

# Client Update

## SEC Enforcement Actions Getting Up Close and Personal

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Set against criticism that it has not acted aggressively enough against executives and other senior company personnel for their roles in corporate misconduct, on September 8 and 9 the Securities and Exchange Commission (SEC) announced a series of enforcement actions against four chief executive officers, four chief financial officers, an audit committee chair, and one outside auditor (BDO USA LLC) and five of its partners arising out of securities law violations by four different corporations (MusclePharm Corporation, Bankrate, Inc., KIT Digital, Inc. and General Employment Enterprises, Inc.). Each of the actions involved financial reporting and disclosure violations.

While the specific facts underlying the charged violations differ, the common denominator in each action is that the SEC brought civil proceedings against the individuals that allegedly caused the corporations to engage in, or were complicit in, the proscribed conduct. Though the SEC has not publicly announced its own version of the “Yates Memorandum,” the recently issued Department of Justice (DOJ) memorandum detailing how DOJ expects prosecutors to hold individuals accountable for criminal wrongdoing, the SEC’S actions may portend renewed determination by the agency to hold executives and directors, as well as outside professionals, accountable for securities fraud and disclosure violations committed by corporations.

### KEY PRACTICE POINTS

From a corporate compliance perspective, the SEC’S actions highlight the need for directors and senior management to maintain a sharp focus on their company’s controls and disclosure practices.

- **Focus on Controls and Procedures.** Directors and senior management should regularly review and evaluate the sufficiency of current policies and procedures regarding disclosure controls and internal control over financial

reporting. If not already in place, companies should establish a disclosure committee and implement a bottom-up disclosure process. Senior management should focus on “tone at the top” and ensure that employees involved in the disclosure process are appropriately trained.

- **Maintain Substantive Engagement with Outside Auditors.** Directors (and audit committee members specifically) should engage with outside auditors in a comprehensive “walkthrough” of the financial statements each quarter. Specific inquiry should be made as to whether, in the course of the auditor’s review, they had been made aware of or uncovered any potential red flags or other undisclosed issues. Further, directors should satisfy themselves that the auditors had been granted access to all company documents, information and personnel, as requested, and that the auditors believe that the company’s internal finance and audit functions are appropriately staffed.
- **Don’t Fly Solo on Complicated Legal or Accounting Matters.** Outside legal counsel and independent experts should be consulted on sensitive and/or complicated disclosure- or accounting-related questions. Of note, the Director of the SEC’s Division of Enforcement stated that the MusclePharm audit committee chair had “subjected himself to liability when he substituted his wrong interpretation of SEC rules for the views of experts the company had hired, resulting in an incorrect disclosure.”

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Please do not hesitate to contact us with any questions.