

Regulatory and Enforcement Alert

Recent SEC Action Serves as a Powerful Reminder of the Requirements to File Form 13F

February 27, 2023

Last week, the Securities and Exchange Commission (the “**SEC**”) announced a settled enforcement action against The Church of Jesus Christ of Latter-day Saints (the “**Church**”) and Ensign Peak Advisors Inc. (“**Ensign Peak**”), a non-profit entity operated by the Church.¹ The SEC found that Ensign Peak failed to file Forms 13F from 1997 through 2019 and filed other forms intended to obscure the Church’s investment portfolio and Ensign Peak’s control over investment decisions. According to the SEC’s order, Ensign Peak, with the Church’s knowledge and approval, created shell LLCs to file Forms 13F while it continued to exercise investment discretion over the reportable securities. The SEC also found that the Forms 13F filed by the shell LLCs falsely stated that the LLCs had sole investment and voting discretion over the securities. Notably, each LLC entered into investment management agreements purporting to assign the LLCs with the authority to manage the securities; however, Ensign Peak failed to transfer *actual* investment discretion to the LLCs, notwithstanding the agreements.

Ensign Peak agreed to pay a \$4 million penalty to settle the SEC’s charges that it violated Section 13(f) of the Securities Exchange Act of 1934 (the “**Exchange Act**”), and Rule 13f-1 thereunder. The Church agreed to pay a penalty of \$1 million to settle charges that it caused Ensign Peak’s violations through its knowledge and approval of the use of the shell LLCs. Ensign Peak and the Church neither admitted nor denied the SEC’s findings.

Key Takeaways

By bringing a public enforcement action of this type, the SEC is demonstrating its intent to penalize firms (and potentially individuals) that fail to comply with its public market disclosure requirements. Although the SEC’s decision to bring charges in this case was likely influenced by the size of Ensign Peak’s misreported investment portfolio (approximately \$32 billion in 2018), and what the SEC found to be an attempt to circumvent the reporting requirements, the action highlights the importance of entities and individuals ensuring that their Form 13F reporting accurately reflects how investment discretion over their portfolios is exercised in practice.

This matter also demonstrates the importance of entities and individuals that may not otherwise consider themselves to be “institutional investment managers” to ensure they are in compliance with Rule 13f-1. The definition of “Institutional Investment Manager” for purposes of Rule 13f-1 is far broader than the term itself may indicate, encompassing persons wholly unaffiliated with any institution or SEC-registered investment adviser. Although reports on Forms 13F make market information public on a relatively delayed timeline, compared to

¹ See [SEC Order](#) (February 21, 2023).

Forms 13D and 13G, we believe the SEC will likely continue to take an aggressive approach toward actions it perceives as having the effect of withholding public market information from investors.

A Reminder of the Form 13F Reporting Requirements

Section 13(f) of the Exchange Act requires certain persons that exercise investment discretion over accounts that own publicly traded or exchange-listed securities² (“**13F Securities**”), with an aggregate fair market value in excess of \$100 million, to report their holdings on a quarterly basis on Form 13F. Rule 13f-1 under the Exchange Act imposes a filing requirement on all “Institutional Investment Managers,” including (i) any entity that either invests in, or buys and sells, securities for its own account or that of any other natural person or entity; and (ii) any natural person who exercises investment discretion over the account of any other natural person or entity, (a “**Reporting Person**”).³ For example, banks, broker/dealers, investment advisers and corporations managing their own investment portfolios are all considered Institutional Investment Managers under Rule 13f-1. While Form 13F filings are typically available to the public, the SEC is precluded from publicly disclosing information from a Form 13F filing that identifies securities held by the account of a natural person or an estate or trust,⁴ and other Reporting Persons may request confidential treatment or delayed public disclosure of information provided in their Form 13F filings.⁵

A Reporting Person is deemed to exercise investment discretion if (i) the person has the power to determine which securities are bought or sold for the account under management; or (ii) the person makes decisions about which securities are bought or sold for the account, even if another person is responsible for the investment decisions.⁶ In addition, a Reporting Person is deemed to exercise investment discretion with respect to all accounts over which any person under its control exercises investment discretion.⁷ In circumstances where two or more Reporting Persons share investment discretion over the same investment portfolio,⁸ each Reporting Person has an independent reporting obligation for the 13F Securities in that portfolio. However, to avoid duplicative reporting of the same 13F Securities, one Reporting Person may file a 13F Holdings Report, listing all 13F Securities over which it and the other Reporting Person(s) share investment discretion, while the other Reporting Person(s) would file a 13F Notice, indicating that the 13F Securities over which it exercises investment discretion are reported on a 13F Holdings Report filed by another Reporting Person.

Once the aggregate fair market value of 13F Securities in a Reporting Person’s discretionary accounts exceeds \$100 million, a Form 13F must be filed (1) within 45 days after the end of the calendar year and (2) within 45 days

² See [Official List of Section 13\(f\) Securities](#). The SEC publishes a comprehensive list of 13F Securities on its website each quarter. In addition, the SEC staff has provided, and periodically updates, responses to [Frequently Asked Questions About Form 13F](#).

³ See Securities Exchange Act of 1934, § 13(f)(6)(A).

⁴ See Exchange Act § 13(f)(4).

⁵ See Form 13F, “Instructions for Confidential Treatment Requests.”

⁶ See Exchange Act Rule 13f-1(b) and Exchange Act § 3(a)(35).

⁷ See Exchange Act Rule 13f-1(b).

⁸ For example, as a result of a sub-advisory agreement or a direct or indirect control relationship.

after the end of the first three quarters of the following calendar year. This reporting obligation remains even if the aggregate fair market value of the 13F Securities in the Reporting Person's discretionary accounts falls below \$100 million during the calendar year. A Reporting Person may cease filing Forms 13F if the aggregate fair market value of the 13F Securities over which it has discretion remains below \$100 million on the last calendar day of each month during a calendar year.

For further information about this Alert, please contact the following authors:

WASHINGTON, D.C.

David W. Blass
+1-202-636-5863
david.blass@stblaw.com

David Nicolardi
+1-202-636-5571
david.nicolardi@stblaw.com

NEW YORK CITY

Meredith J. Abrams
+1-212-455-3095
meredith.abrams@stblaw.com

Humza Rizvi
+1-212-455-7654
humza.rizvi@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.