

September 12, 2008

Memorandum to Our Investment Management Clients

**New SEC Rules to Revise Form D and Regulation D and to  
Require Electronic Filing of Form D**

Regulation D of the Securities Act of 1933 provides a number of safe harbor exemptions from the registration of securities for issuers conducting private offerings of securities (including hedge funds). Regulation D currently requires any issuer relying on a safe harbor exemption to file a notice filing on Form D in paper format with the Securities and Exchange Commission (the "SEC") no later than 15 days after the first sale of securities. Form D includes information about the issuer, the offering and the exemption from registration under which the offering is being made.

On February 6, 2008, the SEC issued final rules intended to simplify the filing process and increase accessibility to, and usefulness of, the Form D for the SEC, other regulators and investors. When the new rules are fully implemented, they will amend the content of Form D and require electronic filing of the Form D via the SEC's EDGAR website, where the forms will be easily available to the public via the Internet. The amendments to Form D are more fully described below under "Revisions to Form D Information Requirements". As set out in the timeline below, although the new rules are generally effective on September 15, 2008, **electronic filing and the new Form D will not be mandatory until March 16, 2009.**

We believe that, prior to the March 16, 2009 mandatory electronic filing date, the SEC will provide further guidance on the new Form D and the application of the new rules. Accordingly, until any further guidance is issued, **we plan to continue to file the current version of Form D on our clients' behalf in paper format during the transition period from September 15, 2008 through March 15, 2009.**

Relevant Dates

- **September 15, 2008.** The final rules will be effective, and the electronic filing system for Form D is expected to be available on that date. Electronic filing and the use of the new Form D is not yet mandatory.
- **September 15, 2008 through March 15, 2009.** A transition period, during which issuers will have three options for filing Form D: (i) filing the current version of Form D on paper; (ii) filing a new version of Form D on paper; or (iii) filing a new version of Form D electronically. Please see below under "Revisions to Form D Amendment Filing Requirements" to understand how the new amendment filing rules will apply during the transition period.
- **March 16, 2009.** Electronic filing of the new Form D will be mandatory.

## Revisions to Form D Information Requirements

In an attempt to modernize and clarify some of the information requirements on the Form D, the new Form D is comprised of sixteen numbered items with more specific categories of information, replacing the current Form D's format which requires responses to five sections of information. The new Form D carries over many of the questions on the current Form D, omits or revises some questions and adds others.

Set forth on Exhibit A are some of the significant revisions to the information requirements on Form D.

## Revisions to Form D Amendment Filing Requirements

During the transition period (i.e., September 15, 2008 through March 15, 2009), current amendment requirements will apply to all current Form D filings in paper format, while the new annual and other amendment rules will apply to both paper and electronic filings of the new Form D.

Also set forth on Exhibit A are some of the significant revisions to the Form D amendment filing requirements.

## EDGAR Codes

Issuers will need EDGAR codes in order to make electronic filings of the Form D with the SEC. Current EDGAR filers may use their previously assigned EDGAR filing codes to log onto the new filing system. Issuers who have not filed electronically in the past will need to obtain EDGAR filing codes. As a matter of practice, in order to prepare for the March 16, 2009 mandatory electronic filing date, we intend to begin the process of obtaining EDGAR codes for each issuer filing a Form D prior to that date, and we may be contacting you during this process..

## Federal and State Coordination

It is unclear how the states will respond to, or incorporate, the new rules and the new Form D. At this date, only Washington has published conforming amendments to its rules.

The SEC and the North American Securities Administrators Association are exploring a "one-stop filing" approach that would allow issuers to file Form D information with the SEC and with states designated by them in a single electronic filing. Until further notice, issuers will continue to make filings with the states in accordance with each state's rules.

We will keep you up to date about any further guidance from the SEC or the states on these matters.

