ALERT MEMORANDUM

SEC Fines Icahn for Not Disclosing Margin Loans and Pledges

August 22, 2024

On August 19, 2024, the U.S. Securities and Exchange Commission instituted cease-and-desist proceedings against each of Icahn Enterprises L.P. ("**IEP**") and IEP's founder, officer and controlling shareholder, Carl C. Icahn, for failing to disclose material information about pledges by Mr. Icahn of IEP depositary units to secure his obligations under personal margin loan agreements. Without admitting or denying the findings of the SEC, IEP and Mr. Icahn agreed to cease and desist from future violations of Section 13 of the Exchange Act (and certain rules thereunder) and to pay US$1,500,000 and $500,000, respectively, in civil money penalties to settle the proceedings.[1]

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The outcome of these proceedings serves as a reminder of the importance of making complete, accurate and timely disclosure of required information, and having in place robust policies regarding the identification and disclosure of share pledges.

[1] See In the Matter of CARL C. ICAHN, Exchange Act Release No. 100756, File No. 3-22012 (SEC August 19, 2024), available at: https://www.sec.gov/files/litigation/admin/2024/34-100756.pdf; In the Matter of ICAHN ENTERPRISES L.P., Exchange Act Release No. 100755, File No. 3-22011 (SEC August 19, 2024), available at: https://www.sec.gov/files/litigation/admin/2024/34-100755.pdf.

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The Respondents

IEP is a publicly-traded holding company with subsidiaries in various industries, including automotive, real estate and pharma, and also invests in public equities through two affiliated private funds (the "**IEP Funds**"). Carl C. Icahn is the founder and a named executive officer of IEP, as well as the Chairman of the Board of Icahn Enterprises G.P., the general partner of IEP. He and his wholly-owned entities (collectively, the "**Icahn Group**") have been IEP's controlling shareholders since the 1990s and have collectively owned approximately 85% to 92% of IEP's outstanding depositary units between 2018 and 2023. As of December 31, 2023, they also owned approximately 40% of the IEP Funds.

Mr. Icahn's Margin Loans and Unit Pledges

Since at least December 31, 2018, Mr. Icahn had entered into sizeable personal margin loans with various bank lenders and pledged IEP units and interests in the IEP Funds in their favor to secure his obligations under those loans. The SEC found that from December 31, 2018 through to August 19, 2024, Mr. Icahn had pledged between 51% and 82% of IEP's outstanding units as collateral for his personal loans. Certain of his wholly-owned entities had also guaranteed Mr. Icahn's obligations and pledged IEP units to secure these guarantees. The Icahn Group had reported its ownership of IEP units by filing an initial Schedule 13D in the 1990s and had amended it sporadically thereafter to disclose, in general terms, Icahn's pledge of IEP units as collateral for personal margin loans.

The SEC's Findings

Despite Mr. Icahn's entry into (and amendment of) numerous personal margin loans and the Icahn Group's multiple pledges of IEP units and interests in the IEP Funds over the years, Mr. Icahn failed, until July 10, 2023, to amend his Schedule 13D to disclose the terms of his margin loan agreements, the affiliate guarantees and the unit pledges as required by Items 6 and 7 of Schedule 13D. The SEC found that this conduct violated the provisions of Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) thereunder. In so doing, the SEC rejected Mr. Icahn's argument that he had disclosed his various margin loan agreements and amendments to his advisors, noting that "Icahn's disclosures [did] not excuse his violations because an individual retains legal responsibility for compliance with the filing requirements, including the obligation to assure that the filing is accurately made."

Additionally, the SEC found that IEP was required to disclose in its Form 10-K the existence of Mr. Icahn's pledge of IEP units and the number of units so pledged pursuant to Item 403(b) of Regulation S-K given Mr. Icahn's status as director of IEP's general partner and named executive officer of IEP, but that IEP failed to do so for at least the years ended December 31, 2018 through December 31, 2020 in violation of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder. The SEC rejected IEP's claim neither IEP nor its advisors were aware of the existence of the pledges.

Takeaways

The outcome of these proceedings serves as a stark reminder to securityholders and issuers alike of the importance of making complete, accurate and timely disclosure of required information, and having in place robust policies regarding the identification and disclosure of share pledges and other security arrangements.

The proceedings also point up that general disclosure of pledges may be insufficient—while Icahn had previously disclosed that the Icahn Group had pledged IEP units as collateral, prior to 2023, the number of units pledged was not disclosed. In fact, the Icahn Group had pledged a majority of outstanding IEP units. The extent of the pledge, and potential effects of a foreclosure on the stock price, may have been one motivation for the SEC taking action here.

That said, this order can be taken as a general reminder that borrowers under margin loans filing on Schedule 13D will also be required to disclose any pledge of the issuer's securities and guarantees in connection therewith, and to do so accurately, precisely and in a timely manner.

Similarly, issuers must diligently identify and disclose the existence and tenor of stock pledges by their management in their proxy statement or annual report on Form 10-K in accordance with Item 403(b) of Regulation S-K. As noted by the SEC, neither securityholder nor issuer can abdicate its responsibility to disclose required information by claiming ignorance or pointing the finger at its advisors. Each remains ultimately responsible for complying with disclosure requirements that are applicable to it and should ensure that it has in place proper policies and procedures that address the identification and compliance with these obligations. While neither advisors nor the financial institutions providing margin loans were themselves implicated in the violations, the case indicates that both may nevertheless want to ensure their clients and borrowers are appropriately and accurately making filings.

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