SEC Update

November 13, 2024

This is a commercial communication from Hogan Lovells. See note below.

SEC enforcement targets beneficial ownership reporting violations

On September 25, the SEC announced that it had initiated and simultaneously settled cease-and-desist proceedings against 23 individuals and companies charged with violations of Exchange Act provisions and SEC rules that required them to report information about their holdings and transactions in public company equity securities.

Most of the alleged violations involved failures to file beneficial ownership reports in a timely manner. The SEC cited the respondents for filing late reports on Forms 3, 4, and 5 under Exchange Act Section 16(a) and Schedule 13D or 13G disclosure statements under Exchange Act Section 13(d) or 13(g). In addition, the SEC charged one company for also filing late reports of its reportable securities holdings on Form 13F as required by Exchange Act Section 13(f).

The SEC cited two other public companies with causing violations of Section 16(a) by their officers and directors by agreeing to assist them in preparing and filing their reports on time but failing to do so. Those companies were further charged with violating Exchange Act Section 13(a) by failing to report their insiders' delinquent Section 16(a) filings as required by Item 405 of the SEC's Regulation S-K.

In settling the actions, the respondents agreed to pay civil monetary penalties and to enter into orders requiring them to cease and desist from committing or causing future violations of the reporting requirements.

The SEC's announcement of the enforcement actions is available **here**.

Section 16 and Section 13 reporting requirements

The SEC has emphasized that beneficial ownership reports filed under Sections 16(a), 13(d), and 13(g) provide investors and other market participants with an opportunity to evaluate whether the holdings and transactions disclosed in the reports could be indicative of a company's prospects or a potential change in control.

Section 16(a). Section 16(a) and Rule 16a-3 require officers and directors of a company with a class of equity security registered under Exchange Act Section 12, and beneficial owners of more than 10% of such a class, to file reports with the SEC on Forms 3, 4, and 5 of their holdings and transactions in the company's equity securities.

Form 3 is required to be filed within ten days after the beneficial owner becomes a Section 16 insider to disclose the person's holdings of the company's equity securities at the time the person became an insider. Form 4 is required to be filed to report any change in an insider's beneficial ownership of the company's equity securities within two business days after the transaction that resulted in the change. Form 5 must be filed within 45 days after the end of the company's fiscal year to report any transaction allowed to be deferred from reporting on Form 4, as well as any transaction that should have been reported earlier but was not.

Public companies are required by Regulation S-K Item 405 to disclose in their annual Form 10-K report any delinquent filings by their insiders under Section 16(a) during the company's most recent fiscal year that are evident from a review of Forms 3, 4, and 5.

Sections 13(d) and 13(g). The reporting requirements of Sections 13(d) and 13(g) and Rules 13d-1 and 13d-2 are intended to inform investors of significant accumulations of shares that may lead to a change in control of an issuer.

Under these provisions, any person or group that becomes the beneficial owner of more than 5% of a class of voting equity security registered under Exchange Act Section 12 must disclose such ownership

and other required information on a Schedule 13D or, if the filer is eligible, on a short-form Schedule 13G. A filing on Schedule 13D must be amended within two business days following a material change in the information disclosed in the schedule. A Schedule 13G filing must be amended within 45 days after the end of a calendar quarter if, as of the end of the quarter, a material change occurred in the information previously filed. Additional Schedule 13G amendments may be required as specified in the form.

Key reporting principles. In its orders settling the enforcement actions, the SEC underscores the following three key principles that underlie beneficial ownership reporting.

