

- 8 The definition of “security” has a catchall for any “instrument commonly known as a security.” The cases interpret this to mean Congress intended to include instruments not specifically listed in the definition. The SEC has urged a broad interpretation of the definition to protect investors. Substantial case law has developed over many years on whether particular instruments are “securities.”
- 9 *Marine Bank v. Weaver*, 455 U.S. 551, 555-556 (1982).
- 10 H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933); see American Bar Association, What Constitutes a Security and Requirements Relating to the Offer and Sales of Securities and Exemptions From Registration Associated Therewith (April 27, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/04/06_loev/.
- 11 See SEC Release No. 33- 4552, <https://www.sec.gov/rules/final/33-4552.htm>.
- 12 Industry practice may suggest that this number is 35 investors. As a legal matter, however, limitation to 35 investors doesn't necessary qualify a deal for the exemption.
- 13 Though Issuers can technically hire third party “finders” to raise capital in a Private Placement, that is inadvisable, as Issuer loses control and increases the likelihood of over-broad or otherwise illegal marketing activities. More generally, it is just a bad idea to use a broker-dealer (a term with special meaning and implications under the securities laws) or any other intermediary to raise capital in a Private Placement.
- 14 As a practical matter, Issuer should satisfy itself that no investor is investing money it cannot afford to lose. No investor should invest their life savings or money they require to live on.
- 15 Preferably, Issuer should not issue certificates at all, as that can facilitate future transfers. If Issuer does issue certificates, they should include conspicuous legends restricting transfer.
- 16 17 C.F.R. § 230.506 – Exemption for limited offers and sales without regard to dollar amount of offering, <https://www.law.cornell.edu/cfr/text/17/230.506>.
- 17 See SEC Publication, Private placements – Rule 506(b), <https://www.sec.gov/smallbusiness/exemptofferings/rule506b>.
- 18 If the due date falls on a Saturday, Sunday or holiday, it moves to the next business day. See SEC Publication, Filing and Amending a Form D Notice, A Compliance Guide for Small Entities and Others, <http://www.sec.gov/info/smallbus/secg/formdguide.htm>.
- 19 See SEC Publication, Form D, Notice of Exempt Offering of Securities, <https://www.sec.gov/about/forms/formd.pdf>.
- 20 See SEC Publication, Division of Corporation Finance Guidance on Form D Filing Process, <https://www.sec.gov/corpfin/form-d-filing>. The filing page can be found at U.S. Securities and Exchange Commission, Electronic Data Gathering, Analysis, and Retrieval (EDGAR) Filer Management, <https://www.filermanagement.edgarfiling.sec.gov/filermgmt/Welcome/EDGARFilerMgmtMain.htm>.
- 21 See SEC Publication, Fast Answers, Regulation D Offerings, <https://www.sec.gov/fast-answers/answers-regdhtm.html>.
- 22 17 C.F.R. § 230.507- Disqualifying provision relating to exemptions under §§ 230.504 and 230.506, <https://www.law.cornell.edu/cfr/text/17/230.507>.
- 23 See SEC Publication, Private placements – Rule 506(b), <https://www.sec.gov/smallbusiness/exemptofferings/rule506b> and SEC Publication, Rule 506 of Regulation D, <https://www.investor.gov/introduction-investing/investing-basics/glossary/rule-506-regulation-d>.
- 24 The Committee on Securities Regulation of the New York State Bar Association, Private Offering Exemptions and Exclusions Under the New York State Martin Act and Section 18 of the Securities Act of 1933 (2002), <https://nysba.org/app/uploads/2020/07/Private-Offering-Exemptions-and-Exclusions.pdf>.
- 25 NYAG recently proposed changes to modify notice filing requirements for private funds offered under Reg. D and require “finders” to register and comply with broker-dealer registration and exam requirements. According to NYAG, the changes would conform New York’s regulations to federal securities regulations, including timing requirements for filing. See Press Release, New York State Office of the Attorney General, Attorney General James Moves to Modernize and Streamline Securities Filings in NYS (April 6, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-moves-modernize-and-streamline-securities-filings-nys>.
- 26 See <https://ag.ny.gov/sites/default/files/form99.pdf>. Issuer should include a copy of Form D as filed with the SEC. If that has not yet happened, submit a copy of the unfiled Form D and state when filing will occur. When it does, submit an “as filed” copy to NYAG.
- 27 See New York State Division of Corporations, State Records and Uniform Commercial Code, State Notice/Further State Notice, <https://www.dos.ny.gov/forms/corporations/0125-f.pdf>.
- 28 See NYAG Publication, Instructions for Filing a Designation for Service of Process (or Form U-2) Pursuant to Sections 352-a or 352-b of the General Business Law of the State of New York, <https://ag.ny.gov/sites/default/files/form-u2.pdf>.
- 29 Form D has no filing fee. For a real estate syndication, the filing fee for NY Form 99 is \$1,050, plus \$900 if the offering exceeds \$500,000.
- 30 Legal fees should not exceed \$5,000.