

Final Reminder – Mandatory Electronic Form D Filing Requirement Takes Effect on March 16, 2009

March 5, 2009

THE FOLEY ADVISER - MARCH 5, 2009

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Beginning on March 16, 2009 all federal Form D filings must be made electronically using the SEC's online filing system ("EDGAR"). In order to comply with this requirement, any issuer effecting a private placement of securities in reliance upon Regulation D will need to obtain EDGAR access codes. Current EDGAR filers can use their previously assigned EDGAR filing codes to complete Form D filings.

The mandatory electronic filing requirement was included among the amendments to the rules (the "Amended Rules") regarding Form D filings adopted by the Securities and Exchange Commission (the "SEC" or the "Commission") on [February 6, 2008](#). In addition to implementing the electronic filing requirement, the Amended Rules also introduced a new Form D and addressed when amendments to the Form D can and must be made. The final rule went into effect on September 15, 2008. During a transition period from September 15, 2008 through March 15, 2009, Form D filings were permitted to be made either in paper format or electronically.

Among the new requirements is that for offerings which last more than one year (typical for hedge funds), an annual amendment to the Form D must be filed. **Therefore, all issuers making ongoing offerings whose last Form D was filed with the SEC on or before March 15, 2008 are required to file an annual amendment on the new electronic Form D no later than March 16, 2009.**

Overview of New Form D

The new Form D replaces the prior Form D's use of five sections of preliminary and other information with sixteen numbered items containing more specific categories. The new Form D includes many of the requirements of the old Form D, but also requires disclosure of some additional items, including, among other things:

- The issuer's industry group and revenue range;
- If applicable, the specific subsection of Section 3(c) of the Investment Company Act of 1940, as amended (the "Investment Company Act") being relied on if the issuer claims an exclusion from being an "investment company" under the Investment Company Act;
- The date of first sale in the offering;
- Whether the issuer intends that the offering will last for longer than one year;

- Whether the offering is being made in connection with a business combination transaction, such as a merger, acquisition, or exchange offer;
- Additional information regarding the types of securities being offered; and
- The Central Registration Depository, (“CRD”) number of each broker-dealer receiving compensation in the offering.

In addition, the electronic Form D omits several items that were required by the old Form D. For example, and most significantly, the electronic Form D no longer requires issuers to identify owners of 10% or more of a class of their equity securities as “related persons.” Additionally, the new Form D includes a single signature block for federal and state filing purposes.

New Amendment Filing Requirements

Under the Amended Rules, amendments are permissible at any time, but are required in three instances:

- To correct a material mistake of fact or error in a previously filed notice as soon as practicable after discovery of the mistake or error;
- To reflect a change in information provided in a previously filed notice as soon as practicable after the change, other than changes occurring after the offering terminates or certain other changes that would be expected to occur during the course of an offering; and
- Annually, for offerings lasting more than one year.

Impact on filings with state securities authorities

Currently, there is no system in place to file the Form D electronically with the various state securities authorities. Until the state electronic system is completed, issuers will need to file the Form D electronically with the SEC and continue to file with the various states by mailing a printed copy of the Form D, together with any required other documents, to the appropriate state securities authorities to satisfy the blue sky requirements.

Investment advisers with questions about the electronic Form D filing requirements should contact [Peter Rosenblum](#) or [Jeffrey Collins](#) in Foley Hoag’s Investment Management Group at 617 832 1000.