
SEC Enforcement Reminds Filers that Beneficial Ownership Reporting Obligations Are Not Optional

OCTOBER 6, 2023

“Several years ago, we undertook a similar initiative to root out repeated late filers,” said Sanjay Wadhwa, Deputy Director of the SEC’s Division of Enforcement. “Today’s enforcement action should serve to remind SEC filers that reporting obligations under the securities laws are not optional, and there are consequences for failing to file required forms in a timely manner.”

On [September 27, 2023](#), the Securities and Exchange Commission’s Division of Enforcement announced settled charges against five publicly-traded companies and six individuals for failures to timely report information about the individuals’ holdings and related transactions in the companies’ securities. The settled proceedings, each of which was entered into without admitting or denying the SEC’s findings, resulted in civil penalties ranging from \$66,000 to \$200,000, as well as cease and desist orders, and are summarized below. These actions build on the SEC staff’s continued focus on enforcing ownership reporting requirements, including the wide-ranging enforcement sweep against 34 companies and individuals in [2014](#).

The most recent actions involved failures by officers, directors and major shareholders to timely report holdings and transactions on Forms 3, 4 and 5 pursuant to Section 16 of the Securities Exchange Act of 1934, as amended, as well as Schedule 13D and 13G pursuant to Section 13 of the Exchange Act. The reporting delinquencies resulted in filings being delayed for weeks, months or years beyond the prescribed due dates. The investigations that led to the charges also highlight the staff’s continued use of data analytics to uncover noncompliance with the securities laws.

Below are notable takeaways for issuers and insiders:

Issuer As Cause of Section 16(a) Violations

Consistent with the 2014 enforcement sweep, the SEC targeted not just insiders but also issuers that the SEC staff believes “contributed” to the filing delinquencies.

- **Implement Adequate Oversight Systems Where Issuer Assists Directors and Officers with Filing Section 16 Reports** – The SEC encourages issuers to assist insiders in complying with their Section 16(a) reporting requirements, and most issuers routinely handle these reports on behalf of their directors and officers. These enforcement actions underscore that such assistance should not be regarded as a mere administrative convenience. Failure to maintain systems to help ensure insider reports are filed timely can expose issuers to liability.
- **Prevent Recurrent Failures to Meet Filing Deadlines** – The SEC’s enforcement staff continues to use data analytics to identify repeated late reports. The investigations related to the most recent enforcement actions against issuers generally spanned three to five years beginning in 2018 and identified between 60 and 150 untimely reports for each issuer. In several instances, the SEC remarked that “[f]or virtually all of these late-reported transactions, the issuer had received timely notification or otherwise possessed the necessary information for such filings but failed to prepare and file the reports within the required time frame.”

Issuer Failures Related to Disclosure under Item 405 of Regulation S-K

Item 405 requires identification of each insider who failed to timely file any Section 16 report during the most recent or prior fiscal years, as well as the number of late reports, the number of transactions that were not reported on a timely basis and any known failure to file a required form.

- **Review Disclosure Closely to Ensure Accuracy** – The most recent actions identified numerous issues related to omitted or incomplete disclosure under Item 405 where there were in fact late reports to be disclosed that were not or the disclosure did not identify all of the late reports required to be disclosed.
- **Do Not Rely Solely on Written Representations from Insiders** – Item 405 disclosure often includes language indicating that the issuer’s conclusions are based on review of copies of reports and written representations provided by insiders. The SEC reiterated its position that issuers bear the responsibility of reviewing all Section 16(a) activity during the relevant period, as well as any pertinent information within the issuer’s possession, to identify late (or missing) reports.
- **Maintain Form 5 Representations for Two Years** – Under Item 405(b)(3), issuers may rely on a written representation from an insider that no Form 5 is required, but to do so must maintain the representation in its records for two years. The SEC noted several instances where a required Form 5 filing had not been made, but the issuer did not possess any related written representations from its officers and directors.

Officers, Directors and Beneficial Owners Face Individual Civil Penalties

- **Consistent Untimely Reporting is Flagged** – Similar to the actions involving issuers, the SEC concentrated its attention in its most recent sweep on recurrent violators when pursuing actions against individuals. In one case, nearly all reportable transactions within a nearly four-year span were consistently reported late, while in another instance, over half of the transactions over a three-year period were reported with delays of one or more days.
- **Insiders Must Provide Notice of Transactions Where Issuer Does Not Possess the Necessary Information** – In one enforcement action, a failure to report a number of derivative option transactions executed during a 2-year period was identified, where the director had not notified the issuer of the transactions. This serves as a reminder to directors and officers of the importance of promptly notifying the issuer of their transactions where the issuer has undertaken to assist the insider with compliance. Failure to do so may result in individual liability.

Compliance Failures in Beneficial Ownership Tables

In at least two recent, but unrelated, enforcement actions the SEC has also brought charges against companies and insiders for failures to disclose in the proxy statement pledges of company securities by insiders, as required by Item 403 of Regulation S-K.

- **Closely review D&O Questionnaires and Beneficial Ownership Table Disclosure** – As noted in our recent [blog](#), the SEC's actions involving beneficial ownership table disclosure failures serve as an important reminder of the importance of D&O Questionnaires in a company's disclosure controls and compliance function. It is important for companies to ensure the annual questionnaire process is robust and not a simple "check the box" exercise in connection with the preparation of the proxy statement and Form 10-K.

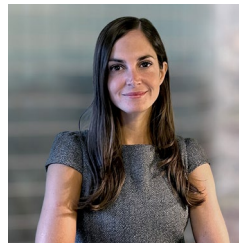
Issuer and Insider Charged			
1.	Issuer	\$190,000	<ul style="list-style-type: none"> Failed to comply with Item 405 disclosure requirements Cause of certain violations of Section 16(a) by its insiders
	CFO	\$125,000	<ul style="list-style-type: none"> Failed to file Section 16(a) reports on a timely basis
2.	Issuer	\$125,000	<ul style="list-style-type: none"> Cause of certain violations of Section 16(a) by its insiders
	Director	\$66,000	<ul style="list-style-type: none"> Failed to file Section 16(a) reports on a timely basis
Issuer Charged			
3.	Issuer	\$200,000	<ul style="list-style-type: none"> Failed to comply with Item 405 disclosure requirements Cause of certain violations of Section 16(a) by its insiders
4.	Issuer	\$115,000	<ul style="list-style-type: none"> Cause of certain violations of Section 16(a) by its insiders
5.	Issuer	\$185,000	<ul style="list-style-type: none"> Failed to comply with Item 405 disclosure requirements Cause of certain violations of Section 16(a) by its insiders
Insider Charged			
6.	President and CEO of Business Unit	\$143,000	<ul style="list-style-type: none"> Failed to file Section 16(a) reports on a timely basis
7.	Director and Beneficial Owner	\$150,000	<ul style="list-style-type: none"> Failed to file Section 16(a) reports on a timely basis
8.	Beneficial Owner	\$120,000	<ul style="list-style-type: none"> Failed to file Section 16(a) reports on a timely basis
9.	Beneficial Owner	\$150,000	<ul style="list-style-type: none"> Failed to file Section 16(a) reports on a timely basis Failed to timely file on Schedule 13G/D

Contributors



C. Alex Bahn
PARTNER

alex.bahn@wilmerhale.com
+1 202 663 6198



Liz Graffeo
COUNSEL

liz.graffeo@wilmerhale.com
+1 720 598 3481