

SEC Enforcement Case Summary

\$3.8 Million In Penalties for Late Beneficial Ownership & Insider Transaction Reports

On September 25, 2024, the SEC charged 23 entities and individuals for failures to timely report information about their holdings and transactions in public company stock. Certain investment advisers were charged with causing violations of filing requirements by private funds they managed. Two public companies were also charged with contributing to filing failures by their officers and directors and failing to report their insiders' filing delinquencies as required. The charges stem from SEC enforcement initiatives focused on Schedules 13D and 13G reports and Forms 3, 4, and 5 that certain corporate insiders are required to file.

The firms charged in connection with beneficial ownership of publicly traded companies and their respective penalties are:

- Sunbeam Management, LLC - \$40,000;
- TALANTA Investment Group, LLC - \$45,000;
- Grays Peak Ventures LLC - \$65,000;
- Stilwell Value LLC - \$75,000;
- BSC, LP - \$75,000;
- Bain Capital Credit Member, LLC - \$130,000;
- FIG LLC, which conducts business under the name Fortress Investment Group - \$200,000;
- Adage Capital Management, L.P. - \$200,000;
- Essex Woodlands Management, Inc. - \$225,000;
- The Goldman Sachs Group, Inc. - \$300,000;
- Oaktree Capital Management, L.P. - \$375,000;
- The Bank of Nova Scotia - \$375,000; and
- Alphabet Inc. - \$750,000.

Multiple individuals who were officers, directors, and/or beneficial owners of publicly traded companies, were required to pay civil penalties ranging from \$10,000 to \$200,000. The public companies that were charged with contributing to filing failures each agreed to pay \$200,000 penalties.

Section 13(d) of the Securities Exchange Act (the "**Exchange Act**") and Rule 13d-1 together require that any person who directly or indirectly acquires beneficial ownership of more than five percent of any voting class of equity security registered under Section 12 of the Exchange Act file a statement with the SEC. During the relevant time covered by these cases, beneficial owners could comply with this requirement by filing a Schedule 13D with the SEC within 10 days after acquiring the requisite amount of beneficial ownership, with amendments required promptly for material changes. An acquisition or disposition of beneficial ownership in an amount equal to one percent or more of a class of equity securities beneficially owned is deemed to be material. Certain passive investors are eligible to file a short-form statement on Schedule 13G instead of a full Schedule 13D. During the relevant time period, Schedule 13G filings were due either within 10 days after the transaction or 45 days after the calendar year in which the person became obligated to report a beneficial ownership position, depending on the filer's eligibility. Passive investors were required to amend Schedule 13G promptly upon acquiring beneficial ownership of greater than 10% of a registered class of equity securities and to amend Schedule 13G promptly thereafter upon increasing or decreasing its beneficial ownership by more than 5% of the class. Passive investors were further required to file an annual amendment to Schedule 13G

within 45 days after the end of each calendar year if there were any changes in the information previously reported, unless certain limited exceptions applied.

Section 16(a) of the Exchange Act requires officers and directors of a company with a registered class of equity security, and any beneficial owners of greater than 10% of such class of equity security (collectively referred to as "insiders"), to file certain reports of securities holdings and transactions. Pursuant to Rule 16a-3(a), insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, Section 16(a)(2) of the Exchange Act and Rule 16a-3 thereunder require that within 10 days after becoming an insider, or on or before the effective date of the Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. These same provisions require that insiders must also file Form 4 reports disclosing certain transactions resulting in a change in beneficial ownership within two business days following the execution date of the transaction. In addition, according to Rule 16a-3(f)(1), insiders are required to file a Form 5 report within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 (as applicable) during the issuer's most recent fiscal year and any transactions eligible for deferred reporting. The obligation to make Section 16 filings applies irrespective of profits or the filer's reasons for engaging in the transactions.

