

Alert

Reminder for Private Fund Managers: New Form D Is In Effect

October 3, 2013

A new Form D is now effective and must be utilized by private fund managers in making future filings and amendments. Changes to this form were needed as a result of recent changes to the Regulation D private placement safe harbor, including (1) a new set of procedures for issuers to follow in conducting certain general solicitation activities within a private placement safe harbor and (2) the imposition of certain “bad actor” disqualifications that now apply to all Regulation D offerings.

Private fund managers not conducting a “general solicitation” will need to check a box marked “Rule 506(b)” (as opposed to “Rule 506”) and — by signing the Form D — to certify that the issuing fund is not subject to any “bad actor” disqualification.

Form D Overview

Rule 503 of Regulation D requires that any issuer offering or selling securities in reliance on Rule 506 (which many private funds utilize), Rule 505 or Rule 504 must file a Form D with the SEC for each new offering of securities. These filings are required to be made no later than 15 calendar days after the first sale of securities in the offering and are generally made electronically through the SEC’s EDGAR system. Annual and other updating amendments, also generally made through EDGAR, are required.

Form D currently¹ requires the consideration of 16 numbered items; issuers are required to provide information such as:

- The name of the issuer;
- The issuer’s year and place of incorporation or organization;
- Information about certain related persons (e.g., executive officers, directors and promoters);
- The exemption or exemptions being claimed for the offering;
- Certain information regarding placement agents and other solicitors; and
- Factual information about the offering, such as its duration, the type of securities offered, the total offering amount and certain disclosures on intended uses of the offering’s proceeds.

One point that was made clear in the three SEC releases² adopting the changes described above (and proposing additional changes to Regulation D) (collectively, the “Reg D Releases”) is that the SEC views Form D data as an important source of information. The SEC staff has noted that effective rulemaking is

¹ Additional changes to Form D have been proposed in Release No. 33-9416.

² Release No. 33-9414, [“Disqualification of Felons and Other ‘Bad Actors’ from Rule 506 Offerings”](#) (July 10, 2013); Release No. 33-9415, Release No. 34-69959, Release No. IA-3624 [“Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings”](#) (July 10, 2013); and Release No. 33-9416; Release No. 34-69960; Release No. IC-30595, [“Amendments to Regulation D, Form D and Rule 156”](#) (July 10, 2013).

predicated on accurate marketplace data and that existing Form D disclosures are deemed not to be sufficient.

New Changes to Form D

In the Reg D Releases, the SEC adopted two changes to Form D that are relevant to private fund managers:

- The first relevant change was to “rename” a check box under Item 6 (“Federal Exemptions and Exclusions Claimed”) from “Rule 506” to “Rule 506(b)” and to add another option for “Rule 506(c)” (general solicitation). By “renaming” the Rule 506 indicator, the SEC effectively bridged the old and new forms by equating Rule 506 elections on the old form with Rule 506(b) filings on the new Form D.

New filings and amendments to existing filings,³ therefore, will require the issuer to make an express choice (i.e., 506(b) or 506(c)), but amendments solely to reassert a Rule 506(b) claim are not necessary. **In other words, in future Form D filings and amendments, private fund managers not employing general solicitation will now check “Rule 506(b)” instead of “Rule 506”** and issuers seeking to utilize Rule 506(c)’s general solicitation option on a prospective basis will need to affirmatively amend and elect that option in a timely manner.⁴ *(If you rely on Schulte Roth & Zabel to make your Form D filings and you intend to make a general solicitation under Rule 506(c), please notify us of your intention as soon as possible.)*

- The second change that affects private funds involves a new “bad actor” certification to be made by issuers claiming a Regulation D exemption. This certification, found in the signature block of the new Form D, states that “the issuer is not disqualified from relying on Regulation D for one of the reasons stated in Rule 505(b)(2)(iii) or Rule 506(d).” **All Regulation D issuers will be required to make this certification.**

These changes are currently in effect and a paper version of the new Form D can be found at:

www.sec.gov/about/forms/formd.pdf.

Next Steps

In the wake of the Reg D Releases and the new and proposed changes to Regulation D, all private fund managers should review their controls around the Form D reporting of sales of unregistered interests and other securities. In the new environment, accuracy, completeness and timeliness are all important. In addition, given the Rule 506(d) certification, managers should confirm that their diligence procedures satisfy the “reasonable care” exception under the “bad actor” disqualification rules.

In terms of actually making the required filings, managers should: (1) ensure that all personnel in the data-gathering and reporting chain understand the differences between a Rule 506(b) offering and a Rule 506(c) offering and (2) know which option each managed fund is pursuing. While we expect that most managers will — at least initially — be electing to continue conducting Rule 506(b) offerings, if and when that changes, a manager’s personnel and service providers should be informed of the change in advance.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

³ Proposed changes in the timing and content of Form D filings, and possible new consequences for failures to file, are the subject of Release No. 33-9416.

⁴ As a reminder, the SEC also cautioned issuers in the Reg D Releases that:

- An issuer is not permitted to check both the Rule 506(b) and the Rule 506(c) boxes for the same offering; and
- An issuer is precluded from making a claim of Rule 506(b) reliance subsequent to a general solicitation of purchasers in an offering.

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