

SEC Charges Insiders and Issuers for Failing to Timely File Beneficial Ownership Reports

September 29, 2023

On September 27, 2023, the U.S. Securities and Exchange Commission (the “SEC”) announced charges against multiple insiders for repeatedly failing to timely file Section 16(a) and Section 13(d) beneficial ownership reports, as well as five issuers for failing to disclose delinquent Section 16(a) filings and contributing to their insiders’ reporting failures. According to the press release, the charges “stem from an SEC enforcement initiative focused on Form 4 and Schedules 13D and 13G reports,” which included the use of data analytics to identify late filings. In each case, the insiders were found to have made multiple late beneficial ownership report filings, or failed to make required filings at all, while the issuers were cited for failing to timely file Section 16(a) reports on behalf of their directors and officers and, in certain cases, for not disclosing violations of Section 16(a). The penalties ranged from \$120,000 to \$150,000 for individuals and \$115,000 to \$200,000 for issuers.

BACKGROUND

This most recent SEC enforcement action on repeat Section 13(d) and Section 16(a) offenders is similar to enforcement sweeps conducted in 2014 and 2015 and is the latest in a series of enforcement actions to arise out of a decades-old partnership between the Office of Mergers and Acquisitions in the Division of Corporation Finance and the Division of Enforcement that illustrates the SEC’s continued focus in this area, particularly in respect of serial delinquent filers. In those cases, both issuers and insiders were cited for various failures to file or update beneficial ownership reports under Section 13 and Section 16, with the 2015 cases focusing on Schedule 13D updates in the context of take-private transactions. More recently, in 2020, the SEC announced the [settlement of charges](#) against an investment adviser for failing to amend a Schedule 13D relating to a change in investment intent and disposal of shares.

These actions also take place in the backdrop of the SEC’s [proposed amendments](#) to Section 13(d) in February 2022, which, among other changes, would significantly shorten filing deadlines for initial and amended Schedules 13D and 13G. It remains uncertain when, and in what form, these proposals will be adopted, particularly in light

of the temporary reopening of the comment period in April 2023 and concurrent publication of supplemental data and analysis on the effects of the proposed amendments. Nonetheless, the SEC appears to remain committed to enforcing the requirements in their current form, highlighting the need for both issuers and insiders to remain vigilant in understanding their reporting obligations. In addition, a proposal to subject securities issued by foreign-private issuers to Section 16(a) reporting was included in the recently proposed National Defense Authorization Act for Fiscal Year 2024 that would further expand the beneficial ownership reporting landscape, if adopted.

ANALYSIS

Insiders

The six individuals charged by the SEC were found to have repeatedly filed late, or failed to file entirely, reports required by Section 16(a) and Section 13(d) between 2014-2021.

In the case of the Section 16(a) reports, insiders were a combination of officers, directors or 10% beneficial owners of public companies, with delinquent Form 4 filings ranging from one day to more than three years late. The transactions covered by the delinquent reports involved both open market and privately negotiated sales and purchases, as well as equity grants and transactions pursuant to Rule 10b5-1 plans. Each individual was also found to have failed to file one or more Form 5 filings to report the transactions in the prior year that should have been reported on Form 4.

Regarding Section 13(d) reports, deficiencies included failing to timely amend Schedule 13G as a result of material increases or decreases in ownership, failing to file Schedule 13D upon becoming a greater than 5% owner and failing to file on Schedule 13D upon losing eligibility to file on Schedule 13G under Rule 13d-1(c).

In one case, a director found to have delinquently filed 18 Forms 4 over a three-year period, as well as a Form 5 for such years, attempted to shift the blame to the issuer and his broker. The SEC found that his reliance was not a defense “because an insider retains legal responsibility for compliance with the filing requirements, including the obligation to assure that the filing is timely and accurately made.” The SEC also found that the insider “took inadequate and ineffective steps” to monitor whether his broker was providing timely notice to the issuer and whether timely and accurate filings were made on his behalf.

Issuers

The five issuers charged by the SEC were each found to have been the cause of multiple violations of Section 16(a) by their insiders. The number of delinquent filings that the

issuers were responsible for ranged from 60 to more than 150, relating to transactions related to stock and option awards, option exercises and open-market transactions. In the case of two of the charged issuers, they were the employer of an insider charged as well. While the orders stated that the individual insiders retained responsibility for the filings, they also stated that issuers that “voluntarily accept certain responsibilities and then act negligently in the performance of those tasks may be liable as a cause of Section 16(a) violations by insiders.”

Three of the issuers also were found to have failed to properly disclose in their annual reports on Form 10-K or proxy statement that one or more Section 16(a) reports were delinquent for the prior year, as required by Item 405 of Regulation S-K, which was particularly noteworthy given that the issuer had directly made the late filings. In addition, one issuer was found to have included Item 405 disclosure, but with material deficiencies and omissions due to failing to specify the number of late filings and transactions.

TAKEAWAYS

As was the case following the 2014 and 2015 enforcement sweeps, public companies and their insiders should consider these enforcement actions as a warning that the SEC continues to closely monitor compliance with Sections 13 and 16 of the Exchange Act, including through the use of sophisticated technological resources. While the SEC in these cases appears to have targeted repeat offenders with multiple filing deficiencies, even infrequent infractions involving Section 16(a) and Section 13(d) reports can be subject to SEC scrutiny. In addition, these actions reaffirm the SEC’s long established stance that reporting persons cannot discharge their filing responsibilities by tasking the issuer, broker or outside counsel to handle the filings, while issuers that assume such responsibility may also be held accountable for negligently contributing to the insiders’ reporting violations. In each case, these actions demonstrate the importance of implementing robust procedures for identifying and evaluating potentially reportable transactions and ensuring timely filings, regardless of the size, form or intent of a transaction, particularly if the Section 13(d) filing deadlines are ultimately shortened.

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Please do not hesitate to contact us with any questions.



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