

Financial Services Alert

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Developments of Note

➤ **SEC Issues Adopting Release for Form D Electronic Filing Requirement and Form D Revisions**

The SEC issued the formal release adopting rule and form amendments that will mandate electronic filing of Form D and revise various aspects of the Form. An issuer relying on certain securities offering exemptions under the Securities Act of 1933, as amended (the "1933 Act"), most notably Regulation D, must file a report regarding the offering on Form D with the SEC and, depending on the offering, with various state securities regulatory authorities. The electronic filing requirement will make Form D filings publicly available on the SEC's website. The amendments to Form D modify certain of its informational and procedural requirements. Electronic filing of revised Form D will be mandatory beginning March 16, 2009.

Revisions to Form D's Informational Requirements. The amendments reorganize the information requested in Form D into 16 numbered items that generally reflect the information currently requested on the Form. The principal changes from the current Form are as follows:

Related Persons - The amendments eliminate the current requirement to identify as "related persons" owners of 10 percent or more of a class of the issuer's equity securities.

Business Description - Rather than providing a description of its business, an issuer must choose an industry classification from the list provided. The revised instructions to Form D provide that in responding to this item, an issuer should "use the ordinary dictionary and commonly understood meanings of the terms identifying the industry groups" and that an issuer or issuers that can be categorized in more than one industry group should be categorized based on the industry group that most accurately reflects the use of the bulk of the offering proceeds.

- An issuer that selects the "Pooled Investment Fund" industry classification will also have to indicate a specific type of fund (hedge fund, private equity fund, venture capital fund or other investment fund) and indicate whether or not it is registered under the Investment Company Act of 1940, as amended (the "1940 Act").

Revenue Range/Aggregate Net Asset Value - For issuers other than pooled investment funds and for private equity and venture capital funds, revised Form D asks the issuer to indicate in which of several specified dollar ranges (*e.g.*, \$25 million to \$100 million) its revenue for its most recent fiscal year falls. For hedge funds and other pooled income funds, the revised Form asks the issuer to indicate in which specified dollar range its aggregate net asset value as of the most recent practicable date falls. In each case, an issuer may indicate that this disclosure item is not applicable if its business is not intended to produce revenue. This disclosure item is entirely optional, *i.e.*, an issuer may decline to make the requested disclosure.

1933 Act Exemption and 1940 Act Exclusions – Revised Form D will require an issuer to identify the exemption from registration under the 1933 Act on which it is relying and any exclusion claimed from the definition of “investment company” under the 1940 Act.

Date of First Sale – Revised Form D requires an issuer to specify the date of first sale or indicate that the first sale has yet to occur. The revised instructions to the Form specify 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. This definition also applies to the requirement that Form D be filed no later than 15 calendar days after the date of first sale.

Length of Offering – Revised Form D will require an issuer to indicate whether the offering is expected to last over a year.

Minimum Investment Amount – The only minimum investment amount information an issuer must report on revised Form D is the minimum accepted from outside investors. Outside investors are defined as all investors who are not employees, officers, directors, general partners, trustees (when an issuer is a business trust), consultants, advisors or vendors of the issuer, its parents, its majority-owned subsidiaries, or majority-owned subsidiaries of the issuer’s parent.

Business Combination Transaction - Revised Form D replaces the current requirement to indicate whether the offering is an exchange offer with a requirement to indicate whether the offering is being made in connection with a business combination, such as an exchange (tender) offer or a merger or acquisition.

Sales Compensation – Revised Form D adds a requirement to disclose CRD numbers for recipients of sales compensation that have them, and clarifies that sales compensation includes cash and non-cash consideration.

Expenses – Revised Form D replaces most of the currently required disclosures regarding expenses and applications of proceeds with a requirement to report only (a) amounts paid for sales commissions and finders’ fees, and (b) the amount of gross proceeds used to make payments to executive officers, directors and promoters.

Free Writing – Revised Form D permits free writing to the extent necessary to clarify information provided in response to the items dealing with related persons, business combination transactions, offering and sales amounts, sale commissions and finders’ fees and use of proceeds. The size of the “clarification” fields in electronic Form D will limit the amount of free writing permitted.

Amendment Requirements for Revised Form D. Amendments to a filing on the revised Form will be required only in the following three instances:

- annually, on or before the first anniversary of the initial filing of Form D or of the most recent amendment, if the offering is continuing at that time

- to correct a material mistake of fact or error in a previous filing (as soon as practicable after discovery of the mistake or error)
- to reflect a change in the information provided in a previous filing (as soon as practicable after the change), except that an amendment is *not* required for (a) a change that occurs after the offering terminates or (b) a change in the following information:
 - the address or relationship to the issuer of a related person
 - 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 previous filing, does not result in a decrease of more than 10%
 - any address or state(s) of solicitation shown for persons receiving sales compensation
 - the total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previous filing, does not result in an increase of more than 10%
 - the amount of securities sold in the offering or the amount remaining to be sold
 - the number of non-accredited investors who have invested in the offering, as long as the change does not increase the number above 35
 - the total number of investors in the offering
 - the amount of (1) sales commissions, (2) finders' fees or (3) gross proceeds paid 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 previous filing notice, does not result in an increase of more than 10%

The instructions to revised Form D direct an issuer filing an amendment to provide current information for all items in the Form. (Under current Form D requirements an amendment need only report *material* changes to identifying information regarding the issuer, related persons and certain aspects of the offering.)

