

SEC Enforcement Action – Failure to File Forms D

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On December 20, 2024, the U.S. Securities and Exchange Commission (SEC) announced that it settled charges issued against one registered investment adviser and two private companies for failing to file Forms D in connection with unregistered securities offerings.[1] Issuers must file Forms D with the SEC to rely on the exemptions under Regulation D from securities registration. However, prior to the SEC's announcement, it was commonly understood in the private equity industry that enforcement action would not be taken against issuers on the basis of failing to make a Form D filing alone. These recent charges indicate that the SEC is taking a different approach, at least with respect to offerings where the issuers may have engaged in general solicitation.

Background: Rule 503 and Form D

Regulation D of the Securities Act of 1933 (the "Securities Act") allows issuers to conduct offerings of securities that qualify for the exemptions under Rules 504 or 506 of Regulation D without having to meet certain registration requirements under the Securities Act. Because these exemptions circumvent the registration process that provides the SEC and investing public with certain basic information about issuers' identities and their offerings, Rule 503 requires such issuers to instead inform the SEC through a Form D notice filing within 15 calendar days of the applicable offering's first sale of securities.[2] Such issuers are also required to amend existing Forms D upon several events. The SEC's stated purpose behind this filing is to protect investors, safeguard markets, and foster transparency in its monitoring and enforcement responsibilities.[3]

Rule 507 of Regulation D prohibits any issuer found to be in violation of Rule 503 from relying on the securities registration exemptions under Regulation D.[4] However, Compliance and Disclosure Interpretations published by the SEC in 2009 assured issuers that the failure to file a Form D alone would not affect the availability of the foregoing exemptions, with the SEC noting: "The filing of a Form D is a requirement of Rule 503(a), but it is not a condition to the availability of the exemption pursuant to Rule 504 or 506 of Regulation D". Furthermore, SEC enforcement actions disqualifying issuers from using these registration exemptions have historically focused on violations involving fraud or other bad acts. Failing to timely file a Form D was treated as a relatively minor offense. As a result, many in the private equity industry did not believe that such failure would increase issuers' exposure to monetary penalties or other regulatory action unless the issuer also committed more

egregious violations.

Recent Enforcement Actions and Industry Impact

The SEC's recent enforcement actions mark a significant shift in industry expectations and standards around the consequences of a Rule 503 violation. Each of the three enforcement orders cites the issuer's failure to comply with Rule 503 by filing a Form D as the basis for the order.^[5] Although it appears that the issuers did not forfeit their offerings' exempt status under Rules 504 or 506, they were each ordered to pay civil penalties to the SEC ranging between \$60,000 and \$195,000. Additionally, each issuer was ordered to cease and desist from committing any future violations of Rule 503.

Notably, the SEC did not invalidate the availability of other exemptions and noted that each of the three issuers had engaged in general solicitation, which prevented them from relying upon the general private placement exemption under Section 4(a)(2) of the Securities Act. Specifically, in the action against a registered investment adviser involving two private funds controlled by the adviser, the SEC noted the large number of prospective investors contacted by the adviser to solicit investment in the funds and the significant number of investors accepted by the funds and stated that the adviser engaged in communications that constituted general solicitation for these offerings. As a result, the SEC reasoned that the offerings could not have been conducted as exempt offerings under Section 4(a)(2) of the Securities Act and therefore could not have been conducted without reliance upon Rule 504 or Rule 506(c) of Regulation D.

The penalties imposed by the SEC in these actions serve as a reminder for issuers relying upon registration exemptions under Regulation D to prioritize timely filing of a Form D with respect to each of the issuers' offerings of securities and to review any previous filings to verify they remain accurate and up to date. Although the SEC's actions may indicate its renewed commitment to fostering transparency in the context of exempt offerings, it also sends a clear message to issuers not to place undue reliance on the SEC's Compliance and Disclosure Interpretations and prior enforcement trends and to instead simply comply with the statute as written (including Regulation D's notice filing requirements), or risk potential penalties in consequence.

[1] <https://www.sec.gov/newsroom/press-releases/2024-210>.

[2] Note that Forms D may alternatively be filed prior to the initial sale of securities in the relevant offering (rather than 15 days after the initial sale), in which case certain details regarding the sale are not required to be included in the form.

[3] *Id.* Note that the announcement of these enforcement charges follows an increasing U.S. governmental focus on corporate transparency over the past few years. See, e.g., the issuance of final regulations implementing the Corporate Transparency Act (<https://natlawreview.com/article/corporate-transparency-act-what-investment-advisers-private-investment-funds-need>).

[4] <https://securities-law-blog.com/2021/09/21/consequences-of-failing-to-file-a-form-d/>.

[5] <https://www.sec.gov/newsroom/press-releases/2024-210>.

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