



Companies with Company Stock Funds in 401(k) Plan or ESOP Should Review Compliance in Light of Recent SEC Enforcement Actions

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Most public companies offer a Company Stock fund investment option under their 401(k) plans and non-qualified excess 401(k) plans. On September 10, the [SEC announced enforcement actions](#) against 34 companies and insiders (directors, officers, and 10% owners) for failing to file timely reports for stock transactions. All but one settled, with cease-and-desist orders and monetary penalties ranging from \$25,000 to \$150,000. The enforcement actions came without warning, after more than a decade of little or no SEC enforcement in this area.

Commentators are not interpreting this as a sea change as to late filings where there is no pattern or flagrant violations, but it remains unclear what the SEC might do going forward. Therefore, nearly all public companies are carefully reviewing their compliance procedures and filing history (warning: shameless business plug appears next), often with the help of outside counsel like us. *Ideally, management will have initiated this review before board members ask about it* (as the surprise Enforcement Actions were widely reported in the business press).

In our experience, most companies have very effective procedures for reporting stock awards to, and stock sales by (including on vesting or exercise), officers and directors. However, some companies that offer a company stock fund investment option under their 401(k) plan and non-qualified excess 401(k) plan could benefit from a check-up. For those of you not expert in the area, Section 16(a) of the Securities Exchange Act of 1934 requires that “insiders” must electronically file a Form 4 *Statement of Changes of Beneficial Ownership of Securities* with the SEC on or before the 2nd business day after nearly any transaction involving company stock. Examples of transactions that an insider must report include:

- Grants of stock options
- Cashless exercise of stock options (and any sale of shares)
- Grants of restricted stock or RSUs
- Vesting (settlement) of restricted stock or RSUs
- Open market purchases or sales of company stock
- Transfers of shares from insider’s trust to a spouse’s trust

- “Discretionary Transactions” under a 401(k) plan, ESOP, Non-qualified excess benefit plan, or stock purchase plan (ESPP).

As if the threat of litigation stemming from the Supreme Court’s decision in *Fifth Third Bancorp v. Dudenhoeffer* wasn’t enough, it **sure would be a good time to check your filings and compliance!**

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