- *No intent requirement:* There is no "state of mind requirement" for violations of Sections 16(a), 13(d), and 13(g) and the SEC's rules thereunder. The SEC affirms in the orders that the failure to file a report under any section, "even if inadvertent, constitutes a violation." In accordance with this principle, the duty to file a Schedule 13D disclosure statement is not dependent on a shareholder's intention to gain control of an issuer, "but on a mechanical 5% ownership test."
- *No consideration of profit or purpose:* In view of the informational purpose underlying Section 16(a) reporting, the obligation to report securities transactions on Forms 3, 4, and 5 applies irrespective of whether the reporting person has realized a profit from the transactions and without regard to the reporting person's reasons for engaging in the transactions.
- *No substitution of other reporting:* Although they may be triggered by the same securities transactions, reporting obligations under Sections 16(a), 13(d), and 13(g) must be independently fulfilled, and filing under one section does not excuse the reporting person's obligation to report the holdings and transactions under another applicable section. For example, as the SEC notes in one order, the filing of Form 4 reports by a respondent with respect to particular transactions "did not alter [the respondent's] obligations under Section 13(d) of the Exchange Act and were not a substitute for making required filings on Schedules 13D." The SEC further observes in the order that, although the issuers had disclosed the respondent's beneficial ownership in their annual proxy statements, the issuers' filings did not relieve the respondent from the obligation to report the transactions on Schedule 13D.

SEC enforcement process

The SEC enforces Sections 16(a), 13(d), and 13(g) through cease-and-desist orders and injunctions. Cease-and-desist orders are the SEC's preferred method of enforcement because, unlike injunctive proceedings, they do not require proof of multiple violations or approval by a court. Instead, the orders may be issued by an SEC administrative law judge and may involve as little as a single violation.

In practice, the SEC generally does not need to engage in proceedings before an administrative law judge to obtain cease-and-desist orders with respect to beneficial ownership reporting violations. The SEC generally has been able to work out a settlement in which the respondent neither admits nor denies the allegations but consents to a cease-and-desist order and any associated penalties, such as a civil monetary penalty or occasionally other remedies.

The new charges resulted from an enforcement "sweep" in which the SEC's Enforcement Division simultaneously institutes multiple similar enforcement actions for violations of the federal securities laws. Most recent sweep investigations have focused on broker-dealers and other market participants directly regulated by the SEC. The Enforcement Division also has used sweeps to target public companies and their insiders in cases that enable it to identify similar violations by multiple market participants through streamlined investigations.

As in the actions discussed here, sweep investigations often target violations of strict liability and negligence-based provisions of the federal securities laws. This focus relieves the SEC of having to conduct a time-consuming inquiry into each target's mental state.

Enforcement actions

The new enforcement actions relate to alleged violations of Section 16(a) and Section 13 and the SEC's rules under those sections and do not involve alleged violations of other securities laws or regulations. The Enforcement Division is able to bring stand-alone actions based on reporting violations due to efficiencies achieved through the use of quantitative data sources and ranking algorithms that enable the SEC to identify violators more easily.

The SEC brought the enforcement actions for beneficial ownership reporting violations against 23 respondents, consisting of ten individuals and 13 companies. Of the companies, two are public companies engaged in a non-financial business

and 11 are investment firms, registered investment advisers, or financial services firms. The SEC charged these reporting persons with committing or causing reporting violations of Section 16(a) and Sections 13(d), 13(g), and Section 13(f) (in one case) and the related SEC rules.

The SEC also charged two other public companies with causing violations of Section 16(a) by their officers and directors and with violating Section 13(a) by failing to report their insiders' delinquent Section 16(a) filings as required by Item 405 of Regulation S-K.

The SEC levied total penalties of just over $3.8 million in settlement of all of the enforcement actions.

Some notable features of the enforcement actions include the following:

Transactions and filings. The beneficial ownership reports targeted in these actions generally related to transactions that occurred during various periods from 2018 to 2023. The SEC evaluated the timeliness of Schedule 13D and Schedule 13G filings against the reporting deadlines in effect before the recent rule changes that shortened and otherwise updated the deadlines. We discussed the rule changes in our *SEC Updates* available **here** and **here**.

The respondents acquired or disposed of beneficial ownership of securities in the late-reported transactions primarily through open-market purchases and sales, private and public offerings by the issuers, merger transactions, and the conversion or exchange of warrants, options, and convertible preferred and common stocks.

