

Section 13 and 16 Developments: Lessons Learned from Recent SEC Enforcement Actions

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Over the past year, the U.S. Securities and Exchange Commission (“SEC”) has intensified its focus on beneficial ownership reporting under Sections 13(d), 13(g) and 16(a) of the Securities Exchange Act of 1934 (“Exchange Act”), as well as seemingly starting to focus on enforcement of reporting obligations under Sections 13(f) and 13(h) of the Exchange Act. This alert provides an in-depth review of recent developments and lessons learned from recent SEC enforcement actions.

Overview

Sections 13(d) and 13(g) of the Exchange Act require investors who beneficially own more than five percent of any US public company’s SEC-registered voting stock to make Schedule 13D or 13G filings regarding their holdings. Section 16(a) requires “insiders” (i.e., officers, directors and beneficial owners of more than 10% of the registered voting stock of any US public company (other than a foreign private issuer)) to file Forms 3, 4 and 5 disclosing their beneficial ownership of and transactions in the company’s equity securities. Section 13(f) requires that certain “institutional investment managers” file on Form 13F if they have investment discretion over \$100 million or more of certain Section 13(f) securities (generally, U.S. listed securities), and Section 13(h) requires that certain “large traders” identify their status to the SEC and their broker-dealers via Form 13H.

Recent developments from the SEC on these filings include:

- **Rule amendments** to Sections 13(d) and 13(g), accelerating the Schedule 13D and 13G filing deadlines (previously covered in our [client alert](#) on the topic); and
- **Enforcement actions** against delinquent filers, including the most recent two “sweeps” against 34 entities and individuals, as well as comment letters from the SEC’s Division of Corporation Finance.

Together, these developments emphasize the importance of taking stock of the SEC’s various beneficial ownership requirements and the increased risk that accompanies such obligations. As noted in our [“Lessons Learned”](#) section below, the recent SEC actions suggest a shift in enforcement approach, from targeting more egregious violations toward pursuing more garden variety failures to make timely or complete filings. Public companies and investors subject to these requirements should review and consider enhancements to their processes and controls over such filings.

Schedule 13D and 13G Rule Amendments

In 2023, the SEC adopted [amendments](#) to the rules governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Exchange Act (including amendments to Schedule 13D and 13G deadlines). [Appendix A](#) contains a summary of these amended requirements, as well as the requirements under Sections 16(a), 13(f) and 13(h), which did not change.

Filers should be aware that the revised Schedule 13D deadlines have been in effect since February 5, 2024, and the revised Schedule 13G deadlines recently went into effect on **September 30, 2024**. This means that Schedule 13G filers may need to make initial or amendment filings by **November 14, 2024** (which they should assess based on the filing triggers in the new rules), and that Schedule 13D filers should remain on top of their two-business-day amendment obligations. The amendments also added a requirement that these filings use a structured, machine-readable XML-based language, which applies to all information disclosed on Schedules 13D and 13G (excluding exhibits) effective **December 18, 2024**.

Summary of Recent Enforcement Actions and Other SEC Measures

In the wake of these amendments affecting Schedules 13D and 13G specifically, the SEC has pursued an increasingly aggressive enforcement approach to violations of *all* of the beneficial ownership filing requirements under Sections 13 and 16. These enforcement actions, as well as other measures, underscore the SEC's focus on compliance with beneficial ownership reporting requirements, as articulated in this [statement](#) from Corp Fin Director Erik Gerding.

Sections 13(d), 13(g) and 16 Enforcement Sweep: Earlier this fall, the SEC [announced](#) settled enforcement proceedings against 23 public companies and public company investors, including individuals, arising out of late Section 13(d), 13(g) and/or 16(a) beneficial ownership filings. These violations ranged from one-off filings, which were late by a few weeks or few months, to years of repeatedly late or missed filings, and included actions against affiliates designated by investors as directors at public companies. This followed the SEC's 2023 [enforcement actions](#) against five publicly-traded companies for contributing to the filing failures by insiders or failing to report their insiders' filing delinquencies. The most recent actions from fall 2024, which are notable for their prosecution of lower-level infractions, are described in our [in-depth survey](#) below.

