SEC SENDS WARNING WITH ACTIONS AGAINST 28 CORPORATE INSIDERS FOR DELINQUENT REPORTS OF STOCK TRANSACTIONS AND HOLDINGS

September 2014

On September 10, 2014, the Securities and Exchange Commission (SEC) announced charges against 28 officers, directors and major shareholders of publicly-traded companies regarding the failure to timely report information concerning transactions and holdings in those companies' shares. The SEC also charged six publicly-traded companies for failing to report their insiders' filing delinquencies or for contributing to the filing failures by insiders. Although these actions are consistent with statements made by the SEC during the past 12 months, they do represent increased scrutiny in an area in which the SEC had not been active in the past several years. As a result, the charges are likely to be considered surprising by many.

Background

Officers, directors and certain 10% beneficial owners of a security that is registered with the SEC are required to file, with the SEC, a Form 3 within 10 days of becoming an officer, director or 10% beneficial owner, and, thereafter, a Form 4 within two business days of undertaking a transaction in that security. In addition, beneficial owners of more than 5% of an SEC-registered security are required, at specified times, to file Schedule 13D and 13G reports concerning, among other matters, their holdings of that security. Although there is no question that these regulations are expected to be complied with, in the recent past, in the absence of fraud-related activity, the SEC had typically not taken action with respect to short-term delinquencies in filing of these reports. As an indication of the SEC's current direction, in a widely-publicized October 2013 speech, SEC Chair Mary Jo White stated that the SEC planned to begin investigating "even the smallest infractions". In the September 10, 2014 press release announcing the charges described above, Andrew Ceresney, Director of the SEC Division of Enforcement, stated that "we are bringing these actions… to send a clear message about the importance of these filing provisions."

The SEC Charges

The charges against the officers, directors and shareholders included assertions of multiple late filings of Forms 3 and 4, and, for some of the shareholders, included late or neglected filings of initial filings or amendments to Forms 13G and 13D. The charges against the publicly-traded companies included failure to make required disclosures in their proxy statements or annual reports of delinquent or neglected filings of Forms 3, 4 or 5, and failure to fulfill commitments they may have made to assist insiders with their obligations to report stock transactions and holdings.

The SEC press release stated that it had used "quantitative data sources and ranking algorithms" to identify the repeated late filers, including the number and length of their delinquencies. An SEC official commented in that press release that "inadvertence is no defense to filing violations, and we will vigorously enforce these sorts of violations through streamlined actions." The reference to inadvertence being no defense reaffirms the SEC's adherence to the fact that the applicable statutes and regulations do not require intent as an element of a violation. The SEC actions appear to have been extremely effective, as 33 of the 34 individuals and companies named agreed to settle the charges for amounts ranging from US$25,000 to US$150,000.

Observations and Conclusions

The SEC's press release also stated that the reporting requirements "are legal obligations that must be obeyed" and that those "who fail to do so run the risk of facing an SEC enforcement action." Although our own analysis indicates that each of the targeted individuals and entities that was charged with delinquent filing of Forms 3, 4 or 5 had between nine and 75 violations, the SEC definitely has set the stage to charge persons with less chronic and less extended delinquencies – perhaps even one-time violators. It appears that the SEC has used these charges as a warning device, and publicly-traded companies, together with their directors, officers and major shareholders, should take notice. Given the SEC's self-proclaimed streamlined access to advanced technology to be able to discover the violations, the notice is even more compelling.

Two areas of follow-up for publicly-traded companies would be education and implementation. Publicly-traded companies should update and recirculate information to educate and re-educate their officers, directors and major shareholders concerning the various reporting requirements. Publicly-traded companies also should review and update the means by which they institutionally revise and implement their policies for dealing with these requirements. For example, for some companies it may make sense to modify and consolidate the company's insider trading policy and its insider SEC reporting program so that they function together to achieve their separate objectives with a more vertically integrated system of communication and responsibility. Depending on a company's particular circumstances, other potential follow-up actions may need to be considered.

If you have any questions regarding these recent SEC enforcement proceedings or would like any further information regarding any of the matters discussed above, please contact one of the individuals listed in this publication.

Contacts

Daniel G. Berick
T +1 216 479 8374
E daniel.berick@squirepb.com

Alan L. Talesnick
T +1 303 894 6378
E alan.talesnick@squirepb.com

Courtney Kanouff
T + 1 303 830 1776
E courtney.kanouff@squirepb.com