The Matrix is freely available to all and includes information on creating and managing a hedge fund management business; the investment process and portfolio risk management; portfolio administration and operational controls; raising capital and investor relations; and hedge fund structure and organisation.

The Matrix is located at www.hedgefundmatrix.com

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1 See: http://www.ustreas.gov/press/releases/reports/amcreportapril152008.pdf
2 See: http://www.hfsb.org/sites/10109/files/final_report.pdf
3 Alternative Investment Management Association
4 International Organisation of Securities Commissions
5 Managed Funds Association

Changes in U.S. Private Placement Procedures

By Ethan W. Johnson of Morgan, Lewis & Bockius LLP

The U.S. Securities and Exchange Commission (SEC) has amended the private placement rules (specifically, Regulation D) to mandate the electronic filing of Form D and to revise the required disclosures in the Form. As of this date few state regulators have announced revised filing requirements to coordinate with the new federal electronic filing mandate. It is assumed that for the foreseeable future state administrators will continue to require or accept paper Form D filings.

We thought that this would present a good opportunity to remind non-U.S. investment funds and other issuers that private placements of securities within the U.S. should in many instances be preceded by the filing of Form D with the SEC and the securities commissions in the states where the offering is to occur. The filing is not strictly necessary on the federal level, it is rather a safe harbour provision that provides a higher level of certainty that an offering has complied with the federal private placement rules. On the state level, however, there are a number of states that in effect mandate the filing of Form D in order for the offering to be exempt from certain state securities law requirements. Issuers should consider carefully in advance the states in which offerings are to occur in order to determine whether the filing of a Form D is advisable in any of those states. There may be a number of applicable exemptions to consider.

The following is a brief description of the changes that have recently been made by the SEC. Currently, a paper copy of a signed Form D is required to be filed with the SEC within 15 days after the first sale in an offering. The amendments will require an issuer to file electronically commencing on 16 March 2009. The Form D must be submitted via the SEC's EDGAR System, which means that private issuers such as hedge funds will need to obtain EDGAR access codes in order to file, including a CIK number and password. An electronically filed Form D will be accessible to the public in the same manner as the issuer's other public filings.

An amendment to a previously-filed Form D will be necessary to correct a material mistake of fact or error or to reflect a change in the information provided. No amendment will have to be filed to reflect a change in the information if the offering has been completed. This will not be applicable for most investment funds as their offerings are typically continuous. Whether or not there are corrections or changes, a Form D amendment will have to be filed annually for offerings that continue for more than a year, on or before the first anniversary of the original filing (or the filing of the most recent amendment, whichever is later).

The revised Form D requires the disclosure of certain basic information about the issuer of the securities and the offering, including the names of the executive officers and directors, the dollar amount of securities being offered and the amount sold to date, a breakdown of the use of net proceeds as well certain new information, including the following:

(a) *Date of First Sale* – As amended, the Form D will require a statement as to the date of the first sale in the offering. The revised instructions to Form D state that the date of first sale is "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". Consequently, it will not be appropriate under most circumstances to use the closing date of an offering as the date of sale.

This presents certain practical problems. While issuers such as funds normally inform their lawyers when an offering has closed, the lawyers may not receive notification that individual subscription agreements or payments have been received, and not having that information could cause the lawyers assisting with the filing of Form D to miss the 15 day post-sale filing deadline. It may be helpful to consider one or more of the following steps in order to minimize the risk of a late filing:

i. If practicable, include language in the subscription agreement to the effect that the investor's subscription is not binding until closing and may be withdrawn until that date.

ii. File the Form D at the time the offering commences. A statement may be made on the revised Form D that the first sale has not yet occurred.

iii. Alert issuers to the fact that they need to notify their lawyers immediately upon receipt of an executed subscription agreement or funds.

(b) *Investment Company Act Exemption* – A hedge fund or other pooled investment fund must disclose the specific section of the Investment Company Act on which it is relying for its exemption from registration under that Act.

(c) *Revenues and Asset Information* – All issuers will be asked to disclose revenue information, however a "Decline to Disclose" option will be provided. If the issuer is a hedge fund or other pooled investment fund, it will be asked to provide aggregate net asset value range information in lieu of revenue information, however the issuer will still have the option of not disclosing this information.

(d) *Identification of Persons Receiving Compensation* – The Form D currently requires, and will continue to require, identification of all persons who receive selling compensation from an issuer in connection with a Regulation D offering. With respect to each person who will receive selling compensation, Form D will now require disclosure of such person's FINRA registration number (referred to as the CRD number). The failure to provide such a number could result in an inquiry from the SEC and/or state regulators about the registration status of the person(s) as a broker-dealer and/or as a sales agent, as the case may be.

(e) *Signature* – By signing the Form D, an issuer will be undertaking to provide to the SEC and states in which the Form D is filed upon written request any offering materials provided to investors. A signature will also constitute an issuer's consent to service of process in states in which the Form D is filed in connection with any actions arising out of the offering of securities for which the Form D is being filed.

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Standards of Conduct and Control Procedures for Hong Kong Hedge Fund Managers

Following certain onsite inspections, the Hong Kong Securities and Futures Commission (SFC) issued a Circular in October 2008 setting out various standards of conduct and control procedures that the SFC views as being 'generally expected' of a Hong Kong-licensed hedge fund manager (HKHFM). A summary of such standards and procedures is set out below:

- the risk management systems of HKHFMs should be commensurate with the complexity of their investment strategies;
- HKHFMs should critically review existing risk management policies and procedures given the current severe market conditions;
- where it is not practical to appoint an independent risk manager, internal controls should be implemented to compensate;
- HKHFMs are reminded that the financial statements prepared for their managed funds are required under the International Financial Reporting Standard / Hong Kong Financial Reporting Standard to disclose their use of financial risk management tools;
- HKHFMs should take all reasonable steps to ensure that information disclosed to investors is accurate and not misleading;
- it is good practice to disclose the material terms of side letters to all investors;
- all information which gives rise to actual or potential conflicts of interest should be disclosed to the HKHFM's ultimate clients and all reasonable steps should be taken to ensure their fair treatment;
- before introducing 'side pockets', HKHFMs should critically assess certain factors (such as their operational capacity). The material terms of 'side pockets' should be disclosed to all investors;
- HKHFMs should plan ahead to ensure that they have the resources, structure, systems and controls that are commensurate with their business needs;
- smaller HKHFMs should implement proper checks and balances to compensate for their limited resources; and
- HKHFMs are reminded to report the value of their managed assets in their financial returns.

SFC Issues FRR Circular

We have published an article on the SFC's Circular of 17 December 2008 relating to common Financial Resources Rules issues.

To view the full article, please visit http://www.deacons.com.hk/eng/knowledge/knowledge_319.htm

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Whilst every effort has been made to ensure the accuracy of this publication, it is for general guidance only and should not be treated as a substitute for specific advice. If you would like advice on any of the issues raised, please speak to any of the contacts listed.

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