

## SECURITIES LAW UPDATE

The last few months have seen some significant securities law developments, including: the first amendment to the Securities and Exchange Commission's Rule 144 in ten years, new rules requiring electronic filing of Form D by March 16, 2009, and changed and proposed rules affecting private funds and investment advisers. This newsletter briefly summarizes these developments. If you desire more information about any of these topics, please contact one of the Levett Rockwood attorneys listed below.

### RULE 144 AMENDMENTS

Rule 144 under the Securities Act of 1933 creates a safe harbor from Securities Act registration for sales of two categories of securities: (a) sales by holders of "restricted securities" (i.e., securities acquired in a transaction other than a public offering), and (b) sales of securities held by affiliates of an issuer, regardless of how the securities were acquired. The SEC amendments, which were effective February 15, 2008, should simplify compliance with the Rule and increase the liquidity of restricted securities.

Prior to the amendments, Rule 144 permitted affiliates and non-affiliates of an issuer to make sales of restricted securities held for more than one year without registration, subject to a number of conditions, including availability of current public information about the issuer, volume limitations, compliance with "manner of sale" requirements and Form 144 filing requirements. Sales of other securities by affiliates could be made without registration subject to these same conditions. Non-affiliates who held their restricted securities for more than two years were permitted to sell them without being subject to any conditions to sale under Rule 144.

The amendments make a number of significant revisions to the Rule, including:

- Shortening from one year to six months the holding period for sales of restricted securities of "reporting issuers."
- Shortening from two years to one year the holding period for sales of restricted securities by non-affiliates that are not subject to any conditions to sale under Rule 144.
- Eliminating Form 144 filing requirements for non-affiliates and increasing Form 144 filing thresholds for affiliates.

### Restricted Securities – Reporting Issuers

*Non-affiliates.* Under the amendments, after a six-month holding period but prior to one year, non-affiliates of a "reporting issuer" (i.e., an issuer that has been subject to the reporting requirements of the Securities Exchange Act of 1934 for at least 90 days immediately before the sale) may now make unlimited sales of restricted securities subject only to the Rule's requirements regarding availability of current public information about the issuer. After a one year holding period, non-affiliates of a reporting issuer may make unlimited sales of restricted

securities without being subject to any conditions to sale under Rule 144.

*Affiliates.* After a six-month holding period, affiliates of a reporting issuer may make sales of restricted securities subject to all the Rule's requirements regarding availability of current public information, volume limitations, "manner of sale" and filing of Form 144.

### Restricted Securities – Non-Reporting Issuers

*Non-Affiliates.* Under the amendments, after a one-year holding period, non-affiliates of a non-reporting issuer may make unlimited sales of restricted securities without being subject to any conditions to sale under Rule 144.

*Affiliates.* After a one-year holding period, affiliates of a non-reporting issuer may make sales of restricted securities subject to all the Rule's requirements regarding availability of current public information, volume limitations, "manner of sale" and filing of Form 144.

### Sales of Other Securities by Affiliates

Rule 144, as amended, continues to permit sales of other securities by affiliates without registration subject to all the Rule's requirements regarding availability of current public information, volume limitations, "manner of sale" and filing of Form 144.

### Other Amendments

Under the amendments, non-affiliates are no longer subject to Form 144 filing requirements, and affiliates are only required to file Form 144 if they intend to sell more than 5,000 shares or shares with an aggregate sale price of more than \$50,000 in any three-month period. The amendments also broaden the manner of sale requirements for equity securities and eliminate the manner of sale requirements and increase the volume limitations for debt securities.

Rule 144's requirements are detailed and its application is fact specific. If you have questions about Rule 144 or how it applies to you or any securities you hold, please contact **Barbara A. Young, Peter H. Struzzi** or **Jennifer Kleiner** of our office at (203) 222-0885.

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## MANDATORY ELECTRONIC FILING OF FORM D STARTING IN 2009

Form D provides official notice to federal and state regulators of an offering of securities made without registration under any of the exemptions in Regulation D of the Securities Act of 1933. Both public and nonpublic companies use Form D, which is currently filed on paper, typically within 15 days after an issuer's first sale of unregistered securities under a Regulation D exemption. Regulators monitor the filings to help collect data for rulemaking efforts and confirm compliance with the securities laws.

