

Client Alert

An informational newsletter from Goodwin Procter LLP

March 16, 2009 Due Date for Form D Amendments for Certain Ongoing Offerings

Under rules adopted by the Securities and Exchange Commission, issuers that filed an initial Form D or an amendment to a Form D with the SEC on or before March 16, 2008, and that wish to continue an ongoing securities offering in reliance upon the registration exemptions provided under Regulation D under the Securities Act of 1933 must make a Form D amendment filing with the SEC on or before March 16, 2009. The rules were adopted by the SEC to implement new electronic filing requirements for Form D, and apply broadly to different types of issuers, including open-end hedge and institutional funds, as well as private equity, venture and real estate funds with offering periods that extend over the relevant time periods (“Funds”). In addition to filing electronically through the EDGAR system using the new Form D, Funds may rely on temporary transition rules that allow the Form D amendment to be filed before March 16, 2009 in one of two ways: (i) on paper, using a printed version of the new electronic Form D or (ii) on paper, using the paper-only Temporary Form D. Each option is summarized below.

- ***Electronic Form D Amendments.*** Electronic amendments may – and starting March 16, 2009 must – be made using the new Form D adopted by the SEC. Electronically filed Form Ds will be publicly searchable through the EDGAR system, and involve new disclosure requirements, including: (i) the date of first sale of Fund securities; (ii) a CRD registration number for every person who receives compensation for sales of Fund securities, including brokers, dealers and finders; and (iii) the specific exclusion from registration under the Investment Company Act of 1940 upon which the Fund may be relying (*e.g.*, Section 3(c)(7)). Electronic amendments will be most appropriate for Funds that expect to continue an ongoing offering after March 16, 2009, particularly open-end Funds.
- ***Paper Amendments Using New Form D.*** The SEC has provided a transition period during which issuers can make filings using a paper version of the new electronic Form D. After the transition period ends on March 15, 2009, all Form D filings must be made electronically. This method may be appropriate for Funds that wish to manage the time schedule of their transition to the new electronic Form D and defer obtaining EDGAR access codes until a later date.
- ***Paper Amendments Using Temporary Form D.*** Issuers also have the option to file a paper amendment using a Temporary Form D that is essentially the same as the previous paper Form D. This method may be appropriate for Funds that wish to defer disclosures on the new Form D because they expect their securities offering to cease in the near future.

Beginning March 16, 2009, all Funds that have made Form D filings will be required to file electronic amendments in the following circumstances: (i) to correct a material mistake of fact or error in a previously filed Form D; (ii) to update information in a previously filed Form D if there have been any changes in that information, other than certain changes specified in the new rules; and (iii) for continuing offerings, at least annually on or before the anniversary of the most recent Form D filed with the SEC for that offering, even if there has been no change that would otherwise require an amendment. These amendment rules also apply to Funds that filed an initial Form D or an amendment with the SEC on or after March 16, 2008. Accordingly, such Funds will need to file an amendment electronically on or before the first anniversary of their most recent Form D filing or amendment.

In order to make an electronic filing, a Fund will need to have an EDGAR access code. The SEC has said that it expects requests for EDGAR access codes to increase as the March 16 deadline approaches, and is recommending that new EDGAR filers request EDGAR access codes well in advance of a filing deadline in order to avoid a delay in receiving EDGAR access codes. In addition, state “blue sky” laws may require notice filings of amended Form Ds as filed with the SEC. Funds should review such state requirements on a case-by-case basis. Currently, all state notice filings must be made on paper because an electronic filing system has not yet been developed.

The SEC rules concerning new Form D and electronic filing, *Electronic Filing and Revision of Form D*, Release No. 33-8891 (February 6, 2008), are available [here](#). Additional information is also available in our February 26, 2008 *Financial Services Alert*, “[SEC Issues Adopting Release for Form D Electronic Filing Requirement and Form D Revisions.](#)”

If you would like additional information or assistance in addressing the issues described in this Alert, please contact your regular Goodwin Procter lawyer or any of the individuals listed below.

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