The adopting release also discusses the SEC staff's position on amending current Form D (which will continue to be relevant to issuers until they begin using revised Form D). The adopting release indicates that under current SEC staff interpretations an issuer should file an amended Form D in an ongoing offering when there has been a material change in information filed about the offering and where basic information previously submitted about the issuer has materially changed; on the questions of how to calculate aggregate offering price for an extended offering and when an amendment to the Form D for an extended offering should be filed, the adopting release states that the staff's practice has been to advise issuers to use a good faith and reasonable belief standard to calculate the aggregate offering price and to amend the Form D annually.

Revisions to Form D's Procedural Requirements. The amendments revise certain procedural aspects of Form D filings as follows:

Multiple Issuer Filings – Revised Form D allows filers to make a single filing for all issuers in a multiple-issuer offering.

Signature Block – The amendments replace the current federal and state signature requirements with a single signature requirement designed to combine the existing requirements and make the Form D’s signature block consistent with other SEC forms.

Electronic Filing. Revised Form D will be filed electronically through an online filing system that will be accessible from any computer with Internet access. The information in Form D filings will be tagged to make it interactive and facilitate analysis. There will be no hardship exemption from the electronic filing requirement but there will be provision for filing date adjustments along the lines of those currently permitted for other electronic filings.

General Solicitation Safe Harbor. To address concerns that the public availability of Form D filings on the SEC website and free writing by issuers in their filings on the revised Form could run afoul of the prohibition against “general solicitation” and “general advertising” in offerings under Regulation D, the amendments provide that a filing on Form D in which the issuer has made a good faith attempt to comply with the Form’s requirements is not a general solicitation or general advertising for purposes of the prohibition.

Implications for State Securities Law Compliance. The amendments will affect the manner in which revised Form D can be used to comply with state securities law requirements. The SEC’s goal is one-stop filing with issuers able to file Form D information with the SEC and with designated states in a single electronic filing. One-stop filing will not, however, be possible when Form D electronic filing becomes available for voluntary use on September 15, 2008, but the SEC is working actively with the North American Securities Administrators Association (“NASAA”) to develop that capability as soon as practicable. NASAA has indicated that it is considering establishing its own new electronic filing system that would interface with the SEC’s system and would receive filings and collect fees on behalf of participating state securities regulators. The SEC’s electronic filing system will not collect fees on behalf of any states. Changes to Form D under the amendments that may affect an issuer’s compliance with state securities law requirements include elimination of (a) the ability to indicate the Uniform Limited Offering Exemption on which an issuer is relying, (b) the appendix that currently provides certain offering information on a state-by-state basis and (c) the ability to indicate the states to which the Form D filing is directed.

Effectiveness/Transition Period. Issuers will be required to file electronically using revised Form D beginning March 16, 2009. During a transition period, which starts September 15, 2008, issuers may either (a) file current Form D or revised Form D in paper form, or (b) file revised Form D in electronic form. Issuers that use revised Form D during the transition period regardless of the manner of filing must follow the revised requirements for amending Form D as discussed above.

➤ **OTS Issues Guidelines on the Payment of Fees for the Referral of Trust Business**

The OTS issued updated guidelines (the “Guidelines”) on the payment of fees for the referral of trust business. The Guidelines are intended to assist federal savings associations (“FSAs” and each an “FSA”) in structuring a referral fee program that will meet its fiduciary duty of loyalty and avoid any conflict of interest, while also recognizing that FSAs are no longer subject to registration under the Investment Advisers Act of 1940. The Guidelines state that trust account customers impacted by a referral fee program should receive a referral fee disclosure from the FSA prior to payment of the referral fee. The OTS states that the disclosure should be in writing and contain, at a minimum, the following information:

- The name of the referring party and the FSA;
- The nature of the relationship, including any affiliation, between the referring party and the FSA;
- The terms of the referral arrangements, including a description of the compensation paid or to be paid to the referring party;

- A statement that the referral fee will not result in any increased charge to the customer;
- A statement indicating that only the FSA will provide fiduciary services; and
- The extent of any support services the referring party will perform.

