T O O U R F R I E N D S A N D C L I E N T S

M e m o r a n d u m

FRIED FRANK

www.friedfrank.com

March 5, 2009

New SEC Rules Modify Form D Disclosure Requirements, Mandate Electronic Filing of Form D and Require Annual Amendments

Introduction

The Securities and Exchange Commission (the "SEC") recently adopted revisions to Regulation D under the Securities Act of 1933 (the "Securities Act") that become effective on March 16, 2009.[1] The SEC's new rules (i) adopt a new version of Form D[2] (the "New Form D") that requires significantly different information from what was required on the expiring version of Form D (the "Old Form D"); and (ii) require the electronic filing of all Form D filings.

Among the more significant items resulting from the change in Form D and related rules are (i) the elimination of the 10% beneficial owner name and address requirement, which issuers had opposed for competitive and privacy reasons; (ii) clarification of the SEC's position that the "date of first sale" that triggers a Form D filing is the date upon which the investor has become "irrevocably contractually committed;" (iii) the requirement that recipients of sales commissions must be reported on the Form D together with their CRD numbers, if applicable; (iv) the requirement to amend Form D filings on an annual basis; and (v) clarification of when an amendment to a Form D is required due to a change in circumstances, *e.g.*, increases in the offering size or amount of sales commissions/finders' fees by more than 10% or a change in the officers or directors of the issuer.

On March 16, 2009, the six-month transition period (the "Transition Period") for the filing of Form D will expire. Until the expiration of the Transition Period, companies have the option to file: (i) Old Form D in paper format; (ii) New Form D in paper format; or (iii) New Form D in electronic format. After the Transition Period, Old Form D will be eliminated and electronic filing of New Form D will be mandatory, consistent with recent SEC policy requiring that filings be made electronically. In light of the revisions to

[1] SEC Release No. 33-8891 (Feb. 6, 2008) (the "SEC Release") is available on the SEC website at: http://www.sec.gov/rules/final/2008/33-8891.pdf.

[2] The New Form D is available on the SEC website at: http://www.sec.gov/answers/formd.htm.

Copyright © 2009 Fried, Frank, Harris, Shriver & Jacobson LLP

A Delaware Limited Liability Partnership

the rules regarding Form D, it may be advantageous for issuers to file amendments to previously filed Form Ds prior to March 16, 2009.

Practical Considerations for Electronic Filing of the New Form D

- The SEC's new rules may have a significant impact on sponsors of private investment funds, which commonly rely on the safe harbor under Regulation D under the Securities Act. Given that private investment funds generally offer securities on a continuous basis and/or over a long period of time, the requirements of the SEC's new rules may make it necessary or advisable for sponsors of private investment funds to amend their subscription documentation and modify the process for making both initial and amended Form D filings. In addition, certain changes to the information required to be disclosed on Form D described below are of particular import to private investment funds, including the requirement to identify the issuer as a "pooled investment vehicle" and the requirement to disclose the section under the Investment Company Act of 1940, as amended (the "Investment Company Act") that the fund claims excludes it from the definition of an "investment company.

- As noted below, the new rules clarify the SEC's position that the date of first sale is the date upon which the investor has become "irrevocably contractually committed," which could be as early as the date of receipt of the investor's subscription agreement or check. In light of this interpretation and in order to avoid a late filing, issuers may wish to consider amendments to subscription agreements or similar agreements. Issuers may also wish to file a Form D prior to commencement of the offering.

- As described herein, the new rules increase the likelihood that an amended Form D may be required with respect to an offering. A monitoring system should be implemented to ensure that those responsible for making required initial or amended Form D filings are notified of the occurrence of an event that would require a filing (for example, changes of greater than 10% in the size of the offering and any changes to issuer's directors or officers).

- Those filing on behalf of an issuer, should be sure to obtain the required authorizations and codes as far in advance of the filing deadline as possible.

Below is a summary of the new rules relating to Form D.

The New Form D

Among the changes to the Form D disclosure requirements reflected in the New Form D are the following:

- Elimination of the 10% Beneficial Owner Requirement. The New Form D no longer requires issuers to identify beneficial owners that own 10% or more of a class of equity securities.

- Date of First Sale. Issuers must provide the date of first sale in the offering (or confirm the first sale has yet to occur). The new rules now clarify that first sale means "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."

- Sales Compensation. The issuer must now provide the name of every recipient of sales compensation and finders' fees, the states in which they intend to solicit investors and Central Registration Depository ("CRD") numbers if the recipient is a registered broker-dealer.

- Expenses of Offering / Use of Proceeds. Issuers only have to provide the amount of proceeds used for sales commissions and finders' fees and the amount of payments to related persons, and will no longer have to include information about other expenses of the offering (*e.g.*, legal fees).

- Federal Exemptions and Exclusions. The issuer must identify (1) the applicable section of Regulation D that the issuer is claiming as an exemption from registration of the securities under the Securities Act and (2) if applicable, the section of 3(c) of the Investment Company Act that the issuer is claiming excludes it from the definition of an "investment company."