Please contact Robin Greenstein at (212) 574-1284 or [greensteinr@sewkis.com](mailto:greensteinr@sewkis.com), Susan Schneider at (212) 574 -1389 or [schneider@sewkis.com](mailto:schneider@sewkis.com) or Yonina Siegal at (212) 574-1228 or [siegal@sewkis.com](mailto:siegal@sewkis.com) if you have any questions about the new requirements.

## EXHIBIT A

### SIGNIFICANT CHANGES TO FORM D INFORMATION AND AMENDMENT FILING REQUIREMENTS

#### Revisions to Form D Information Requirements

The SEC's revisions to the content of Form D include the following:

- Permitting issuers in multiple-issuer offerings to file one Form D identifying all issuers;
- Deleting the requirement to disclose owners of 10% or more of a class of the issuer's securities as "related persons";
- Replacing the current requirement to write a business description of the issuer with a requirement to classify the issuer by industry from a pull-down menu;
- Replacing the current requirement for information about a variety of expenses with a requirement to report only expenses with respect to sales commissions and finders' fees;
- Replacing the current general requirement for information on the issuer's use of proceeds with a more narrow request for the amount of proceeds used to pay executive officers, directors and promoters;
- Requesting information on the revenue range of the issuer, or net asset value information in the case of hedge funds or other pooled investment vehicles,(in each case, with the option to decline to disclose such information, or answer "not applicable";
- Requiring more specific information on the Regulation D exemption being relied on by the issuer as well as any exclusion from the definition of "investment company" claimed under the Investment Company Act of 1940;
- Requiring reporting of the date of first sale in the offering;
- Requiring an annual amendment to a Form D, on or before the one-year anniversary of the filing of the Form D (or the filing of the most recent amendment), if the offering is continuing at that time and specifying when amendments are and are not required to a previously filed Form D (please see below under "Revisions to Amendment Requirements" for more details);
- Requiring reporting of whether the offering is expected to last for more than a year;

- Requiring the names of all recipient of sales compensation and finders fees, the states in which they intend to solicit investors, and the Central Registration Depository (“CRD”) numbers, if any, for individual recipients of sales compensation and any associated broker-dealers; and
- Providing a single signature block for both federal and state signature requirements, including an undertaking to provide offering documents to regulators on request (subject to applicable law), a consent to service of process and a certification that the issuer is not disqualified by rule from relying on the exemption claimed.

In addition, the SEC has also allowed for a limited amount of “free writing” in answering five of the items on the Form, so that the issuer may clarify information provided.

### Revisions to Form D Amendment Filing Requirements

The SEC has clarified when, and why, amendments will be required, namely:

- to correct a material error or mistake of fact on a prior filing (as soon as practicable following the discovery of the error or mistake);
- to reflect changes in the information provided in a previously filed notice (as soon as practicable after the change); and
- annually, on or before the first anniversary of the filing of the Form D or the filing of the most recent amendment, if the offering is continuing at that time.

The new rules specify that the following will not be deemed changes requiring an amendment:

- a change in a related person’s address or relationship to the issuer;
- a change in the issuer's revenues or aggregate net asset value;
- an increase in the minimum investment amount, or a cumulative decrease of no more than 10% from the amount in the most recently filed Form D;
- a change in address of, or the states in which, a broker who is receiving sales compensation or finders' fees intends to solicit investors;
- a decrease in the total offering amount, or a cumulative increase of no more than 10% from the offering amount shown in the most recently filed Form D;
- a change in the amount of securities sold in the offering or the amount remaining to be sold;
- a change in the total number of investors, or in the number of non-accredited investors, as long as the change does not increase the number of non-accredited investors to more than 35; or
- a decrease in the amount of sales commissions, finders' fees, or use of proceeds for payments to executive officers, directors or promoters, or an increase in any of

these payments of no more than 10% from the amount reported in the most recently filed Form D.

Under the new amendment rules, an issuer that files an amendment for any reason will be required to provide current information in response to all items on the Form D.

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