The OTS also states that when establishing a referral fee program, an FSA should ensure that:

- The referral fee agreement is in writing and includes: (a) a description of any support services the referring party will perform for the FSA; (b) a statement that those support services will be performed in a manner consistent with the instructions of the FSA and in accordance with provisions of law; and (e) the compensation to be paid to the referring party;
- The referral fee program is approved by the board of directors and annually reviewed by senior management;
- The referral fees are reasonable under the circumstances and do not result in the customer paying any additional amount for trust services;
- The customer is provided with a written referral fee disclosure;
- Fee arrangements are terminated when the account closes;
- Fee arrangements with affiliates or subsidiaries are in compliance with the restrictions with affiliates or subsidiaries;
- Fee arrangements for employee benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") do not violate any ERISA provisions, particularly as addressed in ERISA Section 406 - Prohibited Transactions; and
- A copy of the master referral fee agreement and referral fee disclosure is maintained by the FSA.

➤ **Mutual Fund Directors Forum Issues Guidance on Board Self Assessments**

The Mutual Fund Directors Forum (the "MFDF") issued a report entitled Practical Guidance for Directors on Board Self Assessments. The report is designed to provide practical guidance to mutual fund boards of directors in conducting the annual self assessments required of most registered fund boards. In broad terms, the report addresses how to conduct self assessments and the subject matter to cover. Acknowledging that each board's self assessment will be different, the report nonetheless identifies three generally accepted base line principles for effective self assessments: (1) each director must be involved in the self assessment process; (2) all directors must have the opportunity to discuss findings that are made during the process; and (3) a plan for follow-up action must be developed based on the findings of the self assessment.

Process. The report discusses the pros and cons of conducting self assessments via each of the following methods: (a) discussion, (b) questionnaire and (c) interview. The report also examines the extent to which third parties can be useful in the assessment process (noting that mutual funds have traditionally been hesitant to use third parties other than counsel to the independent directors in this capacity). The report cautions that a self assessment program may become stale and unproductive if the same process is followed rigidly from year to year and suggests that each board periodically review the process for conducting its self assessment and make any revisions necessary to meet changing industry practices and to address changes in the board itself.

Subject Matter. The report addresses the subject matter aspect of self assessments by discussing a number of topics boards may want to consider in their self assessments, including: number of funds overseen, board composition, information provided to the board, board meeting process, committee structure and board accountability. The report acknowledges that each board may consider other elements in its review, such as the level of director compensation and whether there is an appropriate succession plan in place.

**Goodwin Procter LLP
Financial Services
Partners and Counsel**

Lynne B. Barr
Gary A. Beller
Kay E. Bondehagen
Raymond P. Boulanger
Agnes Bundy Scanlan
Margaret B. Crockett
Anna E. Dodson
Eric R. Fischer
Elizabeth Shea Fries
Jackson B.R. Galloway
James J. Kelly
Satish M. Kini
William R. Kirschner
Thomas J. LaFond
Paul W. Lee
Gregory J. Lyons
Robin J. H. Maxwell
William P. Mayer
Philip H. Newman
Sean P. O'Malley
Christopher E. Palmer
Byron C. Pavano
Regina M. Pisa
Mark S. Raffman
Derek N. Steingarten
William E. Stern
Michael P. Whalen

To e-mail any of the above attorneys, use first initial of first name followed by last name followed by @goodwinprocter.com. For example, the e-mail address for Gregory J. Lyons would be glyons@goodwinprocter.com

Individual Director Assessments. The report notes that under SEC rules there is no requirement to assess the performance of individual directors and that the decision whether or not to conduct such assessments is one for each board. To the extent that a board chooses to conduct individual director assessments the report offers some suggested formats, as well as, topics and questions to be addressed in such assessments.

➤ **OCC Lowers Assessment Fees and Creates Two New Assessment Brackets**

The OCC issued an interim final rule (the "Rule") that lowers the OCC's aggregate fees by approximately 2.5% and adds two new asset-size categories to the assessment schedule. The former top bracket of national banks with assets of \$40 billion and above has been replaced with a bracket of banks with total assets between \$40 billion and \$250 billion, and a new top category has been established for banks with total assets in excess of \$250 billion. The Rule reduces the premium rates in each assessment bracket.

The fee structure for independent trust banks and independent credit card banks, however, is unchanged by the Rule. The OCC will also continue to impose a surcharge on the fees for banks that require heightened supervision because of poor supervisory ratings. The Rule became effective February 19, 2008 (and affects assessment fees starting March 31, 2008), but comments will be accepted through March 20, 2008.

Other Item of Note

➤ **U.S. Supreme Court Allows 401(k) Plan Participant to Sue Plan Employer over Loss to Participant's Account**

In a unanimous decision, the U.S. Supreme Court held that the Employee Retirement Income Security Act ("ERISA") authorizes participants of defined contribution pension plans (such as 401(k) plans) to sue ERISA fiduciaries under ERISA § 502(a)(2) to recover losses arising from a breach of ERISA fiduciary duties to their individual plan accounts. Goodwin Procter ERISA litigators and practitioners have prepared a Client Alert analyzing the decision. The Client Alert is available at <http://www.goodwinprocter.com/~media/C876A66A22DA409E8767F11C548645EA.ashx>.