

Key Takeaways from SEC Charges Against Former View CFO

News

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On July 3, the US Securities and Exchange Commission's (SEC) filed negligence-based charges against a California-based manufacturer of smart windows and its CFO for failing to disclose \$28 million in warranty-related liabilities. Partners Jennifer Lee and Charles Riely, both of whom served as Assistant Directors in the SEC's Division of Enforcement, share insight into how the SEC's Enforcement Division may be thinking through key issues:

- 1. The SEC appears more willing to litigate negligence-based claims against senior executives:** This is a rare instance of Enforcement litigating standalone, negligence-based charges against an individual. Negligence entails significant litigation risk and would likely require evidence of what a reasonable CFO would do under similar circumstances. Significantly, there is no specific allegation that the CFO benefitted from the company's failure to disclose the liability.
- 2. A CFO's reliance on accounting/finance may not be enough to avoid charges:** The complaint alleges that the CFO learned of a fact that was important to the warranty analysis but failed to inform the company's accounting and finance personnel when their accounting presentation relied on a different factual assumption. However, there is no specific allegation that the CFO understood the accounting treatment for warranty liabilities, much less the significance of the fact to the warranty analysis. The allegations focus on the CFO's apparent failures in overseeing his team preparing the analysis.
- 3. The SEC may not be seeking SOX 304 clawbacks in certain circumstances:** This case does not seek SOX 304 remedies from the CEO or CFO despite the restatement and suggests that Enforcement might be exercising discretion where the conduct is negligence.
- 4. The main incentive for cooperation for companies appears to be no penalty, and the SEC is reluctant to agree to reduced charges:** The company apparently self-reported, remediated, and cooperated, but still had to agree to negligence-based fraud charges to resolve the action.

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