

Could Your Form D Already be Late by the Date of Closing?

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Canadian companies that sell securities to U.S. investors under Regulation D must file a Form D with the SEC within 15 days after “the date of first sale.” Most people would assume that the closing of the offering is the date of sale. However, in the instructions to Form D, the SEC explains that the date of first sale is “the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check.” Therefore, the deadline for the Form D will depend on the wording of the agreement and how those words are interpreted under the governing law of the agreement.

Companies whose agreements say a subscription is “irrevocable” should consider what that language is intended to mean. If it is intended to mean that the subscriber is contractually obligated to purchase the securities, regardless of whether the company has accepted the subscription agreement, then the receipt of the subscription may begin the 15-day clock and the Form D may be late by the date of closing. This problem can be addressed either by rewording the subscription agreement or by filing a Form D at the start of the offering, covering the maximum amount that may be sold in the offering.

If instead, the “irrevocable” language is intended to be effective only upon the company counter-signing the agreement, the company should refrain from counter-signing the agreement until it is ready to begin the 15-day clock for filing of the Form D.

Next week we will address the consequences of filing a Form D late.

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