

SEC Charges Audit Firm BF Borgers With Fraud

MAY 13, 2024

On May 3, 2024, the Securities and Exchange Commission ([SEC](#)) announced charges against audit firm BF Borgers CPA PC ([BF Borgers](#)) and its owner, Benjamin F. Borgers, of deliberate and systemic failures to comply with Public Company Accounting Oversight Board ([PCAOB](#)) standards in its audits and reviews incorporated in over 1,500 SEC filings from January 2021 through June 2023, in what the SEC [called](#) “one of the largest wholesale failures by gatekeepers in our financial markets.” In addition to monetary fines of \$14 million, the SEC barred BF Borgers and Mr. Borgers from appearing or practicing before the SEC as an accountant.

Among a host of violations detailed in its [order](#), the SEC found that BF Borgers falsely documented planning meetings that never actually occurred, had a single staff member use multiple usernames to sign off on all audit workpapers within seconds of each other rather than the members of the audit team, and failed to obtain the required engagement quality review for financial statements included in hundreds of filings with the SEC. The SEC also found that Mr. Borgers failed to adequately supervise and review the work of the engagement team. Specifically, Mr. Borgers failed to inform the engagement team of important details of the audit procedures they were to perform, to hold audit planning meetings for any of BF Borgers’s audit engagements, and to review important workpapers for many audits. According to the SEC’s order, for 369 BF Borgers clients whose public filings from January 2021 through June 2023 incorporated BF Borgers’s audit reports and reviews, at least 75% of the filings incorporated audit reports and/or reviews by BF Borgers that did not comply with PCAOB standards.

KEY TAKEAWAYS FOR IMPACTED ISSUERS

Engagement of New Auditors and Form 8-K

Issuers that had previously retained BF Borgers will be required to engage new auditors and file a Form 8-K announcing a change in their certifying accountant under Item 4.01 within four business days of the date of BF Borgers’s resignation or dismissal. In lieu of providing a letter from BF Borgers stating whether it agrees with the disclosures required to be included in the Form 8-K under Item 304 of Regulation S-K, issuers may include a statement that their former auditor is not currently permitted to appear or practice before the SEC. In addition, if a new auditor is not appointed within four business days of the date of BF Borgers’s resignation or dismissal, an additional Form 8-K will need to be filed by the issuer under Item 4.01 disclosing the appointment of a new auditor within four business days of such appointment.

Periodic Reports

Periodic reports filed on or after May 3, 2024, the date of the SEC's order, may not include audit reports or financial information that has been audited or reviewed by BF Borgers. Impacted issuers will be required to engage a new qualified, independent, PCAOB-registered public accountant to audit or review such financial information. Registrants that require additional time to file their periodic reports following the termination of BF Borgers should file a Form 12b-25 no later than one business day following the filing deadline of such report in order to obtain a limited extension of the applicable filing deadline. If additional time beyond the applicable Rule 12b-25 grace period is needed, issuers should proactively communicate this to the SEC staff and to the staff of any exchange where their securities are listed.

While previous filings that included financial information audited or reviewed by BF Borgers do not necessarily need to be amended, the SEC advised issuers in a staff statement accompanying the order to consider whether their filings need to be amended to address any reporting deficiencies arising from the engagement of BF Borgers.

Registration Statements

The SEC further advised in its staff statement that it will not grant a request to accelerate the effectiveness of a Securities Act registration statement that contains financial information reviewed or audited by BF Borgers. Instead, before the SEC will grant a request for acceleration, the registrant must file a pre-effective amendment to include financial information reviewed or audited by a qualified, independent, PCAOB-registered public accountant that is permitted to appear or practice before the SEC. In addition, any impacted issuer that has submitted a draft registration statement for nonpublic review that includes an audit opinion or consent from BF Borgers must engage a qualified, independent accountant that is permitted to appear or practice before the SEC to audit the required financial information before publicly filing the registration statement.

The SEC also reminded registrants with an effective registration statement that sales must be preceded or accompanied by a Section 10(a)-compliant prospectus, which must not include an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. Accordingly, any issuers that relied on an audit opinion from BF Borgers in their effective registration statements should no longer use the impacted registration statements.

Regulation A Offering Statements

Similarly, issuers with a pending Regulation A offering statement that is required to include audited financial statements and such financial statements were audited by BF Borgers will need to engage a new qualified, independent accountant to audit such financial statements and file a pre-qualification amendment including the same. As advised by the SEC staff, impacted issuers with ongoing Regulation A offerings should consider whether their qualified offering statement includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

Potential Litigation

The SEC order also notes that BF Borgers's conduct caused certain issuer and broker-dealer clients to violate Sections 13(a), 15(d), 17(a), and 17(e) of the Exchange Act by filing financial statements that had not been audited in accordance with PCAOB standards. The SEC has not brought any actions against clients of BF Borgers to date and the SEC order does not indicate that clients were or should have been aware of BF Borgers's misconduct. However, the SEC and private litigants could bring claims against issuers on the theory that the clients knew or should have known about BF Borgers's failure to conduct audits in compliance with PCAOB standards. In addition, private litigants may try to pursue claims alleging violations of Section 10(b) of the Exchange Act or Section 11 or Section 12 of the Securities Act as a result of the issuer's misstatement that their financial statements were audited by BF Borgers in accordance with PCAOB standards.

Issuers that used BF Borgers will also have to address other potential implications of the SEC's order, including the impact on financial statements audited or reviewed by BF Borgers delivered pursuant to contractual obligations.

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