Section 16(a) Delinquencies Disclosure Enforcement: In the enforcement sweep mentioned above, two public companies were charged with contributing to their insiders' late or missed Section 16(a) filings (by maintaining insufficient procedures to file timely on their behalf) and failing to disclose the delinquent filings as required by Item 405 of Regulation S-K in their Form 10-Ks/proxy statements.

Section 13(f) and 13(h) Enforcement: A few weeks earlier, the SEC [announced](#) that one public company and eleven institutional investment managers were charged with failing to timely file Forms 13F to report that they had discretion of more than \$100 million over certain types of U.S. listed securities (called Section 13(f) securities)¹. Two of those institutional managers were also charged with failure to make filings under Section 13(h), which are required of a person whose transactions in NMS securities equals or exceeds 2 million shares or \$20 million during any calendar day, or 20 million shares or \$200 million during any calendar month. The SEC appears to have focused on filers who had with numerous late filings over a long time period, and to have assessed lower fines to those entities which self-reported.

SEC Comment Letters: In addition to bringing enforcement actions, the SEC has recently been issuing comment letters focused on the timing of Schedule 13D filings. For example, one [comment letter](#) questioned why a Schedule 13D filing was made *one month* after a term sheet in connection in a business combination was delivered, rather than within the shorter required filing deadline. The comment letter also noted that Item 4 of the Schedule 13D did not reference such term sheet, only stating that the reporting person "may" explore potential changes in the issuer's operations and management, despite the fact that the term sheet had already been

¹ The SEC publishes an official list of Section 13(f) securities quarterly.

delivered. In another recent [comment letter](#), the SEC noted that a Schedule 13D was filed more than two months late in connection with the acquisition of more than 5% of a class of equity securities in a newly public company.

Getting More Serious About Violations: An In-Depth Survey of the Most Recent Sections 13(d), 13(g) and 16(a) Enforcement Actions

The SEC's fall 2024 enforcement initiatives on Sections 13(d)/13(g) and 16(a) filings indicate the SEC is taking this area of beneficial ownership reporting more seriously than perhaps ever before, with particular focus on Schedule 13D and Section 16(a) and investments in or by domestic issuers and with readiness to pursue less severe infractions than was historically the case. White & Case reviewed each of the individual enforcement actions, and found the following:

- **Domestic vs. foreign:**
 - The actions overwhelmingly involved investments in domestic issuers, not foreign private issuers, and in the few cases where they involved investments in foreign private issuers, they were cases against large investors (two large private equity firms and one large bank).
 - There were no actions against foreign entities, except one large bank.
- **Types of filings:**
 - **14** actions involved late or missing Schedule 13Ds,
 - **8** actions involved late or missing Schedule 13Gs.
 - **4** actions involved both late or missing 13D and 13G filings.
 - **14** actions involved late or missing Forms 3, 4 or 5.
 - **11** actions involved both violations of Section 13 and Section 16.
- **Length of delinquency:²**
 - Section 13 filings. Violations ranged from nine days late to 16 years late:
 - **5** actions included filings less than one month late.
 - **10** actions involved filings between one and six months late.
 - **6** actions involved filings between six months and one year late.
 - **7** actions involved filings more than one year late.
 - Section 16 filings. Violations ranged from one day to four years:
 - **9** actions involved filings less than one month late
 - **8** actions involved filings between one and six months late
 - **5** actions involved filings between six months and one year late
 - **2** actions involved filings more than one year late
- **Sanctions:**
 - The range of sanctions varied depending on the scope of the violation, including the number of delinquent or missed filings, how overdue the filings were and other means of severity.
 - Sanctions for late or missing Schedule 13D filings ranged from **\$10,000 to \$200,000.**³
 - Sanctions for late or missing Schedule 13G filings ranged from **\$30,000 to \$225,000.**⁴

² Nearly all of the enforcement actions involved multiple delinquencies of various lengths, so these numbers add up to more than the total number of enforcement actions.