The SEC has adopted rule amendments mandating the electronic filing of Form D and revising Form D. Once the new Form D filing system becomes available, which the SEC expects will be by September 15, 2008, companies will be *permitted* to file Form D electronically through the Internet. Starting March 16, 2009, electronic filing will be mandatory. Filing will continue to be required within 15 days after the first sale, and companies will be required to update Form D on an annual basis or more frequently to correct material mistakes or errors.

Electronic filing of Form D ultimately will enable a company to do "one-stop" filing with the SEC and the states in which the company sells securities. That capability will not be available initially, but the SEC is working actively with the North American Securities Administrators Association to achieve that capability as soon as possible.

### REGULATORY DEVELOPMENTS AFFECTING PRIVATE FUNDS AND INVESTMENT ADVISERS

#### New Anti-Fraud Rule for Advisers to Hedge Funds and Private Equity Funds

On August 9, 2007, the SEC adopted Rule 206(4)-8 under the Investment Advisers Act of 1940. The rule, known as the Anti-Fraud Rule, prohibits advisers to "pooled funds" from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in those pooled funds. The term "pooled fund" includes hedge funds, venture capital funds, buyout funds, other private equity funds and registered investment companies. Registered and unregistered advisers, and domestic and foreign advisers, are subject to the Anti-Fraud Rule.

The Anti-Fraud Rule applies to *all* communications (both oral and written) with investors and potential investors. It is not limited to statements an adviser makes in connection with a private securities offering, but rather extends to all aspects of a pooled-fund adviser's business, such as statements regarding:

- possible investment strategies for the adviser's pooled fund(s)
- the adviser's credentials

- risks associated with investment in the adviser's pooled fund(s)
- performance of the adviser's pooled fund(s)
- valuation of the adviser's pooled fund(s) or investor accounts
- practices the adviser follows in the course of its business (e.g., how the adviser handles conflicts of interest)

While the Anti-Fraud Rule also refers to conduct other than disclosure, the SEC has not given any guidance on the types of conduct that would be covered. Accordingly, the Anti-Fraud Rule could conceivably cover conduct such as valuation methods, preparation of account statements or other business practices.

An extremely important aspect of the Anti-Fraud Rule is that, unlike other anti-fraud rules under the Investment Advisers Act and the Securities Exchange Act of 1934, liability under the Anti-Fraud Rule can apply *even without intent or knowledge by the adviser that a statement/omission/conduct was false or misleading*. There is no private right of action under the Anti-Fraud Rule. Only the SEC can enforce it.

#### SEC Proposes "Plain-English" Narrative Disclosure to Investors By Advisers

On March 3, 2008, the SEC issued a release proposing rule amendments requiring registered investment advisers to prepare and deliver to clients and prospective clients a narrative brochure written in plain English accompanied by a supplement that provides information about the adviser's personnel. Comments on the release will be accepted until May 16, 2008.

Under the proposed rules, brochures would be filed electronically with the SEC and made available to the general public through the SEC-sponsored Investment Adviser Public Disclosure Website. An adviser would be required to deliver the brochure to clients/prospective clients before or at the time they enter into an advisory contract and after that, an updated brochure annually within 120 days after the end of the adviser's fiscal year.

The plain English brochure would be added as Part 2 to Form ADV (the investment adviser registration form) and replace current Part 2 to Form ADV, which is a "check-the-box" form that most advisers use to meet the existing "brochure" requirement. The SEC believes that the proposed plain English version would provide investors with more detailed information about an adviser's business practices, including the types of advisory services they provide, fees they charge, and the risks clients may expect, as well as disclose information regarding the adviser's disciplinary history, conflicts of interest and the use of client brokerage to obtain "soft dollars benefits."

If you have questions or would like to discuss any of these topics further, please contact **Cheryl Johnson** or **Kate Grijns** of our office at (203) 222-0885.

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