

## **SEC ENFORCEMENT ACTIONS FOR FAILURE TO FILE FORM D: A WAKE-UP CALL FOR STARTUPS AND PRIVATE FUND ADVISERS**

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On December 20, 2024, the U.S. Securities and Exchange Commission (the “SEC”) issued a press release highlighting settled enforcement actions against a private fund adviser and two pre-IPO companies for failure to timely file Form D in connection with unregistered securities offerings, as required by Regulation D (“Reg D”) under the Securities Act of 1933, as amended (the “Securities Act”). See [SEC Files Settled Charges Against Multiple Entities for Failing to Timely File Forms D in Connection With Securities Offerings](#) (“Press Release”). These actions send a clear message that Form D filings are a high priority for the SEC, and should be a high priority for all issuers of securities under Regulation D, particularly private fund advisers and pre-IPO companies.

Under the Securities Act, any offer and sale of securities must be registered or meet the requirements for an exemption from registration. Rules 504, 506(b) and 506(c) under Reg D of the Securities Act set forth certain safe harbors for exemption from registration – *i.e.*, for limited offerings, offerings to accredited investors without general solicitation, and sales to accredited investors with general solicitation, respectively. Rule 503 requires issuers relying on these exemptions to file Form D with the SEC within 15 calendar days after the first sale of securities in the offering. It is worth noting that failure to comply with Rule 503 does not result in the loss of the registration exemption, but is itself a violation of the Rule and the Securities Act. Because of the perceived lack of penalty, some issuers have been cavalier about the obligation to timely file Form Ds.

In the Press Release and related orders, the SEC articulated that failing to file Form Ds on a timely basis:

- hinders the SEC’s ability to assess the scope of the Reg D market, which is vital to the SEC’s understanding of whether the regulation appropriately balances the need for investor protection with the facilitation of capital formation, especially in the case of small businesses,
- hurts the ability of the SEC, state securities regulators and self-regulatory organizations to monitor and enforce compliance with the requirements of Reg D and other securities laws and

rules, as applicable, and

- impedes the ability of investors and other market participants to understand whether issuers are complying with federal securities laws, to research and analyze the Reg D securities market and to report on capital-raising in industries that rely on Reg D for securities offerings.

The Press Release emphasized the final rationale by noting that the sanctioned issuers “deprived the ...[SEC] and the marketplace of timely information concerning nearly \$300 million of unregistered securities offerings.”

Without admitting or denying the charges, the issuers in the three Reg D settlements were subjected to cease and desist orders, as well as civil monetary penalties of up to \$195,000.

Beyond the penalties of an enforcement action, issuers of securities under Regulation D also should consider the following collateral consequences of failing to timely file Form Ds:

- Pursuant to Rule 507, the SEC could seek a court order enjoining an issuer from future reliance on the exemption under Rule 504 or Rule 506 of Reg D.
- For private fund advisers that file Form ADV, settlements of the type referenced in the Press Release are required to be disclosed as a disciplinary event in an adviser’s Form ADV.
- Section 18 of the Securities Act preempts state “blue sky” registration or qualification of securities issued under Rule 506 (but not notice filings). An issuer that fails to file a Form D leaves itself exposed to the regulatory position that it did not rely on Reg D but on the statutory exemption from registration under Section 4(a)(2) of the Securities Act, which does not preempt blue sky registration or qualification of securities. Failure to make such blue sky filings, which vary from state to state and can be costly and burdensome, could expose an issuer to various state-level regulatory actions and penalties.
- While issuances under Rule 506 enjoy the benefit of federal preemption of blue sky registration or qualification of securities, such issuances still must comply with certain blue sky notice filings. Not all states require notice filings, but an issuer that fails to file a Form D will almost certainly have failed to make a proper blue sky notice filing, as such filings typically require a cross-reference to the Form D. Failure to properly file blue sky notice filings also could expose an issuer to various state-level regulatory actions and penalties.
- An issuer that seeks to register its securities in the future (i.e., go public) will need to include specific disclosure in its registration statement of all unregistered securities it has sold in the preceding three years and the specific applicable exemptions from registration. Past failure to file Form D and any applicable blue sky filings generally creates a risk of cumbersome legal analysis and cleanup prior to preparing the registration statement and requisite disclosure.

## **RELATED PRACTICE AREAS**

- Securities Litigation and Enforcement
- Private Investment Funds

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