

SEC Charges Eight Companies and Signals Need for Better Disclosures About Delayed Filings

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On April 29, 2021, the Securities and Exchange Commission (the “SEC”) announced settled charges against eight public companies that filed notifications of late filings on Form 12b-25 (more commonly known as “Form NT”) without disclosing in those filings a pending restatement or correction of financial statements.¹

These settlements are a reminder that filing a Form NT is not only a necessary procedural step when an issuer will be delayed in filing a 10-K, 10-Q, 20-F or other specified report;² it is also a decision point for making potentially sensitive disclosure to the market, and should reflect input from both a company’s IR and legal departments. The fines imposed in connection with these settlements ranged from \$25,000 to \$50,000 based on the number of deficient Form NTs filed.

Rule 12b-25 and Form NT: What do they require?

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.

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¹ See, “SEC Charges Eight Companies for Failure to Disclose Complete Information on Form NT,” available [here](#).

² Form NT filings are applicable to filings of delayed annual reports, semi-annual reports or transition reports on Form 10-K, 20-F, 11-K, N-CEN, or N-CSR.



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.

Balancing Form NT's Disclosure Requirements with the Circumstances Causing the Late Filing

These enforcement actions highlight that Form NT is more than just a cursory formality for the notification of late filings. 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.

In each of these cases, the SEC found that these companies' Form NT disclosures were insufficient because Form NT requires a company to specifically state whether it anticipates any significant change in its results of operations for prior periods and either address these material changes in narrative and quantitative form or explain why reasonable estimates cannot be provided. The Form NT explanations provided by some of the companies subject to these charges were likely true, including the fact that they were still completing and obtaining information necessary to complete the preparation of their financial statements. But the SEC found that the disclosures were insufficient because they did not mention that the company was working on a restatement, and because they did not address whether the company anticipated any significant change in its result of operations. The fact that these companies announced a restatement between 4 to 14 days after their Form NT filings led the SEC to find that they had failed to disclose that anticipated restatements or corrections of financial information were among the principal reasons for the late filings, which "kept investors in the dark regarding the unreliability of the company's financial reporting."

A 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 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 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.

Data Analytics and SEC Enforcement

Of additional interest, the SEC announced that these violations were uncovered by a data analytics initiative focused on Form NT filings by companies that announced restatements or corrections to their financial reporting shortly after the filing of a Form NT. Data analytics tools have been used by the SEC for quite some time. These cases are an interesting example of the enforcement division using such tools to detect disclosure violations that might otherwise have taken longer to uncover or might have gone unnoticed. As Melissa R. Hodgman, acting director of the SEC's Enforcement Division stated, "Targeted initiatives like this allow [the SEC] to efficiently address disclosure abuses that have the potential to undermine investor confidence in our markets if left unaddressed."

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