

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 73055 / September 10, 2014**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-16084**

**In the Matter of**

**Thomas J. Edelman,**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-  
DESIST PROCEEDINGS PURSUANT TO  
SECTION 21C OF THE SECURITIES  
EXCHANGE ACT OF 1934, MAKING  
FINDINGS, AND IMPOSING A CEASE-  
AND-DESIST ORDER AND CIVIL  
PENALTY**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Thomas J. Edelman (“Edelman” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order and Civil Penalty (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws.
2. Section 13(d) of the Exchange Act and the rules promulgated thereunder require any person or group who directly or indirectly acquires beneficial ownership of more than 5% of a Section 12 registered equity security to file a statement with the Commission disclosing certain information relating to such beneficial ownership. Section 13(d) is a key provision that allows shareholders and potential investors to evaluate changes in substantial shareholdings. See 113 Cong. Rec. 855 (1967). The duty to file is not dependent on any intention by the stockholder to gain control of the company, but on a mechanical 5% ownership test.
3. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of inside information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.
4. While subject to these reporting requirements due to his beneficial ownership of the registered class of common stock of BioFuel Energy Corp. ("BioFuel"), Respondent violated Section 16(a) by failing to timely file multiple reports of holdings and transactions in BioFuel's securities and violated Section 13(d) by failing to timely file required amendments to the Schedule 13D Respondent filed with respect to his beneficial ownership in BioFuel.

#### Respondent

5. Edelman, age 62, served as BioFuel's Executive Chairman and Chairman of the Board of Directors until resigning in March 2009 and was a greater than 10% beneficial owner of

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

BioFuel's common stock. Edelman remained a greater than 10% beneficial owner subject to Sections 13(d) and 16(a) after his resignation from the company in 2009.

### **Issuer**

6. BioFuel is a Delaware corporation with its principal place of business in Colorado. BioFuel's common stock is and has been at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the NASDAQ stock market (ticker: BIOF).

### **Applicable Legal Framework**

7. Under Section 13(d)(1) of the Exchange Act, any person who has acquired beneficial ownership of more than 5% of any equity security of a class registered under Section 12 of the Exchange Act must publicly file, within 10 days after the acquisition, a disclosure statement with the Commission. Rule 13d-1(a) requires the statement to contain the information specified by Schedule 13D, which includes, among other things, the identity of the beneficial owners, the amount of beneficial ownership, and plans or proposals regarding the issuer.

8. The term "beneficial owner" is defined broadly under Section 13(d) of the Exchange Act, through the application of Rule 13d-3, to include "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security.

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) thereunder require a filer to amend a Schedule 13D promptly as material changes occur in disclosures previously made. An acquisition or disposition of 1% or more of a class of securities is deemed material for purposes of Rule 13d-2. Any delay in filing beyond the date the filing reasonably can be made may not be prompt.<sup>2</sup>

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means any person who is deemed a beneficial owner under Section 13(d) of the Exchange Act and the rules thereunder, subject to limited exceptions.

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on

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<sup>2</sup> Amendments to Beneficial Ownership Reporting Requirements, SEC Release No. 34-39538 (Jan. 12, 1998), at n.14.

Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of the Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer in which the insider has or is deemed to have a direct or indirect pecuniary interest. To keep this information current, insiders must file Form 4 reports disclosing transactions resulting in a change in beneficial ownership within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

12. There is no state of mind requirement for violations of Sections 16(a) and 13(d) and the rules thereunder.<sup>3</sup> The failure to timely file a required report, even if inadvertent, constitutes a violation.<sup>4</sup>

#### **Respondent Failed to File Required Section 16(a) Reports on a Timely Basis**

13. From June 2007 until Respondent's resignation in March 2009, Respondent was subject to Section 16(a) as an officer, director, and greater than 10% beneficial owner of BioFuel.