Although most of the charges related to untimely filings, the SEC referred in a few orders to failures by the reporting persons to include complete and accurate Schedule 13D disclosures. The deficient disclosures related to such matters as the date of reported beneficial ownership, the terms of convertible securities, the existence of negotiated corporate governance arrangements, and the omission of information regarding transactions in the issuer's securities by the reporting persons within 60 days before the filing date.

Identification of late filings. In its announcement, the SEC says that its staff used "data analytics" to identify those charged with late filings, although, as is customary, the agency did not describe its methodology. The staff was able to identify the existence and duration of filing delinquencies by reviewing the filing dates against the transaction dates reported in the filings.

In some actions, the final list of late filings was compiled after the targets uncovered delinquencies in addition to those that attracted the initial enforcement interest. After being contacted by the Enforcement Division, the reporting persons charged in these actions either voluntarily undertook a review of other filings or conducted such a review at the staff's request.

For many actions, the SEC's orders do not specify the total number of Section 16(a) or Section 13 reports that were filed late. The number must be estimated from the tabular and narrative filing summaries presented in the orders.

Charges against corporate insiders. Of the ten individuals charged by the SEC, nine were directors or executive officers of at least some issuers of the securities, while the tenth individual was solely a major shareholder. The SEC cited eight of the insiders for filing late Section 16(a) reports, nine for filing late Schedule 13D or 13G disclosure statements, and seven for filing late reports under both Section 16(a) and Section 13(d) or 13(g).

Based on information in the orders, the filings were weeks, months, and even years late. The number of late Section 16(a) reports filed by the four insiders charged with the most violations ranged from at least 25 to over 120 reports. Most of the Section 13 reporting delinquencies involved the late filing of Schedule 13D or 13G amendments to report changes in beneficial ownership. The orders identified the number of late Section 13 filings attributable to each insider as ranging from a single filing to over 25 filings.

Each insider was assessed a penalty ranging from $10,000 to $200,000. The primary factors used to determine the amount of the individual penalties, for these and the company respondents, appeared to include the number of late reports and the duration of the filing delinquencies.

In assessing $30,000 penalties for two of the insiders with a heavy volume of late filings, the SEC says it also considered the insiders' representations that they had relied on the assistance of their companies for Section 16(a) compliance. In separate charges, the SEC found that each such company had acted negligently in providing the assistance.

Charges against public companies. The SEC brought charges against two public companies for beneficial ownership reporting violations and against two other public companies for causing such violations and for failing to comply with their obligation to report their insiders' delinquent Section 16(a) filings in their Form 10-K reports.

Beneficial ownership reporting violations. One of the two public company respondents, a large technology company, was cited for multiple untimely Section 16(a) reports and for the late filing of 35 reports on Form 13F required by Section 13(f) and Rule 13f-1 with respect to its reportable securities holdings over a period of almost nine years. The SEC found that the company was obligated to report on Form 13F because during this period it had exercised investment discretion over reportable securities with a fair market value of at least $100 million as a result of its direct and indirect investments in or purchases or sales of securities for its own account, including through its subsidiaries that operate as venture capital investment arms that invest for profit. The SEC levied a penalty of $750,000 for these alleged filing failures, the largest penalty assessed against any respondent.

The second public company was assessed a $40,000 penalty for filing one Form 3 and an initial Schedule 13D over one month late and for failing to file a required Schedule 13D amendment to report a decrease in beneficial ownership.

Other reporting violations. The SEC charged that the other two public companies were a "cause" of Section 16(a) violations by their insiders (including two of the insiders referred to above) by voluntarily agreeing with their officers and directors (and, in the case of one of the companies, two other 10% shareholders) to prepare and file reports for them on a timely basis, but, in the SEC's characterization, "negligently" failing to do so.

