

Corporate

Recent SEC Charges Show Division of Enforcement's Continued Reliance on Data Analytics and Targeted Initiatives

By: [Alexander J. May](#), [Charles D. Riely](#), and [Amy Inagaki](#)

Last week, the SEC's Division of Enforcement charged eight public companies for failing to provide sufficient information in Form 12b-25 filings as to why their quarterly or annual report could not be filed on time. The crux of the cases was that the public companies failed to disclose, as required, significant changes in results of operations in the reported period. Because each of the public companies announced a restatement less than two weeks later, the SEC charged that this information should have been disclosed pursuant to the requirements of Form 12b-25 at the time of the initial filing. This client alert describes the settled actions, and discusses how these cases highlight the continued importance of data analytics and targeted initiatives in the Enforcement Division's work.

Background

The SEC's cases were brought as a result of what the SEC referred to as a targeted initiative to find problems in the use of Form 12b-25. The form is required to be filed pursuant to the Securities Exchange Act of 1934 (the Exchange Act) when a company will file a late periodic report and it must provide reasons as to why the company cannot timely file the periodic report.^[1] Form 12b-25 requires the company to disclose the reasons for its failure to file the periodic report in reasonable detail as well as any anticipated, significant change in results of operations from the corresponding period of the last fiscal year.

The SEC alleged that each of the eight companies failed to make required disclosures. The SEC supported this allegation primarily by alleging that the eight public companies announced restatements or corrections to financial reporting within four to 14 days of filing the Form 12b-25. Such announcements were made despite the fact that the filed Form NTs did not disclose that management anticipated a significant change in quarterly income or revenue.

In bringing the cases, the SEC emphasized that the cases were the result of an initiative that relied on data analytics to identify disclosure violations. Melissa Hodgman, Acting Director of the Enforcement Division said in the press release accompanying the action that "[w]e will continue to use data analytics to uncover difficult to detect disclosure violations" and that "[t]argeted initiatives like this allow us to efficiently address disclosure abuses that have the potential to undermine investor confidence in our markets if left unaddressed."

The SEC resolved the cases against the eight public companies with relatively modest penalties. More specifically, the charged companies agreed to settle the SEC's charges and pay civil penalties of \$25,000 (for one deficient Form NT and no untimely filed reports) or \$50,000 (for either two deficient Form NTs, or one deficient Form NT combined with another untimely filed Exchange Act report) and agreed to cease-and-desist orders. At least two of the companies are no longer public, meaning that the SEC will continue to monitor filings and bring charges notwithstanding the fact that the company may no longer have outstanding securities.

Key Takeaways

The SEC's action is a reminder that the SEC sometimes uses sweeps and initiatives to address regulatory noncompliance with even technical provisions of the securities laws. The SEC staff appears

to have used data analytics to find what they believe to be a common violation in a systematic way. By filing the eight cases on the same day, the SEC was able to emphasize both the importance of filing complete Form 12b-25s and to remind companies that it would use data analytics to find disclosure failings.

The SEC's action also illustrates the caution that should be used when filing a Form 12b-25. When a public company is not able to meet its required deadline, it is commonly dealing with difficult circumstances and perhaps incomplete information. In such a circumstance, there could be a temptation to provide less than complete information. The SEC's action, though, shows that such decisions will be judged with the benefit of hindsight and provide an incentive to companies to err on the side of disclosing possible issues. Upon filing a Form NT that does not disclose any anticipated, significant change in the results of operations, companies should expect the SEC to review any announcements that follow the filing which may indicate otherwise.

[1] Public companies are required to file the SEC's Form 12b-25 "Notification of Late Filing," or "Form NT," if they will not be able to timely file a quarterly Form 10-Q or annual Form 10-K. Such Form NT must be filed no later than one (1) business day after the due date of the applicable report. The Form NT's requirements include a representation that the company could not, without unreasonable effort or expense, eliminate the reason(s) for its failure to make a timely filing, and a representation that the company will file the applicable report no later than the 15th calendar day following the prescribed due date, in the case of a Form 10-K, and not later than the 5th calendar day following the prescribed due date, in the case of a Form 10-Q.



Contact Us



Alexander J. May

amay@jenner.com | [Download V-Card](#)



Charles D. Riely

criely@jenner.com | [Download V-Card](#)



Amy Inagaki

ainagaki@jenner.com | [Download V-Card](#)

[Meet Our Team](#)

Practice Leaders

Kevin T. Collins

Co-Chair

kcollins@jenner.com

[Download V-Card](#)

Carissa Coze

Co-Chair

ccoze@jenner.com

[Download V-Card](#)

Joseph P. Gromacki

Chair, Transactional Department
and Corporate Practice

jgromacki@jenner.com

[Download V-Card](#)

Thomas A. Monson

Co-Chair

tmonson@jenner.com

[Download V-Card](#)

© 2021 Jenner & Block LLP. **Attorney Advertising.** Jenner & Block is an Illinois Limited Liability Partnership including professional corporations. This publication is not intended to provide legal advice but to provide information on legal matters and firm news of interest to our clients and colleagues. Readers should seek specific legal advice before taking any action with respect to matters mentioned in this publication. The attorney responsible for this publication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome.