PCAP Update

GOODWIN

Form 12b-25 "Notification of Late Filing" – Recent SEC's Enforcement Actions Highlight Continued Focus on Late Filing Disclosures

On August 22, 2023, the Securities and Exchange Commission (the "SEC") announced that it had instituted and settled proceedings against five public companies for failing to disclose in Form 12b-25 that their request for seeking a delayed quarterly or annual reporting filing was caused by an anticipated restatement or correction of prior financial reporting. See SEC.gov | SEC Charges Five Companies for Failure to Disclose Complete Information On Form NT. In April 2021, the Commission identified and charged eight companies for similar violations. See SEC.gov | SEC Charges Eight Companies for Failure to Disclose Complete Information on Form NT.

These charges are a reminder that filing a Form 12b-25 "Notification of Late Filing," commonly known as "Form NT," is not only a necessary procedural step when an issuer will be delayed in filing a Form 10-K, Form 10-Q, Form 20-F or other specified report; it is also a decision point for making potentially sensitive disclosure to the market and should reflect input from senior management and in house and outside counsel, as well as the company's audit committee and disclosure committee (if one exists). In the restatement context, the company's auditors also likely will want to review and comment on the draft Form NT prior to filing. See the end of this update for a more detailed discussion of the requirements of Rule 12b-25 and Form NT.

SEC Reminds Public Companies that All Filings Must Be Truthful and Complete, Even Form NTs to Extend a Periodic Report Deadline for a Few Days

The principal violations are the same in each of these five situations. Specifically, the SEC orders found that each of the companies announced restatements or corrections to financial reporting within 3-21 days of their Form NT filings but failed to provide details disclosing that anticipated restatements or corrections were among the principal reasons for their late filings. The orders also found that the companies failed to disclose on Form NT, as required, that management anticipated significant changes in results of operations for the quarter as compared to the same quarter in the prior year. In each of the cases, the company failed to disclose in its Form NT:

- In sufficient detail under the circumstances presented, why the company could not timely file its Form 10-Q;
- That the company anticipated significant changes in its results of operations for the relevant fiscal quarter, compared to the comparable quarter of the prior fiscal year, and to provide an explanation of the changes; and

- That the discovery, and ongoing correction, of errors in the company's prior Form 10-Q report(s) were among the principal reasons that it was unable to file timely its Form 10-Q report for the most recently completed fiscal quarter.

Some of the specific details and violations differ, but the three points above are common to each of the five enforcement actions. Thus, the SEC's orders found that the public companies violated Section 13(a) and Rule 12b-25 under the Securities Exchange Act of 1934 (the "Exchange Act") by failing to make the required Form NT disclosures. While the penalties were modest—ranging from $35,000 to $60,000—being subjected to an SEC enforcement investigation can be time consuming and expensive. Additionally, it is important to note that these are "strict liability" violations. In other words, the SEC does not need to have evidence of bad intent (i.e., scienter); nor does it need to prove that the company was negligent. Rather, the SEC merely needs to establish a material omission from the Form NT disclosures. Further, these enforcement actions highlight that Form NT is more than just a cursory formality for the notification of late filings. Therefore, public companies should pay careful attention to both the disclosure requirements of Form NT and the representations they are making to the SEC in connection with these filings. Careful drafting of Form NT disclosures is also critical to put public companies in the best position possible to defend against class action litigation often filed by company stockholders based upon Form NT disclosures and prior/subsequent disclosures.

A public company that finds itself in a position requiring the filing of a Form NT may face disclosure and investor relations challenges as it balances the requirements of Form NT with the need to investigate/assess the financial issues or operational circumstances that are causing it to miss the initial reporting deadline. Through these enforcement actions, the SEC has made clear that a public company cannot be silent about the reason for the delay or provide only vague or ordinary course disclosure in a Form NT that does not reveal the underlying cause for the late filing when it is due to a restatement or correction of financial information. Even when the underlying reason for a late filing is unrelated to a potential restatement or correction of financial information, companies should pay close attention to whether their Form NT disclosure provides reasonable detail as to the nature of the delay and is consistent with the information provided in the subsequent filing.

Rule 12b-25 and Form NT

Rule 12b-25 requires a public company that is unable to meet the reporting deadline for an annual or quarterly report to file a Form NT no later than one business day after the due date of the report. In its Form NT filing, a company must explain in reasonable detail why it was unable to file the report on time and represent to the SEC that the reasons for the delay could not have been eliminated without "unreasonable effort or expense." Form NT also requires a company to indicate whether it anticipates any significant change in its results of operations from prior periods and either provide a narrative and quantitative explanation of the expected change or state why a reasonable estimate cannot be provided.

After filing a Form NT, a company has five calendar days (for quarterly reports) or fifteen calendar days (for annual reports) from the original due date to file the report in order to be deemed to have filed on a timely basis and remain in compliance with its reporting obligations under Section 13(a) of the Exchange Act. Failure to be in compliance with these reporting obligations removes S-3 registration statement eligibility.

Contacts

Jonathan H. Hecht
Partner, Complex Litigation & Dispute Resolution
+1 202 346 4439
JHecht@goodwinlaw.com

Caroline H. Bullerjahn
Partner, Securities Litigation
+1 617 570 1359
CBullerjahn@goodwinlaw.com

Folake K. Ayoola
Counsel, Public Company Advisory
+1 202 346 4167
FAyoola@goodwinlaw.com

James H. Hammons Jr.
Knowledge Management Lawyer
+1 617 570 1135
JHammons@goodwinlaw.com