KAYE | SCHOLER

March 18, 2015

Securities Litigation Alert

Disclose Early and Disclose Often: SEC Brings Enforcement Actions for Failure to Disclose Potential Going Private Transactions in a Timely Manner

Last week the SEC charged eight officers, directors and large shareholders of public companies with violations of the Section 13(d) of the Exchange Act for the failure to amend their stock-ownership disclosures to reflect steps taken to effectuate potential going private transactions. Each respondent agreed to settle the proceedings by paying a financial penalty, which ranged from $15,000 to $75,000. These cases demonstrate that the SEC is paying close attention to stock ownership disclosure requirements and that large shareholders of public companies need to carefully consider whether certain steps they take may trigger additional disclosure requirements or amendments.

Section 13(d) of the Exchange Act requires the filing of a Schedule 13D—known as a "beneficial ownership report"—when an individual or group acquires the beneficial ownership of more than five percent of a voting class of a company's equity securities. A Schedule 13D is required to disclose a variety of information, including the identity and contact information of the beneficial owner and the "purpose or purposes of the acquisition of securities of the issuer." Exchange Act Rule 13d-101 further provides a list of "plans or proposals" relating to the purpose of the transaction which must be disclosed, including plans for an "extraordinary corporate transaction, such as a merger, reorganization or liquidation" or plans for a going private transaction. In addition, Section 13(d)(2) and Exchange Act Rule 13d-2(a) require that an amendment be filed "promptly" when there is any material change in the information disclosed in a Schedule 13D.

Accordingly, large shareholders are required to disclose plans to effectuate going private transactions. It was unclear, however, exactly when those disclosure requirements were triggered. In the cases announced last week, the SEC has taken the aggressive position that taking even small steps towards a going private transaction could result in a material change from prior disclosures requiring an amendment. These cases further demonstrate that the SEC will bring enforcement actions for failure to amend promptly, even if an amendment is eventually filed.

In one case, the controlling shareholder of a company engaged in "serious discussions" and submitted a "concept paper" disclosing its intention to privatize the company. The SEC found the discussions and concept paper constituted "significant steps" towards a going private transaction requiring an amendment to be filed. In another case, the SEC found that the shareholder's statement to management that it would support and assist management in efforts to take the company private, including by securing waivers from other shareholders, required an amendment to be filed. In another, the SEC considered a feasibility study and discussions with other significant shareholders regarding a going private transaction to constitute a material change requiring disclosure. In these cases, the SEC found amendments filed eight, five and ten months after the actions taken to not be timely.

These cases indicate a new focus by the SEC Division of Enforcement on potential violations of the disclosure requirements under Section 13(d) of the Exchange Act, even if the penalties obtained are relatively small. According to Andrew J. Ceresney, the Director of the Division of Enforcement, "[s]tale, generic disclosures that simply reserve the right to engage in certain corporate transactions do not suffice when there are material changes to those plans, including actions to take a company private." Thus, shareholders who are subject to Schedule 13(d) reporting need to consider whether even minimal steps taken towards a going private transaction, such as informing management or a feasibility study, will trigger disclosure requirements. Waiting to file an amendment until a transaction is close to being finalized could potentially result in a shareholder hearing from the newly energized Division of Enforcement.

Contact Us

Catherine B. Schumacher
+1 212 836 8760
catherine.schumacher@kayescholer.com

Daphne Morduchowitz
+1 212 836 8708
daphne.morduchowitz@kayescholer.com

Joseph F. Clark
+1 212 836 7380
joseph.clark@kayescholer.com