Is Form D Afflicted With Mission Creep?

Posted In California Sui Generis

6/2/2011

In 1981, the Securities and Exchange Commission proposed the adoption of a new form in connection with the adoption of Regulation D. Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791]. The following year the SEC adopted both Regulation D and the new form, which it christened "Form D". Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251] (adopting Form D as a replacement for Forms 4(6), 146, 240 and 242). In proposing Form D, the SEC said that Form D was intended to serve a data collection purpose:

> *"An important purpose of the notice . . . is to collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules and regulations or proposing new ones . . . . Further, the proposed Form would allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses."*

Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791, 41799]. The ensuing 30 years has provided the SEC with ample data (although it is unclear to me how and to what extent the SEC has actually used these data). Perhaps, a more significant use of Form D has been as an enforcement tool by both the SEC and state securities regulators.

Thus, I detect a bit of mission creep in the SEC's proposed "bad actor" rules, a subject that I commented on in this post last week. The SEC has proposed adding the following to the "terms of submission" section of Form D:

> *Certifying that, if the issuer is claiming an exemption under Rule 505 or Rule 506, the issuer is not disqualified from relying on such rule for one of the reasons stated in paragraph (b)(2)(iii) of Rule 505 or paragraph (c)(1) of Rule 506 (as the case may be).*

Although the current terms of submission include certification language with respect to disqualification under Rule 505, the proposal represents another step in the evolution of Form D from a data gathering device to a tool of substantive regulation.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

Although the term "mission creep" was originally associated with military action, the California Court of Appeal has found that "mission creep" can also afflict logothetes:

> *The present case, it will be recalled, began with an inspector's request to see Mr. De La Cruz's list of employees and his trust account records. The inspector later escalated this request to "all … insured files and financial records" and finally to trust account records for the previous twelve months and "bank statements, checks, deposit slips, cash receipt books, journals, signature authority card(s) for each account, all automated data processing systems, all policy folders, for the past five years, including the applications, declarations, binders, quotation sheets, correspondence received, copies of correspondence, and any other record to describe the transaction." The* ***evidence reveals the bureaucratic version of military "mission creep," instead of a scheme "specifically tailored to address" the Commissioner's stated concerns.***

De La Cruz v. Quackenbush, 80 Cal. App. 4th 775, 789-90 (2000). With a few word changes, the above could be applied to Form D.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com