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<sup>3</sup> See Lexington Resources Inc., et al., 96 SEC Docket 229, 2009 WL 1684743, at \*17-18 (June 5, 2009) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]."); Robert G. Weeks, et al., 76 SEC Docket 2609, 2002 WL 169185, at \*50 (Feb. 2, 2002) ("No showing of scienter is required to prove violations of these reporting provisions."); see also SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

<sup>4</sup> Cf. Oppenheimer & Co., Inc., 47 SEC 286, 1980 WL 26901, at \*1-2 (May 19, 1980) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation."); see generally SEC Release No. 34-47809 (noting that an issuer's eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders "does not change the fact that any Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)") (emphasis added); Herbert Moskowitz, 77 SEC Docket 446, 2002 WL 434524, at \*7 (Mar. 21, 2002) ("evidence of both motive for non-disclosure and actual market impact ... is irrelevant" to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

After his resignation, Respondent remained subject to Section 16(a) as a greater than 10% beneficial owner.

14. Respondent did not file until March 23, 2011 any of the required Section 16(a) reports with respect to reportable holdings and transactions executed beginning in January 2011. The late reports primarily consist of open-market sales of BioFuel common stock executed on the following dates:

<u>Form Type</u>	<u>Date of Trans.</u>	<u>Due Date</u>
4	1/11/2011	1/13/2011
4	1/12/2011	1/14/2011
4	1/13/2011	1/18/2011
4	1/14/2011	1/19/2011
4	1/18/2011	1/20/2011
4	1/21/2011	1/25/2011
4	2/9/2011	2/11/2011
4	2/10/2011	2/14/2011
4	2/11/2011	2/15/2011
4	2/14/2011	2/16/2011
4	2/15/2011	2/17/2011
4	2/18/2011	2/23/2011
4	3/2/2011	3/4/2011
4	3/3/2011	3/7/2011
4	3/4/2011	3/8/2011
4	3/7/2011	3/9/2011
4	3/8/2011	3/10/2011

15. Respondent's late-reported sales had an aggregate market value of approximately \$4.8 million.

16. As a result of the conduct described above, Respondent violated Section 16(a) of the Exchange Act and Rule 16a-3 thereunder.

### **Respondent Failed to Timely File Schedule 13D Amendments**

17. After becoming subject to the reporting requirements of Exchange Act Section 13(d) and filing a timely initial Schedule 13D statement on June 26, 2007, Respondent remained subject to those requirements until November 2013.

18. In 2011, Respondent failed to timely file multiple amendments required as a result of material changes to the information set forth previously on Schedule 13D, including:

- Respondent's disposition through open-market sales of more than 1% of the class of outstanding BioFuel common stock during each of the following periods, none of which were reflected in an amendment until March 23, 2011: (i) from January 11 to January 12, 2011; (ii) from January 13 to January 18, 2011; (iii) from January 21 to January 24, 2011; (iv) from January 25 to January 31, 2011; (v) on February 1, 2011; and (vi) on February 2, 2011.
- Respondent's acquisition of BioFuel common stock and Class B common stock from BioFuel in a rights offering and private placement on February 4, 2011, which increased Respondent's beneficial ownership of BioFuel's class of common stock from approximately 5.04% to approximately 16.9%, which was not reflected in an amendment until March 23, 2011; and
- Respondent's disposition through open-market sales of more than 1% of the class of outstanding BioFuel common stock during each of the following periods, none of which were reflected in an amendment until March 23, 2011: (i) from February 9 to February 10, 2011; (ii) from February 11 to March 3, 2011; and (iii) from March 4 to March 7, 2011.

19. As a result of the conduct described above, Respondent violated Section 13(d) of the Exchange Act and Rule 13d-2 thereunder.

### **Respondent's Remedial Efforts**

20. In determining to accept Respondent's Offer, the Commission considered certain remedial acts undertaken by Respondent and cooperation afforded to Commission staff.

## **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Edelman's Offer.

Accordingly, pursuant to Sections 21B and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(d) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 promulgated thereunder.

B. Respondent shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$64,125 to the Securities and Exchange Commission, for transmission to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Thomas J. Edelman as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Timothy Casey, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, New York, NY 10281.

By the Commission.

Jill M. Peterson  
Assistant Secretary