- Duration of the Offering. The issuer must state whether the offering is intended to last more than one year.

- Industry Group Information. An issuer must navigate a series of drop-down menus to select its industry group from a predetermined list. Issuers that are pooled investment vehicles are required to state (1) whether they are a hedge fund, a private equity fund, a venture capital fund or an "other" investment fund and (2) whether they are registered under the Investment Company Act.

- Issuer Size. The New Form D requests that the issuer provide either a revenue range (for operating companies) or an aggregate net asset value range (for hedge funds), as applicable, **although the issuer may opt to decline to disclose such information**.

- Types of Securities Offered. The New Form D provides additional categories of securities that are offered and requires the issuer to indicate all that apply.

- Business Combination Transaction. The New Form D requires issuers to identify whether the offering is being made in connection with a business combination such as an exchange offer, a merger or an acquisition.

- Minimum Investment Amount. The New Form D requires the issuer to state the minimum investment amount only with respect to investors unrelated to the issuer (the Old Form D did not distinguish between investors that are related and those unrelated to the issuer,) rather than any individual investing in the offering.

- Principal Place of Business and Contact Information. The SEC has clarified that post office box and "care of" addresses are not acceptable.

Amendment Provisions

Prior to the SEC Release, there was a lack of clarity about the requirement to make an amended Form D filing. As a result, some issuers opted to file periodically to ensure compliance.

The new rules clarify that amendments to Form Ds are required in the following three instances:

- annually, on or before the first anniversary of the initial or the previous Form D filing, for so long as the offering is continuing;
- to correct a material mistake of fact or error in a previous filing (as soon as practicable after discovery of the mistake or error); or
- to reflect changes in information regarding the offering contained in a previous filing (as soon as practicable after the change). The SEC Release provides an illustrative list of specific examples of informational changes related to the issuer that will either trigger an amended filing or not trigger an amended filing at the present time.

Examples of changes that <u>will</u> trigger an obligation to file an amendment to a previously-filed Form D are:

- an increase in the total offering amount of more than 10%;
- the addition or removal of a related person that must be included on the Form D (*e.g.*, executive officers or directors of the issuer or persons performing similar functions on behalf of the issuer and promoters, if applicable, of the issuer (whether direct or indirect));
- a decrease in the minimum investment amount for external investors of more than 10%; or
- an increase of more than 10% in the amount of (i) sales commissions, (ii) finders fees, or (iii) payments to officers, directors or promoters.

In addition to the circumstances listed above, in the case of a Form D filing made prior to March 16, 2008, unless a new amendment is filed in any paper format or in electronic format, an annual amendment must be submitted through EDGAR no later than March 16, 2009. Therefore, a filing needs to be submitted on or before March 13, 2009, in order to make a filing in paper format.

The new rules clarify that the following changes <u>will not</u>, by themselves, trigger an obligation to file an amendment to a previously-filed Form D:

- a change to the address or relationship to the issuer of a related person previously included in a filing (*e.g.*, executive officers or directors of the issuer or persons performing similar functions on behalf of the issuer and promoters, if applicable, of the issuer (whether direct or indirect));
- a change of the issuer's revenues or aggregate net asset value;

- a change in the minimum investment amount (unless the amount is decreased by more than 10%);
- a change of the issuer's address or state of solicitation;
- a change in the total offering amount (unless increased by more than 10%);
- a change in the amount of securities sold or remaining to be sold;
- a change in the total number of investors and number of non-accredited investors (unless the number of non-accredited investors exceeds 35); or
- a change in the amount of sales commissions, finders fees, payments to officers, directors or promoters (unless increased over 10%).

Electronic Filing Process

In order to file the New Form D electronically, issuers will need a Central Index Key ("CIK") code and electronic access codes obtained from the SEC.[3]

Existing funds that have filed Form D paper filings have already been assigned a CIK code, but will need to obtain electronic access codes before they begin filing electronically. For new funds, both a CIK code and an electronic access code will need to be obtained before electronic filings may be made. In order to obtain a CIK code and electronic access code, a form (the Form ID) must be signed, notarized and submitted (via facsimile) to the SEC. Once the required codes have been obtained, filings can be made online on the SEC's EDGAR filing system.

* * *

[3] The CIK and electronic access codes may be obtained by visiting the EDGAR Filer Management website at: https://www.filermanagement.edgarfiling.sec.gov/.

If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or any of the attorneys listed below.

Authors and Contributors:

New York

Lawrence Barshay	+1.212.859.8551	lawrence.barshay@friedfrank.com
Stuart Gelfond	+1.212.859.8272	stuart.gelfond@friedfrank.com
Edward Alterman	+1.212.859.8104	edward.alterman@friedfrank.com

Washington, DC

Bradford Lucas	+1.202.639.7483	brad.lucas@friedfrank.com
Adam Glaser	+1.202.639.7476	adam.glaser@friedfrank.com