

What if You Miss the Deadline to File a Form D?

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by Christopher L. Doerksen

As a continuation of our [August 9](#) post regarding the deadline for Canadian companies to file a Form D for a private placement in the United States, we now address the questions, “What if our company missed the deadline to file a Form D with the SEC?” And, more importantly, “Have we lost our ability to rely upon the exemption?”

The good news is that the exemption provided by Regulation D is not dependent upon the filing of the Form D. So, an issuer that fails to file the Form, or files it late, need not be concerned about the liability associated with a non-exempt offering. However, the failure to file exposes the issuer to risk of administrative action and possible loss of the ability to rely upon Regulation D in the future, and a willful failure to file Form D is a potential criminal violation. Accordingly, a company that discovers it has inadvertently failed to file a Form D with the SEC by the 15th day after the date of first sale of securities in an offering is best served by making the filing late unless counsel can identify an available alternative exemption.

Unless the offering is otherwise exempt from state law, a late filed Form D must also be filed with, and a filing fee paid to, any state in which purchasers are located that requires such a filing. States differ in their response to late filings. Some states welcome them, and are happy to get the filing fees. Many states, including Illinois, impose an additional late filing fee when the filing is late. A few states, including Hawaii, have claimed that an exemption from state law is not available if the Form D is filed late, and demanded that the company give investors the right to get their money back. While I believe this view misinterprets federal law, it will usually be worth checking whether the late Form D must be filed in any of the states that take this position or that impose an onerous late filing fee and, if so, whether an alternative exemption is available under state law that would allow the company not to file the Form D in that state.

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