

**REMINDER: ANNUAL UPDATE OF FORM ADV AND ANNUAL REQUIREMENT  
TO CONFIRM STATUS OF INVESTORS UNDER THE NEW ISSUE RULE****Annual Update of Form ADV**

The Securities and Exchange Commission (the “SEC”) requires SEC registered investment advisers to annually update the information on their Form ADVs. Part 1 of Form ADV is filed electronically on the Investment Adviser Registration Depository (“IARD”) System. As was the case in past years, the annual update filing must be made within 90 days of the adviser’s fiscal year-end and should update responses to all items on Form ADV.<sup>1</sup>

Previously, a fee was charged in connection with this annual updating amendment, the amount of which was determined by the adviser’s assets under management. However, since 2006 the SEC has waived the fees for all annual updating amendments. The most recent waiver covers filings from November 1, 2008 through July 31, 2009.<sup>2</sup>

The SEC has twice proposed but not yet adopted an electronic ADV Part 2, and instead requires advisers to complete the old non-electronic Part II of Form ADV.<sup>3</sup> The SEC does not require Part II to be filed. However, advisers must continue to deliver the “old” Part II to prospective clients, update the information in it, and annually offer it to clients under the “brochure rule” (Rule 204-3 under the Investment Advisers Act of 1940, as amended).

Even though Part II is not actually filed with the SEC, it is “deemed” to be filed with the SEC. Because the SEC deems Part II “filed,” the state regulators may require SEC registered advisers that make “notice filings” with them to continue to file paper copies of Part II even if the adviser

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<sup>1</sup> In addition to this requirement to update all responses on Form ADV once a year, the instructions for Form ADV require that changes to the following Form ADV items be reported by amendment promptly: (i) any changes to items 1, 3, 9 or 11 of Part 1A of Form ADV, and for state registered advisers, items 1, 2.A. through 2.F., or 2.I. of Part 1B of Form ADV; (ii) any material change to the information provided in response to items 4, 8 or 10 of Part 1A or item 2.G. of Part 1B (for state advisers) of Form ADV; and (iii) any material changes in Part II of Form ADV and in any brochure.

<sup>2</sup> See Release No. IA-2806, (October 30, 2008).

<sup>3</sup> In March 2008, several years after adopting electronic filing of Part 1 of Form ADV, but deferring changes to Part II of Form ADV, the SEC again proposed to adopt a new Part 2 and require it to be filed in electronic format. Release No. IA-2711, (March 3, 2008). The SEC received a number of comments on this proposal, but has not yet adopted new Form ADV Part 2. We will update our clients and friends should there be any developments concerning the new proposed ADV Part 2. Please see our client memo “[SEC Proposes New Part 2 to Form ADV](#)”.

files the new Part 1A through the IARD. New York State regulators require that advisers that “notice file” with New York file a copy of Part II with the New York State Department of Law.<sup>4</sup> The IARD will accept Form ADV Part II. However, an ADV Part II filed on the IARD is not completed online like Part 1. It must be completed offline and then submitted in a text-searchable PDF format.<sup>5</sup>

### **Annual Confirmation of Investors’ Status Under the “New Issue” Rule**

Financial Industry Regulatory Authority, Inc. (“FINRA”) Rule 5130 (the “New Issue Rule”)<sup>6</sup> precludes broker-dealers from selling New Issue securities (generally equity IPO securities) to accounts the beneficial owners of which are Restricted Persons as defined in the Rule.

Because Rule 5130 looks to the beneficial owners of an account, managers of private investment funds that purchase New Issue securities for their funds are required to ask about the Restricted or Non-Restricted status of investors in their funds. Rule 5130 also requires that the Non-Restricted status of those investors be confirmed every year. Therefore, managers that obtained questionnaires as to the Restricted and Non-Restricted status of their investors last year should now confirm the status of such investors again. Rule 5130 only requires that the manager annually reconfirm that an investor is **not** Restricted and is thus able to participate in the profits and losses from New Issue securities. However, many managers also annually ask investors classified as Restricted if their status has changed, because if it has, such investors may be put into a category to participate in New Issue profits or losses in the future. Rule 5130 allows the annual confirmation of status to be in the form of a negative consent once an initial written confirmation has been obtained.

Thus, managers wishing to purchase New Issue securities should write, sometime before the anniversary date of the responses received last year, to each of their investors advising that, based

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<sup>4</sup> New York State Dept. of Law, Bureau of Investor Protection and Securities, 120 Broadway, 23<sup>rd</sup> Floor, New York, NY 10271. Very few other states require such filings. The North American Securities Administrators Association (“NASAA”), which is an organization of the various state regulators, has on its website, [www.nasaa.org](http://www.nasaa.org), a chart listing, among other things, state filing requirements for Part II of Form ADV. The chart is found by clicking on the dropdown “Industry & Regulatory Resources” at the top of the NASAA homepage, choosing “CRD & IARD” and then scrolling down and clicking on “IARD Mandating Table.” The chart, which was last updated in 2004, indicates that Louisiana, New Jersey, New Mexico and Puerto Rico, in addition to New York, request that federally registered advisers filing a notice in those states also file a copy of Part II.

<sup>5</sup> NASAA has created an editable PDF version of Form ADV Part II. It can be found at [www.nasaa.org](http://www.nasaa.org), by clicking on “Industry & Regulatory Resources” at the top of the NASAA homepage, clicking “Investment Advisers” and then clicking on “Form ADV.”

<sup>6</sup> Formerly NASD Rule 2790. As part of the process of developing a new rulebook consolidating many Rules of its predecessor the NASD with those of the NYSE, FINRA has revised or merely renumbered many NASD Rules. NASD Rule 2790 was adopted with minor non-substantive changes as FINRA Rule 5130 on December 15, 2008.

on their answers from last year, the manager has treated the investor as Restricted or Non-Restricted and asking the investor to inform the manager in writing of any changes in such investor's status. The manager may also state in the mailing that if it does not receive a reply by a certain date it will assume there has been no change in the investor's status. We would advise managers to enclose or attach a copy of a current form of New Issue questionnaire so that the investors are aware of the current categories of Restricted and Non-Restricted persons, but not to require the investor to complete or return the questionnaire if there has been no change in status.

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If you have any questions concerning the foregoing or would like further information, please contact Martin R. Miller at (212-728-8690, [mmiller@willkie.com](mailto:mmiller@willkie.com)) or the attorney with whom you regularly work.

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