BCLP. Client Intelligent

BCLPSecCorpGov.com

SEC PENALIZES LATE FILINGS IN BROAD ENFORCEMENT SWEEP USING DATA ANALYTICS

CHARGES COVER FORMS 3, 4 AND 5 AS WELL AS SCHEDULES 13D, 13G AND 13F

Oct 03, 2024

WHAT HAPPENED

Last week, the SEC announced settled charges against 23 companies and individuals for failing to timely file Section 16 reports on Forms 3, 4 or 5.

Additionally, two public companies were charged for contributing to late filings by their officers and directors and failing to disclose the deficiencies as required.

Without admitting or denying the charges, the parties agreed to cease and desist orders and to pay penalties ranging from $10,000 to $200,000 for individuals, $40,000 to $750,000 for entities, and $200,000 each in the case of the two public companies.

TAKEAWAYS

Over the past year, the SEC has shown increased focus on delinquent filings, bringing actions against institutional money managers for 13F reporting failures and corporate insiders for Section 16 reporting failures.

Section 16 of the Securities Exchange Act of 1934 concerns short-swing trading in company stock by certain insiders, and requires disclosure of certain insider transactions. Section 13 of that Act sets forth disclosure obligations of parties who acquire holdings in another company exceeding specified thresholds (typically 5% or 10%). Both statutory regimes depend on the filing of required reports with the SEC.

Notably, according to its announcement last week concerning the settled charges, the SEC used data analytics to identify the individuals and entities who filed late reports. This reflects a continuing trend in enforcement actions based on data analytics; previous analytics-based cases involved 10b5-1 trading plans, insider trading and accounting and disclosure violations. According to the SEC, these tools allow its staff to streamline investigations and bring cases faster and more efficiently.

Public companies should educate and remind their insiders about their personal SEC reporting obligations. They should also review and tighten, where necessary, their corporate controls and procedures for assisting their insiders.

Further, companies with their own Schedule 13D or 13G or Section 16 reporting obligations (or Schedule 13F in the case of entities with portfolios of investment securities of at least $100 million) should review and tighten, as appropriate, their systems and controls intended to:

- Timely identify when the company becomes a 5% or 10% beneficial owner of another entity, taking into account the holdings of related persons as well as securities for which it may have or share investment or voting discretion.
- Timely identify when material changes occur, including increases or decreases in beneficial ownership or material changes in investment intent, that trigger an obligation to amend Schedule 13D or 13G.
- Restrict or closely monitor trading in securities of which the company or its insiders qualify as Section 16(a) reporting persons.
- Update or revise procedures to gather or verify information needed for filings.

DEEPER DIVE

The factual patterns in this most recent enforcement sweep included:

Reporting failures by entities

- Failure to timely file Schedule 13D and Form 3 upon acquisition of convertible preferred stock which, when combined with small existing holdings of common stock, resulted in beneficial ownership of more than 10%.
- Failure to amend Schedule 13D upon learning such convertible preferred stock could not be converted due to insufficient authorized shares.
- Failure to timely file Schedule 13D upon acquisition of warrants which, when combined with existing holdings of common stock, resulted in beneficial ownership of more than 5%.
- Officers, directors and significant shareholders failing to timely file or amend their holdings and transactions in shares of the issuer.
- Several investment advisors and their respective affiliates, including private funds failing to timely file or amend Schedule 13Ds or 13Gs, or Forms 3 and 4, with respect to various companies, even while taking activist positions, nominating director candidates or holding director designation rights or otherwise crossing ownership thresholds.

- Several investment advisors failing to timely file or amend Schedule 13Gs and Forms 3 and 4 due to failures to aggregate holdings of affiliated entities and private funds that shared directors or indirect beneficial ownership.
- An investment manager failing to timely file or amend Forms 3 and 4 and Schedule 13G on behalf of an affiliated private fund that held more than 10% of two public companies.
- The general partner of affiliated investment funds failing to timely file or amend Schedule 13Ds triggered by private credit restructuring transactions.
- A financial services firm and affiliates failing to timely file Forms 3 and 4 with respect to several issuers.
- A financial institution failing to file or amend Schedule 13Ds or 13Gs with respect to numerous companies due to failures to monitor and aggregate beneficial ownership across its subsidiaries.
- A public company with a large investment portfolio failing to timely file Schedule 13Fs and Form 4s.

Reporting failures by individuals

- An individual who failed to timely amend his Schedule 13D following a reduction in the number of outstanding shares of the issuer.
- An individual who failed to timely file a Schedule 13D upon the acquisition of more than 5% of a company in a spin-off.
- Officers/directors who failed to timely file Form 4s and amendments to Schedule 13G with respect to transaction in shares of the respective issuers, purportedly due to the failure of company personnel to make timely filings on their behalf.
- An individual who failed to timely file or amend Schedule 13Ds with respect to several entities spun-off from the company for which he served as chairman.

Oversight and procedural failures by public companies

- A company that failed to timely file more than 200 Form 4s for its officers and directors due to its negligence in handling such filings that it voluntarily agreed to manage. It also failed to disclose such delinquencies as required by S-K Item 405.
- A company that failed to timely file more than 100 Form 4s for its officers and directors due to its negligence in handling such filings that it voluntarily agreed to manage. In many cases, it

improperly marked transactions as voluntarily reported earlier than required. It also failed to disclose such delinquencies as required by S-K Item 405.

RELATED PRACTICE AREAS

- Securities Litigation and Enforcement
- Securities & Corporate Governance

MEET THE TEAM

R. Randall Wang

St. Louis

randy.wang@bclplaw.com
+1 314 259 2149

Eric Rieder

New York

eric.rieder@bclplaw.com
+1 212 541 2057

Mark A. Srere

Washington

mark.srere@bclplaw.com
+1 202 508 6050