

## NEW YORK

1285 Avenue of the Americas  
New York, NY 10019-6064  
+1 212 373 3000

## WASHINGTON, D.C.

2001 K Street NW  
Washington, DC 20006-1047  
+1 202 223 7300

## LONDON

Alder Castle, 10 Noble Street  
London EC2V 7JU  
United Kingdom  
+44 20 7367 1600

## TOKYO

Fukoku Seimei Building, 2nd Floor  
2-2, Uchisaiwaicho 2-chome  
Chiyoda-ku, Tokyo 100-0011  
Japan  
+81 3 3597 8101

## BEIJING

Unit 3601, Fortune Plaza Office  
Tower A  
No. 7 Dong Sanhuan Zhonglu  
Chao Yang District, Beijing 100020  
People's Republic of China  
+86 10 5828 6300

## HONG KONG

12th FL, Hong Kong Club Building  
3A Chater Road  
Central Hong Kong  
+852 2536 9933

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## Electronic Form D Filing Mandatory as of March 16

Many private investment funds, including private equity funds and hedge funds, that offer fund interests in “private placements” commonly rely on a safe harbor provided in Regulation D promulgated under the U.S. Securities Act of 1933, as amended (the “Securities Act”), to avoid registration with the U.S. Securities and Exchange Commission (the “SEC”). Form D serves as the official notice of an offering of securities made without registration under the Securities Act in reliance upon Regulation D.<sup>1</sup>

In 2008, the SEC issued a final rule<sup>2</sup> adopting a revised Form D and mandating electronic filing of Form Ds through the SEC’s Electronic Data Gathering, Analysis and Retrieval System (“EDGAR”) **starting March 16, 2009**. (Electronic filing of Form Ds has been optional since September 15, 2008.) Form Ds filed through the EDGAR system will be publicly available online in an interactive and searchable format.

### What You Need to Do to Prepare

To file a Form D electronically, a fund<sup>3</sup> will use the same Central Index Key (“CIK”) number and CIK Confirmation Code (“CCC”) that it currently uses in connection with the EDGAR system for Schedule 13D/G or Form 3, 4 or 5 filings. In addition, a fund that has previously filed a paper Form D may previously have been assigned a CIK number and CCC. A fund can confirm whether it has been assigned a CIK number by visiting the SEC’s website. If a fund already has a CIK number as a “paper” filer, it will still need to apply to obtain EDGAR access codes. To apply for EDGAR access

<sup>1</sup> Each issuer of securities that sells its securities in reliance on an exemption provided in Regulation D or Section 4(6) of the Securities Act must file a Form D with the SEC and with certain states. While the filing of a Form D is not a condition to the availability of the exemption, it is a legal requirement pursuant to Rule 503 of Regulation D.

<sup>2</sup> See, SEC Release No. 33-8891 (Feb. 6, 2008).

<sup>3</sup> If more than one fund (i.e., parallel funds, feeder funds) has sold their interests in the same offering, all funds should be identified in one Form D filed with the SEC; however, each fund must obtain a separate CIK number and CCC.

codes, a fund must provide the SEC with its CIK number and create a passphrase using the selection “Convert Paper Only Filer to Electronic Filer” on the SEC website.

If a fund does not have a CIK number and CCC, it will need to request the codes by electronically filing a Form ID on the SEC’s website and filing a notarized authenticating document by fax within two business days before or after filing the Form ID. The SEC typically assigns a CIK and CCC to a new EDGAR filer within 24-48 hours; however, there may be a significant increase in applications around March 16. *Accordingly, it is prudent to obtain a CIK and CCC in advance of the March 16 changeover.*

### Electronic Form D

*Changes in Information Required in New Form D.* While much of the basic information required by the paper Form D will also be required in the new electronic version, there are some significant new disclosures that will be required, including: (i) notice of the date of first sale;<sup>4</sup> (ii) the Central Registration Depository number of any U.S.-registered broker dealers that are paid a commission or other fee for selling securities in the offer; and (iii) disclosure of what exclusion, if applicable, from investment company registration is being relied upon. The Form D must be filed with the SEC no later than 15 days after the date of first sale.

*Required Amendments.* On an ongoing basis, the new Form D must be amended:

- to correct a material mistake of fact or error, as soon as practicable after discovery of the mistake or error;
- to reflect a change in the information previously provided, as soon as practicable after the change, except with respect to changes that fall within certain specified exceptions (see below); and
- annually, on or before the first anniversary of the most recent previously filed notice, if the offering is continuing at that time.

*Timing of Annual Amendment.* The requirement to file an annual amendment to a Form D is a significant change and will apply to all funds with offerings lasting more than one year, including those who made their initial Form D filings on paper under the old regime.

- If a fund is engaged in an ongoing offering (including all hedge funds accepting new subscriptions and private equity funds that have not had a final close) and its most recent Form D (including any amendment thereto) was *filed prior to March 16, 2008*, it must file an amendment on or before the March 16th

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<sup>4</sup> The date of the first sale of an interest is defined as the date on which “the first investor is irrevocably contractually committed to invest” in the fund, which, depending on the terms and conditions of the subscription agreement, could be the date on which the first completed subscription agreement or check is received by the fund or its administrator. A fund may elect to file the new electronic Form D prior to receipt of cash or subscription agreements and check “First Sale Yet to Occur” in order to avoid questions about the proper date of first sale.

mandatory electronic filing date. Accordingly, *all funds engaged in ongoing offerings should consider filing paper amendments to their Form Ds prior to March 16 to reset the clock on when their first electronic filing will be due.*

- If a fund is engaged in an ongoing offering and its most recent Form D (including any amendment thereto) was filed between March 16, 2008 and March 16, 2009, it must file an amendment on or before the first anniversary of such filing.

*When an Amendment is Not Required.* Importantly, a previously filed Form D is not required to be amended to reflect a change that occurs after the offering terminates or certain changes specifically enumerated in the rule, including a change reflecting: (i) a fund's revenues or aggregate net asset value; (ii) the total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%; (iii) the amount of securities sold in the offering or the amount remaining to be sold; and (iv) the total number of investors who have invested in the offering.

### State "Blue Sky" Filings Unaffected

Many states require the filing of a Form D with the applicable state regulator to preempt state "blue sky" laws with respect to a sale of securities to investors in that state. Until state regulators update their filing systems, paper Form D filings will continue to be filed in most states. The SEC and the North American Securities Administrators Association are exploring a "one-stop filing" approach that would allow funds to file Form D information with the SEC and with states designated by them in a single electronic filing.

### Helpful Websites:

- To Apply for a CIK: <https://www.filermanagement.edgarfiling.sec.gov/>
- To Search for an Existing CIK:  
<http://www.sec.gov/edgar/searchedgar/companysearch.html>
- For Guidance on the New Form D Filing Process:  
<http://www.sec.gov/divisions/corpfin/formdfiling.htm>

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be addressed to any of the following:

Marco V. Masotti	(212) 373-3034	Robert M. Hirsh	(212) 373-3108
Yvonne Y.F. Chan	(212) 373-3255	Mitchell Berg	(212) 373-3048
Jennifer A. Spiegel	(212) 373-3748	Stephanie McCavitt	(212) 373-3558