. What Happens on March 16?

All new issuers of securities – i.e., fund sponsors opening new funds – will be required to file new Form D electronically with the SEC for all offerings after March 16, 2009 (though state filings will still be made manually, using the new electronic Form D). Existing funds will be required to amend their Form D filings electronically on or before that date, using new electronic Form D. With the transition to new electronic Form D, issuers with existing Form Ds on file with the SEC and whose offerings will continue beyond March 16, 2009 will be subject to the following options when deciding on the timing of filing an amendment to Form D in advance of March 16:

1. Current Form D filed before March 16, 2008 – amendment on electronic Form D required on or before March 16, 2009 *unless* a Temporary Form D (amending the Form D currently on file) is filed in paper format with the SEC;
2. Current Form D filed after March 16, 2008 but before March 16, 2009 – amendment on electronic Form D required on the one year anniversary of such filing *unless* a Temporary Form D (amending the Form D currently on file) is filed in paper format with the SEC;

3. Electronic Form D filed after September 15, 2008 – amendment required to be filed on the one year anniversary of such filing on electronic Form D.

IV. Making Electronic Filings

The filing of electronic Form D must be made through EDGAR, the SEC's electronic filing system. Issuers who have not filed documents electronically with the SEC in the past – including most fund issuers – will be required to obtain access to the SEC's EDGAR website. In order to access EDGAR and begin the electronic filing process, issuers (or their representatives) will be required to obtain an EDGAR ID and associated passphrases and access codes from the SEC. This process can take up to a few days. Since Form D must be filed within 15 days of the first sale of securities in an offering – the SEC has defined the 'date of first sale' as the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the subscription agreement or investment contract, could be the date on which the issuer receives the investor's subscription agreement or check – it is advisable to begin the process of obtaining EDGAR access as early in the filing process as possible.

V. What Should be Done Now?

Existing fund issuers should first determine whether their existing fund(s) will continue to offer securities after the March 16, 2009 transition date. If so, it is advisable to consult with counsel to determine whether filing electronic Form D is appropriate or whether the filing of a Temporary Form D prior to March 16 is recommended. In either case, it is advisable to assess the current status of each existing offering as soon as possible so that the proper filing alternative can be identified and executed.

If you would like us to assist you in preparing and filing Form D electronically with the SEC by the March 15 deadline, we ask that you provide a list of all active funds that you expect will continue to offer securities after March 16 and provide, for each fund, the date on which the first subscription was received by you for investment in the particular fund. If the date on which a fund's first subscription was received is not available, please let us know, as it will then be necessary to file a Temporary Form D with the SEC prior to March 16. If a particular fund will no longer accept subscriptions, no action need be taken at this time. The foregoing information should be provided to us no later than February 27, so that we may timely obtain the necessary passcodes to make an electronic Form D filing.

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The transition to new electronic Form D presents issuers with a new an immediate challenge. However, with proper planning, the transition of existing filings to the new electronic format should pose no difficulty. Please feel free to contact us at any time if

you have any questions regarding this note or if we can be of additional assistance to you on these very important issues.