³ This range includes actions that alleged only Schedule 13D violations.

⁴ This range includes actions that alleged only Schedule 13G violations.

- Sanctions for late or missing Section 16(a) filings ranged from **\$77,000 to \$750,000**.⁵

Violations for Contributing to, or Failing to Report, Insiders' Section 16(a) Filing Failures

As noted above, the SEC also brought enforcement actions against two issuers for contributing to filing failures by their insiders and failing to report delinquent Section 16(a) filings by their insiders, as required by Item 405 of Regulation S-K in their Form 10-K/proxy statements.⁶

In one case, the issuer's disclosures did not fully comply with the requirements of Item 405 in reporting multiple delinquent filings during each of three years. Among other things, the issuer provided the names of insiders with delinquent filings and specified the number of late-filed forms, but failed to disclose as required the number of late-reported transactions (which in several cases far exceeded the number of late-filed forms for such insider). The issuer also omitted from its disclosure numerous untimely transactions and Forms 4. The SEC found that the issuer, despite voluntarily agreeing to perform certain tasks associated with ensuring timely Section 16(a) reports on behalf of its officers and directors, as well as two other greater than 10% beneficial owners, maintained insufficient practices to prevent recurrently late filings, including more than 200 untimely Form 4s.

In the other case, the issuer failed to make the required Item 405 disclosures over multiple years and was found to be the cause of its officers and directors failing to file Section 16(a) reports on a timely basis, including more than 100 untimely Form 4s. For virtually all these late-reported transactions, the issuer had received timely notification of or otherwise possessed the necessary information for such filings but failed to prepare and file the reports within the required time frame.

Lessons Learned

The latest series of enforcement actions reflects the SEC's continued focus on timely Sections 13 and 16 reporting by both insiders and public companies and demonstrates its willingness to scrutinize reporting failures irrespective of the number of delinquent filings or the time period of the delinquency. While this is not the first time the SEC has directed its enforcement focus towards beneficial ownership reporting violations, the recent actions indicate a shift from targeting more egregious violations towards going after more garden variety failures and delinquencies. Further, the SEC emphasized its use of data analytics in identifying the above filing violations, the ease of which will likely increase with the upcoming requirement that all filings be made using machine-readable XML text. Public companies and investors should closely monitor their compliance with these reporting requirements, particularly when they have undertaken an obligation to assist their insiders with their required filings. Steps companies could consider include:

- **For public companies and investors, confirm that the legal and/or compliance team responsible for filings understands the Section 13 and Section 16 reporting requirements.** Section 13 and 16 reporting can be complex, and it is important that those responsible at public companies or investors are well educated on the nuances of these requirements, to avoid missing necessary filings. For example, in one case, the investments at issue were managed by a business unit of the investor that did not typically invest in public equities, and the unit's internal processes did not timely identify the need to make the required filings. Steps should be taken to ensure that all relevant personnel are educated regarding their obligations under, as applies depending on the public company or investor's profile, Section 13(d), 13(g), 13(f), 13(h), and/or 16(a) filing obligations. This could include brokers, financial advisors and estate planning advisors who may assist the insiders in their transactions involving company securities, as these professionals may be unfamiliar with

⁵ This range includes actions that alleged only Section 16(a) violations. The largest sanctions were at a company that also had several Section 13(f) violations.

⁶ Item 405 of Regulation S-K specifically requires an issuer to disclose any late filing or known failure by an insider to file a report required by Section 16(a). The issuer may rely on a review of the Forms 3 and 4 filed during the most recent fiscal year, and Forms 5 filed with respect to the most recent fiscal year, by the issuer's insiders. A "known" failure to file includes, but is not limited to, a failure to file a Form 3, which is required of all insiders, and a failure to file a Form 5, unless the issuer receives a written representation that no Form 5 is required or otherwise knows that no Form 5 is required.

these requirements. In addition, make sure that anyone involved in these filings is aware of the new Schedule 13D and 13G filing deadlines.