The SEC also cited those two public companies with violating Section 13(a) by failing over several years to disclose in their Form 10-K reports or incorporated annual proxy statements complete and accurate information regarding delinquent Section 16(a) filings by their insiders, as required by Regulation S-K Item 405. The companies either made no Item 405 disclosure for years in which delinquent filings occurred (in some instances allegedly misrepresenting that no delinquent filings had occurred), omitted disclosure of some untimely Form 3 and Form 4 filings, or failed to disclose the number of transactions that were not reported on a timely basis, which in some cases exceeded the number of late Form 4 reports filed by the insider.

Each of the public companies charged for violating Section 13(a) and causing violations of Section 16(a) was assessed a penalty of $200,000.

Charges against financial firms. The SEC cited the 11 investment and other financial firms for reporting violations of Section 16(a), 13(d), or 13(g). The firms were alleged to have committed some of the violations themselves as beneficial owners of more than 5% or 10% of the voting equity of public companies, or to have caused funds or other entities under their control to commit violations. The SEC cited six of the firms for filing late Section 16(a) reports, ten for filing late Schedule 13D or 13G disclosure statements, and five for filing late reports under both Section 16(a) and Section 13(d) or 13(g).

Based on information in the orders, the number of late Section 16(a) reports filed by the four firms cited for the most violations ranged from at least 25 to approximately 70 reports, with the duration of some of these delinquencies ranging from weeks to over three years. Except for over 20 untimely Schedule 13D or 13G filings by one of the firms, which were up to four years late for some holdings, most of the firms were untimely in making several filings under Section 13(d) or 13(g), the delinquency periods for which generally ranged from less than two weeks to multiple months.

The SEC assessed penalties for these violations ranging from $45,000 to $375,000.

Charging determinations. The SEC does not explain in its orders how it makes charging determinations or decides what penalties to assess in a particular action. In addition to the number of late reports and the duration of the filing delinquencies, the SEC discusses the following factors in mapping out the scope and scale of alleged violations:

- nature of the reporting person's relationship to the issuer;
- period over which filing delinquencies occurred;
- size of the reporting person's beneficial ownership stake in the issuer;
- percentage of outstanding securities subject to the reported transactions;

- aggregate market value of the reported transactions;
- aggregate proceeds received by the reporting person in dispositions of securities;
- percentage of the reporting person's ownership position disposed of; and
- nature of reported transactions (such as open-market purchases or sales or transactions directly with the issuer).

The orders indicate that, in approving the settlement terms, the SEC considered the cooperation afforded by the respondent to the SEC's staff in the investigation, including voluntary self-reporting of violations, and remedial acts undertaken by the respondent.

Compliance considerations

The filing deficiencies targeted by the SEC reveal some circumstances that warrant close attention in administering filing compliance programs, including the following:

Computing beneficial ownership. The computation of beneficial ownership should take account of the following circumstances:

- *Aggregating beneficial ownership across entities:* Subject to limited exceptions, beneficial ownership of securities held by an entity is generally also attributable to a control person of the entity and any parent company in a control relationship with the entity. Some untimely filings targeted by the SEC allegedly resulted from the failure of reporting persons to measure accurately their ownership position against the filing thresholds because they did not aggregate beneficial ownership of the securities across subsidiaries or other entities within their control group.
- *Aggregating beneficial ownership across transactions:* The orders said that some reporting persons did not timely monitor and aggregate ownership stakes acquired in different transactions occurring at different times. In one such action, the reporting person receiving shares in a merger transaction did not identify the existence of shares acquired before the merger that it was required to aggregate with the merger shares to calculate its total beneficial ownership.
- *Monitoring changes in beneficial ownership:* Some reporting persons failed to file timely Schedule 13D amendments to report increases or decreases of at least 1% in their beneficial ownership. The SEC reminds filers that Rule 13d-2(a), which governs amendments to Schedule 13D filings, states that any acquisition or disposition of beneficial ownership of securities in an amount equal to 1% or more of the class is a material change in the previous disclosure that triggers the amendment requirement. Some qualified institutional investors filing on Schedule 13G failed to identify as reporting triggers the acquisition of beneficial ownership of more than 10% of the covered class and increases or decreases thereafter of more than 5% of the class.

The SEC attributes the filing failures of a number of the financial firms to a lack of adequate controls to monitor changes in their beneficial ownership and other developments that might trigger a filing. The control failures identified in the orders included a lack of sufficient personnel experienced in investments in public equities, internal delays in compiling or verifying information for filings, and errors in calculating beneficial ownership.

Company filing support for insiders. In charging two public companies with having caused Section 16(a) violations by their insiders, the SEC reiterated its prior guidance defining the respective responsibilities of insiders and their companies in preparing and filing Section 16(a) reports.

Insider's legal responsibility. The SEC underlines that, even when receiving filing assistance from the company, an insider "retains legal responsibility for compliance with the filing requirements, including the obligation to assure that the filing is timely and accurately made," and should take action to monitor whether the filing requirements are being met. Consistent with this position, in two enforcement actions against insiders discussed above, the SEC charged an officer and director receiving the company's assistance for filing untimely Form 4 reports, which numbered over 90 reports for one insider and about 25 reports for the other.

In imposing a $30,000 penalty on each insider, the SEC notes that it considered the insider's "representations as to reliance" on filing assistance from the company. The SEC further points out, however, that, in each charging determination, it also took into account that the insider "took inadequate and ineffective steps to monitor whether timely and accurate filings were made" on his behalf by the company.

Company's legal responsibility. The SEC encourages companies to help their officers and directors prepare their beneficial ownership filings or submit the filings on their behalf in order to promote accurate and timely reporting. The agency cautions, however, that, as it says in one order, "issuers who 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."

The SEC charged the two public companies in the actions discussed above with causing many of the Section 16(a) violations by their insiders (including the two insiders who were charged) through their "negligence" in performing tasks they voluntarily undertook in connection with the preparation and filing of Section 16(a) reports on the insiders' behalf.

The SEC found that one company's procedures and policies "were insufficient to the extent that those practices resulted in the recurrent failure to meet the two-business day filing deadline" for Form 4 reports. The SEC similarly determined that the other company had failed to prepare and file the Form 4 reports by the deadline and, in addition, had caused the inaccuracy of some filings by assigning the wrong code to reported transactions.

Looking ahead

The enforcement actions announced on September 25, 2024 are the latest multiple actions charging beneficial ownership reporting violations that stretch back at least to September 2014. The new actions come on the heels of similar enforcement actions announced on September 27, 2023 that targeted six corporate insiders for filing late reports under Section 16(a) or Section 13 and five public companies for contributing to the filing failures by insiders or failing to report their insiders' Section 16(a) filing delinquencies.

One notable difference between the announcement of the new actions and the earlier announcements is that the SEC did not say this year that it had charged only reporting persons with a history of untimely filings. In its 2014 announcement of charges against 28 corporate insiders and six public companies, the SEC emphasized that it had targeted for enforcement "repeated" late filers and that its enforcement initiative was intended to "root out repeated later filers." In its 2023 announcement, the SEC referred to its earlier "similar initiative to root out repeated late filers."

Even though the latest announcement did not refer to an enforcement focus on repeated late filers, many targets of the new charges filed multiple untimely reports over delinquency periods that in some cases extended for months and even years. Other targets were alleged by the SEC to have committed less extensive reporting violations, with fewer late reports and shorter delinquency periods, even though these filers also were cited for multiple violations.

An occasional reporting violation may not attract an SEC enforcement action, although enforcement policies can change. Now that the SEC has announced once again that it intends to continue its "enforcement initiatives" to police beneficial ownership reporting, companies should not overlook the need for renewed attention to effective reporting compliance. This is particularly the case for "large investors," which the SEC in its latest announcement warned "must commit necessary resources to ensure these reports are filed on time." The importance of an investment in compliance has been reinforced by the need for public companies and investors to update their reporting processes and systems so that they can meet the more stringent requirements of the new Section 13 reporting rules.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

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