THE CLS BLUE SKY BLOG
COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS
Editor-At-Large
James D. Nelson

Editorial Board
John C. Coffee, Jr.
Edward F. Greene
Robert J. Jackson, Jr.
Kathryn Judge

Wachtell Lipton discusses SEC Charging Schedule 13D Filers for Failing to Timely Disclose Steps Taken to Pursue Going-Private Transactions

By David A. Katz and Alison Z. Preiss
April 5, 2015

The Securities and Exchange Commission announced [several weeks ago] that it had charged eight directors, officers and major stockholders for failing to timely disclose steps taken to take their respective companies private in their beneficial ownership reports on Schedule 13D. The orders issued by the SEC indicate the SEC staff became aware of the violations in the course of their review of proxy and Schedule 13E-3 transaction statements, which described the steps taken in the required disclosures regarding the background of the transactions. The orders note that emails and other contemporaneous communications clearly indicate the steps taken that had not been properly disclosed. The orders issued by the SEC (to which the offending parties consented) resulted in cease-and-desist orders and payment of civil penalties.

Exchange Act Rule 13d-101 requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" and further provides a list of plans or proposals that a reporting person may have that would trigger a reporting obligation, which includes additional purchases of securities or a going-private transaction by a public company. A Schedule 13D filer is further required pursuant to Rule 13d-2(a) to promptly (within two business days) amend its Schedule 13D when there are material changes or developments in the information previously disclosed. This includes changes to qualitative disclosures providing narrative in response to line item requirements, including to "stale, generic disclosures" indicating that a beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in the rule.

While it is clear that a filer must amend its Schedule 13D when a plan with respect to a disclosable matter has been formulated, the SEC provided additional guidance in the orders noting that, "depending on the facts and circumstances, . . . an amendment also may be required *before a plan has been formulated* because the obligation to revise arises . . . promptly after a 'material change occurs in the facts set forth in the' Schedule 13D." According to the orders, the directors, officers and major stockholders took steps ranging from considering the feasibility of a going-private transaction and engaging in preliminary discussions with advisors to forming a consortium of stockholders and

informing company management of their intention to take companies private – but did not amend their Schedule 13Ds until several months, or in some cases, years, later.

The SEC's latest actions serve as an important reminder for beneficial owners subject to Section 13(d) to be mindful that preliminary planning, or even mere consideration, of a transaction involving an issuer's securities may trigger a requirement to amend a Schedule 13D (or convert a Schedule 13G to a Schedule 13D filing) to make public disclosure of its plans and intentions. Filers cannot rely on generic disclosures regarding the possibility of engaging in certain transactions to satisfy legal requirements in the face of material changes or developments. Moreover, Section 13(d) does not include a state of mind requirement and therefore a failure to file, even if inadvertent, could result in meaningful penalties.

The preceding post comes to us from Wachtell, Lipton, Rosen & Katz (WLRK) and is based on a client alert circulated by WLRK on March 17, 2015.