

PUBLICATION

Nasdaq Proposes Rule Addressing Compensation Committee Independence, Smaller Reporting Company Exemptions [Ober|Kaler]

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A periodic bulletin keeping small businesses informed about current developments in securities law and related matters.

Two recent SEC enforcement cases continue to remind us that the SEC's anti-fraud enforcement program is alive and well, and that the anti-fraud provisions of the federal securities laws apply to private companies as well as public companies.

First, on January 18, the SEC filed securities fraud charges against BankAtlantic Bancorp, the holding company of Florida's BankAtlantic, and its Chairman and CEO Alan Levan, in connection with alleged false and misleading statements and improper accounting in order to hide problems with the bank's commercial residential real estate land acquisition and development portfolio during the beginning of the financial crisis in 2007. According to the SEC's complaint, BankAtlantic and Mr. Levan knew that a large portion of the portfolio was deteriorating in early 2007 because many of the loans required extensions due to the borrower's inability to meet their obligations on the loans. Some loans were kept current only by extending the loan terms or replenishing the interest reserves from an increase in loan principal. Further, many of the loans had been internally downgraded. However, during the first two quarters of 2007, despite being aware of these issues, the company's public filings contained only general risk disclosure about what could happen if Florida's real estate downturn continued and no discussion of the existing problems in the commercial residential loan portfolio. According to the SEC, the downward trend already occurring in the loan portfolio was a "known trend that should have been disclosed in the Management's Discussion and Analysis (MD&A) section of [the company's] periodic filings." According to the complaint, similar misleading statements about the health of the loan portfolio were made on earnings calls. In addition, after the problems were disclosed, according to the complaint, BankAtlantic and Mr. Levan tried to sell some of the loans, but concealed the attempted sale from auditors and investors and improperly did not account for the loans as "held for sale" in order to avoid having to write the loans down and take an immediate loss in accordance with GAAP. As a result, the company's 2007 Form 10-K "materially understated its net loss."

In the second case, the SEC earlier this month filed an enforcement action against Stiefel Laboratories Inc. and Charles Stiefel, its former chairman and CEO, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder in connection with a fraudulent stock buyback scheme. The complaint alleges that Stiefel Labs, a private company, and Mr. Stiefel, defrauded Stiefel Labs' shareholders, who were mainly current and former employees, by buying back stock at "severely undervalued prices" by failing to disclose material, nonpublic information that "would have alerted shareholders that their shares were worth much more than reported."