- **For public companies and investors, ensure internal controls are sufficiently robust and properly functioning.** It is important that the proper systems controls are in place to catch all changes that could be filing triggers given the filing type. In many cases, internal errors, including failure to recognize filing requirements based on affiliate share ownership tracking errors, led to the delinquent filings. For example, one large investor's filing delinquencies resulted from failures of its systems intended to restrict trading in securities, misapplication by the investor's personnel of policy exceptions to its restricted lists, failures to timely identify when the investor became a 10% beneficial owner, and internal delays at the investor in gathering or verifying information for filings. In another case, the violation resulted from a reduction in the outstanding share count which caused the percentage of beneficial ownership to tip over the 5% threshold (not due to any acquisition of stock by the charged entity), which required as Schedule 13D filing to report his ownership position.
- **For public companies specifically, confirm and continue to track beneficial ownership holdings of insiders.** D&O questionnaires should be designed to elicit detailed, comprehensive information regarding equity security ownership, including asking the directly whether the individual is required to file a Form 5. In addition, keeping track of insiders' future equity grant or vesting dates, which can potentially trigger Section 16(a) filing requirements, can help with maintaining timely filings.
- **For public companies specifically, ensure your Item 405 disclosures comply with the requirements.** The SEC has turned its focus to correct Item 405 disclosures. As a reminder, Item 405 disclosure in Form 10-Ks or annual meeting proxy statements of any late filings or known failures to file must (i) identify by name each insider who failed to file on a timely basis any Forms 3, 4, or 5 during the most recent fiscal year or prior fiscal years and (ii) set forth the number of late reports, the number of late-reported transactions, and any known failure to file. As highlighted in the recent enforcement actions, the disclosure must identify all of the late-reported *transactions*, not just the number of late reported *filings*. While the instruction to Item 405(a) of Regulation S-K encourages companies to exclude the "Delinquent Section 16(a) Reports" caption if there were no late filings to report; companies may opt to include the heading even if there were no delinquent filings, as a reminder to check compliance with this item in future years.

Appendix A: Overview of Beneficial Ownership Filing Deadlines

Below are deadlines under SEC amendments effective February 5, 2024 for **Schedule 13D filings** and September 30, 2024 for **Schedule 13G filings**

Schedule 13D:

Initial Filing	5 business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.
Amendment Filing	2 business days after a “material change” (i.e., 1% acquisition or disposition or other material change) occurred.

Schedule 13G:

Initial Filing	<p><u>QIIs & Exempt Investors</u>: 45 calendar days after calendar quarter-end in which beneficial ownership exceeds 5%.</p> <p><u>QIIs</u>: Five business days after month-end in which beneficial ownership exceeds 10%.</p> <p><u>Passive Investors</u>: Within five business days after acquiring beneficial ownership of more than 5%.</p>
Amendment Filing	<p><u>QIIs, Exempt Investors and Passive Investors</u>: 45 calendar days after calendar quarter-end in which a “material change” (using the same materiality standards as under Schedule 13D) occurred.</p> <p><u>QIIs</u>: Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership.</p> <p><u>Passive Investors</u>: Two business days after acquiring more than 10% beneficial ownership, and, thereafter, increasing or decreasing beneficial ownership by 5%.</p>

In addition, as a reminder, **Section 16(a) beneficial ownership filing deadlines** (which have not been amended) are as follows:

Form 3	10 days after becoming a director, executive officer, or beneficial owner of more than 10% of a class of equity securities of a domestic issuer (or no later than the effective date of the registration statement if the issuer is registering equity for the first time).
Form 4	2 business days after the transaction date in which an insider of a domestic company trades registered securities
Form 5	On or before 45th day after the end of the domestic company’s fiscal year

For **Form 13F** filings by institutional investment managers,⁷ if the \$100 million filing threshold is met on the last trading day of any month during a calendar year, the institutional investment manager must make four Form 13F filings, one year-end filing and three subsequent quarterly filings, as follows:

