

Clients & Friends Memo

Regulation D Filings for Hedge Funds – Beware the Ides of March!

February 2, 2009

Hedge funds and other private issuers (collectively “Funds”) that offer their securities in private placements commonly rely on the “safe harbor” provided by Rule 506 (“Rule 506”) of Regulation D under the Securities Act. The Rule 506 “safe harbor” is subject to a number of conditions, such as a limitation on the number and type of investors. While not a condition of Rule 506, Rule 503 of Regulation D requires the filing of a Form D.¹ **The SEC has adopted a number of revisions to Form D that may make it beneficial for Funds to revise and file an amended Form D promptly rather than delaying.**

Importantly, a Fund securities offering complying with Rule 506 qualifies the securities as “covered securities” within the meaning of Securities Act § 18(b)(4)(D). As to “covered securities,” all state securities (“Blue Sky”) law securities registration or qualification requirements are preempted, except that states may require “notice filings” with limited content requirements, including a copy of Form D. Thus, it’s generally useful for Funds, and particularly for offerings including natural persons as investors (whether or not “accredited”), to fully comply with Rule 506 and effect a Form D filing with the SEC so as to claim “covered securities” status for Blue Sky purposes.²

Pursuant to SEC Release No. 33-8891 (Feb. 6, 2008) (“Release 33-8891”),³ the SEC revised Regulation D and Form D in two phases, so as to allow a six-month transition to electronic filings of Form D through the SEC’s “EDGAR” system. In the first phase, effective September 15, 2008, old

¹ A Form D must also be filed in connection with offerings in reliance on the exemptions provided by Rule 504 or 505 of Regulation D, which rules were adopted pursuant to Securities Act § 3(b). The only adverse ramification of a failure to comply with the Form D filing requirement of Rule 503 is found in Rule 507 of Regulation D, whereby an issuer may be disqualified from relying on Rule 504, 505 or 506 if it or any of its predecessors or affiliates has been subject to an order, judgment or decree of a court of competent jurisdiction temporarily, preliminarily or permanently enjoining it for failure to comply with Rule 503, although the SEC may determine, upon a showing of good cause, that it isn’t necessary under the circumstances to deny the exemption.

² Note that the exceptions under Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended, which most Funds rely on (unless they are operating primarily as “commodity pools” or can rely on some other exception or exemption from that Act) are dependent upon the securities being offered privately; accordingly, it may be advisable to rely on Rule 506 and effect a Form D filing to assure appropriate reliance on one of those statutory provisions.

³ 73 Fed. Reg. 10592 (Feb. 27, 2008).

Form D (“Old Form D”), which was filed with the SEC in paper format, was repealed and replaced by a slightly revised version (“Temporary Form D”), which is also filed in paper format with the SEC. In addition, the SEC created a new electronic version of Form D (“Electronic Form D”), which may be filed with the SEC in either paper or electronic format through March 15, 2009. In the second phase, effective March 16, 2009, only Electronic Form D may be filed with the SEC, and solely in electronic format through EDGAR.⁴

One of the major differences between Old and Temporary Form Ds on the one hand, and Electronic Form D on the other, is that Old and Temporary Form Ds need only be amended if there is any “material change” in the facts, without any particular time period specified for the amendment filing.⁵ Electronic Form D, whether filed in paper form from September 15, 2008 through March 15, 2009, or in electronic form at any time from September 15, 2008 on, is subject to more specific amendment requirements, and is also subject to an annual filing requirement. Further, an Electronic Form D must be amended as soon as practicable after discovery of the need for the change.⁶

The annual amendment requirement represents a major change to Regulation D. Many Funds may have never filed amendments to their Old Form D's, on the basis that there had been no “material change” triggering such filings.⁷ Due to the fact that Electronic Form D filings pose a number of potential challenges to issuers and, in particular, Funds effecting continuing offerings (for example, coping with the EDGAR system), and that there was some lack of clarity in the SEC's changes to Form D, two Committees of the American Bar Association submitted questions to the SEC staff last fall concerning the new filing requirements. In a conference call, members of the SEC staff indicated that, as regards a Fund (or any other issuer) which filed or files a paper version of Old Form D or Temporary Form D prior to March 16, 2009:

- a Fund which files a paper version of Old Form D or Temporary Form D before March 16, 2009 in connection with a continuing offering will be subject to the same amendment filing

⁴ A copy of the SEC's compliance guide for Form D filings, including links to Regulation D and copies of Temporary Form D and Electronic Form D, may be downloaded from <http://www.sec.gov/info/smallbus/secg/formdguide.htm>

⁵ See Rule 503T(d)(1) of Regulation D, as added by Release 33-8891. Parts A and B of Temporary Form D provide information about the promoters, certain beneficial owners, and executive officers and directors or general or managing partners of the issuer, and any person being compensated for selling the securities. Part C of the form contains statistical information about the amount of the offering, the number and type of investors to whom the securities have been sold and the amount purchased thereby, and a breakdown of offering expenses and use of proceeds.

⁶ See Rules 503T(d)(2) and 503(a)(3) of Regulation D.

⁷ Owing to the vagaries of the “material change” amendment requirement for Old Form D, as well as the fact that certain states require notice filings to be renewed annually for continuing offerings, it has been the practice of certain law firms (including Cadwalader) to recommend that their Fund clients review and update their Form D's and file amendments thereto with the SEC and all states where filings had previously been effected at least on an annual basis, just to make sure that their filings are up-to-date.

requirements in amended Rule 503(a)(3) applicable to new Electronic Form D, effective March 16, 2009;

- the fact that Electronic Form D requires different or additional information than that required by Old Form D or Temporary Form D will not, in and of itself, trigger an amendment filing;
- any amendment to a prior filing submitted on or after March 16, 2009 will have to be submitted through EDGAR on Electronic Form D;
- in the case of an offering for which an Old Form D (or the latest amendment thereto) was filed prior to March 16, 2008, unless a new amendment is filed in paper form on Temporary Form D (or in the paper version of Electronic Form D) prior to March 16, 2009, if the offering is to continue beyond March 16, 2009, an annual amendment on Electronic Form D will have to be submitted through EDGAR no later than March 16, 2009; and
- in the case of an offering for which an Old Form D or Temporary Form D (or the latest amendment thereto) was filed on or after March 16, 2008 and prior to March 16, 2009, if the offering is to continue beyond the first anniversary of the later of the initial filing or the last amendment thereto, an annual amendment on Electronic Form D will have to be submitted through EDGAR no later than that anniversary date, unless an amendment under Rule 503(a)(3) is otherwise required.

Thus, for example, if an initial Temporary Form D (in paper form) is filed by a Fund for a continuing offering on January 27, 2009, that Fund need not file an annual amendment on Electronic Form D through EDGAR until January 27, 2010, unless an amendment under Rule 503(a)(3) otherwise has to be filed in the interim.

Accordingly, a Fund or other issuer which previously filed an Old Form D or Temporary Form D for a continuing offering and which wishes to delay effecting an Electronic Form D filing should consider the option of filing an amendment on Temporary Form D to such filing prior to March 16, 2009.

Please remember that, in accordance with Rule 503T(d)(2) of Regulation D, an issuer which filed a paper version of Electronic Form D prior to March 16, 2009 will be subject to the amendment filing requirements of amended Rule 503, beginning on the date it filed that Electronic Form D.⁸

Although it is believed that the foregoing is an accurate statement of the SEC staff's views, these were only indications of their positions on these issues, so it's possible that such positions may change. Clarifications of certain other issues raised by the ABA Committees concerning Form D,

⁸ Note that unless and until the state Blue Sky administrators arrange for a "one-stop filing" system as envisioned by Part I.B.3 of Release 33-8891, all state notice filings will continue to be in paper format.

as well as other interpretations of Regulation D, were just published as part of the SEC Division of Corporation Finance's updated "Compliance and Disclosure Interpretations" of the Securities Act Rules. Following is a link to the SEC's website where such Interpretations may be found (see Sections 254-260 and 655, 656 and 659 as regards Regulation D):

<http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>

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If you have any questions with regard to Regulation D, Rule 506, or Form D filings with the SEC or state Blue Sky administrators please contact:

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