The Devil is in the Details: A Primer on Form D and Blue Sky Filings for Private Fund Managers

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With all the filings regulators require these days, just getting started can seem daunting. Luckily, Hardin Compliance Consulting, LLC (HCC) is here to help! HCC has years of experience in making Form D and state blue sky filings on behalf of clients. Keep reading below for some background on the filing requirements, and how HCC’s experts can help your Firm.

Firms offering securities in privately offered pooled investment vehicles (“private funds”) routinely rely on Regulation D (“Reg D”) to avoid registering the offering with the Securities and Exchange Commission (“SEC”) under the Securities Act of 1933. Reg D provides two separate exemptions under Rules 504 and 506. Rule 506 is the most commonly relied upon exemption for hedge and private equity funds. Rule 506 offerings are exempt from state securities (a/k/a “blue sky”) laws but states can still require the filing of Form D, consent to service of process, and payment of a filing fee.

Filing Form D under Federal Law

Under federal securities law, issuers of securities are required to file a Form D with the SEC within 15 days of the first sale to comply with Reg D. A good rule of thumb is to begin the Form D filing process when the fund offering documents are in their final stages. Form D filings must be made using the SEC’s EDGAR (electronic data gathering, analysis and retrieval) system. To get access to EDGAR, a fund must complete a Form ID to get a filer identification number (called a “Central Index Key” or “CIK”) and access codes. This process is completed using the EDGAR Filer Management system and requires Form ID to be signed by an authorized signatory of the issuer and notarized. Once the application process is complete, approval can take up to 48 hours. Therefore, it is important not to wait until the last minute. After the SEC processes the Form ID and approves the request for a CIK number and EDGAR access code, the authorized signatory will receive notification via email and can subsequently complete the registration process by generating new access codes. Firms should securely retain the EDGAR access codes and passphrase for future reference. Passwords have to be updated annually, within ten days of the anniversary of the Form ID acceptance. Filers that fail to update the password before the expiration date have to generate new access codes.

Once the initial Form D is submitted, the filer has to submit an annual amendment on or before the first anniversary date, if the offering is continuous. Certain private funds, such as private equity, generally do not submit an annual amendment if fundraising has been completed and no new commitments are being accepted. Private funds that close to new investors or liquidate before the anniversary date also do not need to submit an amendment. There is no “final” or “withdraw” filing option on the Form D.
Interim amendments are required if any of the information filed is materially inaccurate, such as a change of address or officers of the reporting entity, changes to the number of investors, and total amount sold when the increase is greater than 10% of the value currently reported. Although the Form D instructions provide several samples of what would not be considered materially inaccurate, consult your CCO, compliance consultant or outside counsel to decide whether an amendment is required. Most compliance professionals recommend updating any filings made with the SEC that contain inaccuracies.

There is no cost to applying for a Form ID or filing a Form D, but firms can avoid high costs often associated with having outside counsel make the filings by completing the process internally or engaging a third-party vendor. Although the process is not difficult, it can be time consuming. A third party vendor can alleviate that effort and add value by helping to ensure that the Form D and entity information is accurate, since the same information may be used for other filings, such as blue sky and Section 13 filings.

Filing Form D under State Blue Sky Laws

Rule 506 offerings are exempt from state blue sky laws but issuers may still have to file a Form D, consent to service of process, and pay a filing fee in states where the securities are offered -- BEFORE the first sale. The North American Securities Administrators Association (NASAA) established the Electronic Filing Depository System, or EFD, allowing issuers to file Form D and applicable fees to various states at one time. Issuers get electronic receipts as proof of compliance so they can monitor the progress of each state's review. Not all states participate, so check the EFD filing website to determine which states use EFD.

HCC offers state blue sky and federal Form D filing services, including initial registration and tracking of any ongoing obligations. Our service is proactive: we contact each of our clients on a monthly basis about potential new blue sky filings and track renewals and termination filings. Form D amendments and EDGAR password renewals are also tracked, and we contact clients before the anniversary date to complete the renewal or filing. If you are interested in an economical approach to managing Form D or blue sky filings, and in freeing up time for you and your team to focus on more important matters, give us a call. We'd welcome the opportunity to discuss our services in greater detail.

Partner with Hardin Compliance Consulting

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