



SEC Brings Enforcement Action Against Fund Manager for Single 13D Violation

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The SEC brought charges against a fund manager for 13D violations, in yet another reminder that it will pursue enforcement actions against filers for Schedule 13D violations even without a pattern of repeat violations.

On Sept. 17, 2020, the SEC announced the settlement of charges brought against an investment manager of certain private funds (“IM”) for failure to timely amend a statement of beneficial ownership report on Schedule 13D (Administrative Proceeding File No. 3-20020). [1]

The 13D Requirements

Section 13(d) of the Securities Exchange Act of 1934 requires a “beneficial owner”:

- That acquires more than 5%;
- Of a class of any voting, equity securities registered under Section 12 of the Exchange Act;
- To file with the SEC within ten days of any such acquisition; and
- A statement on Schedule 13D describing such acquisition and containing certain other information, including a description of any plans or proposals that the beneficial owner may have with respect to certain enumerated matters regarding the issuer.

After the initial filing of a Schedule 13D, Rule 13d-2(a) requires the Schedule 13D to be amended “promptly” in the event of any “material change” in the information set forth therein. “Promptly” is not defined under the rules but is generally understood to be within two business days. Under Rule 13d-2(a), an increase or decrease in beneficial ownership of 1% or more is deemed to be “material,” but Schedule 13D filers must keep in mind that an amendment must also be filed promptly upon any material change to any of the other information disclosed in the Schedule 13D, including, without limitation, the filer’s plans or proposals.

The Facts

The IM filed an initial Schedule 13D with respect to its holdings in Hanger Inc. (“Issuer”) on July 22, 2016, disclosing that it beneficially owned 6.7% of the Issuer’s outstanding shares and that it may explore a possible acquisition or restructuring of the Issuer. The IM also included certain standard “boilerplate” language reserving the right to change its intentions. The IM did not amend

its Schedule 13D until Sept. 6, 2019, after it had sold out of its entire position, which it accomplished through sales on July 1, 2019 and Aug. 8, 2019.

The SEC's Findings

The SEC found that the IM failed to amend its original Schedule 13D:

- First, when it determined that it was no longer interested in pursuing a possible acquisition or restructuring of the Issuer and that it would liquidate its position; and
- Second, when it reduced its beneficial ownership by 1%.

Without admitting or denying the SEC's findings, the IM agreed to a cease and desist order and to pay a penalty of \$100,000.

Takeaways

This administrative proceeding serves as a reminder that:

- The SEC remains focused on enforcing beneficial ownership reporting obligations, even when a filer is not engaged in a pattern of recurring delinquent behavior;
- The value of boilerplate language reserving the right to change a filer's intentions or take certain actions is limited once a filer has made a definitive determination to abandon or pursue a specific action; and
- Investment firms, even those that do not frequently file on Schedule 13D, need to have compliance procedures in place to properly monitor filing requirements and changes and events around their outstanding filings to properly update their filings in a timely manner.