



# California Corporate & Securities Law

## **Enforcing Form D Filings – A Misguided State Policy**

By Keith Paul Bishop on January 18, 2012

The American Bar Association's Committee on State Regulation of Securities publishes [The Blue Sky Bugle](#), a newsletter for blue sky lawyers. In a column for the December issue, Alan Parness, of Cadwalader, Wickersham & Taft LLP, wrote about the enforcement report issued last October by the North American Securities Administrators Association (aka [NASAA](#)).

Alan notes that NASAA reported that the states brought more than 250 enforcement actions involving Rule 506 and Regulation D in 2010. Because NASAA didn't disclose the specific allegations in these actions, Alan did a little digging. He found that Arkansas had brought 12 orders specifically involving Rule 506 and that each of these orders alleged failure to file a Form D in a timely fashion. The orders did not allege fraudulent practices or that the issuer had otherwise failed to comply with Rule 506.

When Congress enacted that National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416, it preempted state authority to require registration or qualification of the offer and sale of "covered securities" as defined. While Congress in Section 18(c)(2) did preserve state authority to require filing of any documents filed with the Securities and Exchange Commission, Alan notes that a literal reading of Section 18(c)(3) is that a state's remedy is limited to suspending the offer and sale in the state. This would preclude an order or injunction against possible future violations or the imposition of other penalties.

In my view, taking action against persons who fail to timely file a Form D is a very questionable enforcement policy for the states. It is well settled that filing a Form D with the SEC is not a condition to the availability of Rule 506. Moreover, a failure to file does not vitiate the security's status as a "covered security". Practitioners will recall that the purpose of the Form D was to provide empirical data to the SEC for rulemaking purposes. See [Is Form D Afflicted With Mission Creep?](#)

While a state may view a failure to timely file as a form of low hanging enforcement fruit, it seems to me that these actions may be of questionable legality and a misuse of enforcement resources that might be better devoted to harder cases involving actual securities fraud and investor losses. The point of state law enforcement should not be to rack up statistics or generate additional revenues. Finally, these type of actions do nothing to bolster the role of state securities regulation in our federal system. In fact, states are likely to find that they will only result in further erosion of state authority over securities transactions.

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A reminder – The purpose of this blog is to provide information and opinion for thought and discussion. It is not intended to constitute legal advice.

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