Initial Filing	Within 45 days after the end of the fourth quarter (i.e., the quarter ending December 31) of the same calendar year that the \$100 million filing threshold is met.
Subsequent Filings	Within 45 days after the three quarters-ended March 31, June 30 and September 30 following the year after the filing threshold is met. ⁸

For **Form 13H** filings by large traders,⁹ deadlines are as follows:

Initial Filing	Promptly; generally within 10 days after reaching the identifying activity level.
Annual Filing ¹⁰	Within 45 days after the end of every calendar year after the initial filing. 2 business days after the transaction date in which an insider of a domestic company trades registered securities
Amended Quarterly Filing ¹¹	Promptly after the end of the calendar quarter in which any information in the last filing became inaccurate. For fourth quarter filings, large traders may satisfy this requirement by having their annual filing also designated as an amended filing, if it is filed promptly, rather than 45 days, after the end of the calendar quarter.
Reactivated Status Filing ¹²	Promptly, generally within 10 days after reaching the identifying activity level.

⁷ An “institutional investment manager” is (i) an entity that invests in, or buys and sells, securities for its own account (i.e., banks, insurance companies, broker/dealers, corporation and pension funds that manage their own investment portfolios) or (ii) an entity or natural person that exercises investment discretion with respect to the account of any other entity or natural person.

⁸ All four of these Form 13F filings are required even if – after meeting the \$100 million filing threshold – the institutional investment manager subsequently falls below such threshold. The Form 13F filing obligation is re-evaluated at the end of each calendar year. If an institutional investment manager subsequently falls below the \$100 million filing threshold on the last trading day of every month of a calendar year, then it no longer is obligated to file Form 13F filings for the subsequent year.

⁹ A large trader is a person (whether a natural person, a firm or a group) that, directly or indirectly, has investment discretion over at least one account and transacts in “NMS Securities” (generally, publicly traded equity securities) in aggregate securities transactions equal to or greater than: (i) during a calendar day, either 2 million shares or shares with a fair market value of \$20 million; or (ii) during a calendar month, either 20 million shares or shares with a fair market value of \$200 million. These two thresholds are known as “identifying activity levels.” Large traders are required to make Form 13H filings with the SEC.

¹⁰ Annual filing is required, even if an amended filing for the fourth calendar quarter of the previous year was provided. To correct any information in previous filings that became inaccurate. If no information has changed since the last Amended Quarterly Filing, no filing is required.

¹² If an inactive status filing reaches an identifying activity level again.

The following White & Case attorneys authored this alert:

Maia Gez
Scott Levi
Claudette Druehl
Danielle Herrick
Dylan Abolafia

White & Case Team Members:

A.J. Ericksen: 713-496-9688, aj.ericksen@whitecase.com
Elodie Gal: 212-819-8242, egal@whitecase.com
Maia Gez: 212-819-8217, maia.gez@whitecase.com
David Johansen: 212-819-8509, djohansen@whitecase.com
Scott Levi: 212-819-8329, scott.levi@whitecase.com
Daniel Nussen: 213-620-7796, daniel.nussen@whitecase.com
Kimberly Petillo-Decossard: 212-819-8398, kimberly.petillo-decossard@whitecase.com
Jason Rocha: 713-496-9732, jason.rocha@whitecase.com
Jonathan Rochwarger: 212-819-7643, jrochwarger@whitecase.com
Joel Rubinstein: 212-819-7642, joel.rubinstein@whitecase.com
Michelle Rutta: 212-819-7864, mrutta@whitecase.com
Elliott Smith: 212-819-7644, elliot.smith@whitecase.com
Melinda Anderson: 212-819-7002, melinda.anderson@whitecase.com
Danielle Herrick: 212-819-8232, danielle.herrick@whitecase.com
Patti Marks: 212-819-7019, pmarks@whitecase.com
Sarah Hernandez: 212-819-8429, sarah.hernandez@whitecase.com

White & Case LLP
1221 Avenue of the Americas,
Floor 49 Reception
New York, NY 10020

T +1 212 819 8200

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