

**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 (“Annual Updating Amendment”).¹

In recent years, the SEC waived any fee in connection with filing the Annual Updating Amendment. However, this year SEC-registered investment advisers will have to pay a fee determined by the adviser’s assets under management for filing their Annual Updating Amendments from January 1, 2010 through December 31, 2010.² During that period, investment advisers filing for initial registration with the SEC on the IARD will have to pay the initial registration fee.

Assets Under Management	Initial Registration Fee	Annual Updating Amendment Fee
More than \$100 million	\$200	\$200
\$25 million to \$100 million	\$150	\$150
Less than \$25 million	\$40	\$40

Fees must be credited to the adviser firm’s Daily Account on the IARD before filings may be submitted.³ No fee is charged for filing an electronic amendment to Form ADV unless it is an Annual Updating Amendment. No fee is charged for electronically filing Form ADV-W.

¹ 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.

² See Release No. IA-2959 (December 10, 2009).

³ Every adviser authorized to use the IARD system to make electronic filings of Form ADV has a financial account with the IARD. Firms may submit payments by check, wire transfer or electronic payment via Web CRD/IARD E-Pay. See <http://www.iard.com/accounting.asp> for instructions and relevant addresses. Investment advisers registered with or applying for registration with the SEC will also still be subject to any applicable state notice filing fees.

The SEC has twice proposed but not yet adopted an electronic ADV Part 2, and instead requires advisers to complete the old nonelectronic Part II of Form ADV.⁴ 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 have been filed. Because the SEC deems Part II “filed,” state regulators may require SEC registered advisers that make “notice filings” with them to continue to file copies of Part II even if such advisers file 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.⁵ 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.⁶

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

Financial Industry Regulatory Authority, Inc. (“FINRA”) Rule 5130 (the “New Issue Rule”)⁷ 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.

⁴ 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.](#)”

⁵ New York State Dept. of Law, Bureau of Investor Protection and Securities, 120 Broadway, 23rd 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, 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.

⁶ NASAA has created an editable PDF version of Form ADV Part II. It can be found at 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.”

⁷ 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 nonsubstantive changes as FINRA Rule 5130 on December 15, 2008.

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 on an investor's 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) or the attorney with whom you regularly work.

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