The firms that were charged in the enforcement sweep each held positions that triggered Schedule 13D or 13G filings and, in certain cases, that also triggered Form 3 or 4 filings under Section 16. However, the companies failed to file or timely file the requisite reporting and/or promptly amend previously filed forms. One firm was charged with a late initial Schedule 13D that was filed less than 30 days but more than 10 days after the triggering acquisition. Amendments filed within 45 days after a triggering event were not deemed to be filed promptly, as required. One firm was charged with a late Form 3 filing that was submitted 21 days after a triggering transaction rather than within 10 days.

There are various instructive facts in these cases, as follows:

Holdings of Eligible Convertible Preferred Stock or Warrants: Reporting was sometimes triggered based upon holdings of convertible preferred stock or warrants that were eligible to be converted into or exercised in exchange for common stock. Accordingly, the firms were deemed to be beneficial owners of the common stock.

Holdings in Connection With a Merger, Issuance or Granting of Shares: Certain failures involved shares or options issued in connection with the closing of a merger between two entities, in connection with an initial public offering, or as compensation to an insider.

Holdings by Related Entities: Several cases noted that a filing was triggered when combined ownership with one or more related entities exceeded 5%. In one such case, the SEC noted that related entity investments were held by a business unit that does not typically invest in public equities and, therefore, does not typically file Schedule 13D report.

Failure to Monitor and Aggregate Holdings: The SEC noted that one firm simply failed to monitor and aggregate its beneficial ownership across its subsidiaries and failed to have systems that monitored its beneficial ownership resulting from rehypothecable securities for which it had or shared investment and/or voting discretion. Several cases noted that the failures were due to an error in the firm's internal documents or systems, including trade blotters, internal monitoring reports, and trading systems, used to track positions in which holdings had crossed the 5% beneficial ownership threshold or to restrict trading by 10% beneficial owners. In each of these cases, the firm promptly filed the required Schedule 13D after realizing the error or aggregate positions, but not within the required 10-day window. One firm was charged with not promptly filing an amendment Schedule 13D reflecting a material change decrease of more than 1% in beneficial ownership when the change was due to a combination of

disbursements of shares by the firm and its affiliates and an increase in the outstanding share count of the common stock.

Failure to Recognize Filing Obligation Following a Conversion Transaction: One case faulted a firm that voluntarily reported a Schedule 13D that was not timely filed for a holding in a bank holding company. The case noted that following a bank conversion transaction, all shares of common stock of the predecessor holding company were converted into shares of a new entity. The firm had been an activist investor in the predecessor holding company but had reached a settlement agreement with that company that included the bank conversion transaction. As a result, the firm believed it no longer had the purpose to effect change or influence the control of new entity; thus, the firm planned on filing a Schedule 13G. However, after consultation with outside regulatory counsel, the firm concluded that it had crossed the five percent beneficial ownership threshold after the conversion as a result of its activist strategy, and thus it should have filed a Schedule 13D. The firm subsequently filed a Schedule 13D nearly 9 months after the bank conversion transaction, which the SEC order noted was not timely.

Failure to File Timely and Accurate Filings/Amendments When Converting from 13G to 13D: One firm filed Schedule 13G as a passive investor on behalf of its affiliates 19 days (rather than 10 days) after the relevant transaction and then failed to promptly amend Schedule 13G when beneficial ownership increased to more than 10%, which was not reflected until an initial Schedule 13D was later filed. The Schedule 13D filing reflected beneficial ownership as of the prior year-end, rather than as of the date of the filing, as required, and made inaccurate representations that none of the reporting persons had effected any transactions in the relevant securities during the past 60 days when in fact transactions had occurred.

This sweep emphasizes the importance of effectively monitoring positions in which an adviser or fund manager, either individually or together with affiliates, beneficially owns 5% or more of an issuer. We strongly encourage managers that actively hold or trade public securities to implement trade rules or other compliance rules in trading systems that flag beneficial ownership that is nearing (potentially 4% or greater) so that they can more closely monitor activity that may trip that threshold. Readers should review the nuanced findings highlighted above for situations that may be similar to their business and trading activities, and take proactive steps to update policies, procedures, order management system rules, reporting and monitoring systems, compliance calendars, and other documentation as needed to avoid such violations.

See Summary - <https://www.sec.gov/newsroom/press-releases/2024-148>