

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 73051 / September 10, 2014**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-16080**

**In the Matter of**

**KMG Chemicals, Inc.,**

**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 KMG Chemicals, Inc. (“KMG” 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 issuer reporting requirements and beneficial ownership reporting requirements of the federal securities laws.

2. 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 percent of such class (collectively, "insiders"), 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 to facilitate rapid dissemination to the public.

3. Reporting issuers are required to disclose in the proxy statement for the issuer's annual meeting, or its annual report, Section 16 reporting delinquencies by its insiders. Although insiders remain responsible for the timeliness and accuracy of their required Section 16(a) reports, the Commission has encouraged the practice of many issuers to "help their [officers and directors] or submit the [] filings on their behalf . . . [in order] to facilitate accurate and timely filing." Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, SEC Release No. 34-47809 (May 7, 2003).

4. Respondent is a reporting issuer and its insiders are required to file Section 16(a) reports. On numerous occasions, Respondent's officers and directors violated Section 16(a) by failing to timely file required reports. Respondent failed to comply with its disclosure obligations to report such delinquencies. In addition, Respondent was a cause of numerous Section 16(a) violations by one of its directors as a result of Respondent's negligence in performing certain tasks it voluntarily agreed to undertake in connection with the filing of Section 16(a) reports on the director's behalf.

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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.

## Respondent

5. KMG is a Texas corporation with its principal place of business in Texas. KMG's common stock is, has been at all relevant times registered with the Commission under Section 12 of the Exchange Act, and is traded on the New York Stock Exchange (ticker: KMG). KMG files annual reports on Form 10-K pursuant to Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.

## Applicable Legal Framework

6. 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 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. 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 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). There is no state of mind requirement for violations of Section 16(a) and the rules thereunder.<sup>2</sup>

7. Section 13(a) of the Exchange Act requires issuers that have securities registered pursuant to Section 12 of the Exchange Act to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rule 13a-1 requires such issuers to file annual reports with the Commission containing specified information. In 1991, the Commission adopted Item 405 of Regulation S-K to help address compliance with Section 16(a) by requiring reporting issuers to disclose in annual

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<sup>2</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)]"); 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"). Negligence is sufficient to establish liability for causing such violations. See KPMG Peat Marwick LLP, 74 SEC Docket 357, 2001 WL 47245, at \*19-20 (Jan. 19, 2001) ("[N]egligence is sufficient to establish 'causing' liability under Exchange Act Section 21C(a) ... in cases in which a person is alleged to 'cause' a primary violation that does not require scienter.").

proxy and information statements or annual reports information regarding delinquent Section 16(a) filings by insider.<sup>3</sup>

8. Item 405 requires an issuer to disclose any known late filing or failure by an insider to file a report required by Section 16(a) based on the issuer's review of Forms 3 and 4 filed during the most recent fiscal year, and Forms 5 filed with respect to the most recent fiscal year, by the issuer's insiders. Section 16(a) reports are posted on EDGAR, and thus are readily available to issuers to evaluate their timeliness. A "known" failure to file includes, but is not limited to, a failure to file a Form 3, which is required of all insiders, and a failure to file a Form 5 in the absence of a written representation that no Form 5 is required, unless the issuer otherwise knows that no Form 5 is required. The Item 405 disclosure of any late filings or known failures to file must (i) identify by name each insider who failed to file on a timely basis Forms 3, 4, or 5 during the most recent fiscal year or prior fiscal years and (ii) set forth the number of late reports, the number of late-reported transactions, and any known failure to file. An issuer does not have an obligation under Item 405 to research or make inquiry regarding delinquent Section 16(a) filings beyond the review specified in the item.

9. An issuer that files annual reports with the Commission on Form 10-K, such as Respondent, is required to include the Item 405 disclosure in its Form 10-K, or incorporate by reference to its Form 10-K the Item 405 disclosure made in the issuer's definitive proxy or information statement for its annual meeting of shareholders for the election of directors, if that definitive proxy or information statement is filed with the Commission not later than 120 days after the end of the fiscal year covered by the Form 10-K. Inaccurate or incomplete Item 405 disclosures may constitute a violation of Section 13(a) of the Exchange Act and Rule 13a-1. No showing of scienter is necessary to establish a violation of Section 13(a).<sup>4</sup>

#### **Respondent's Inaccurate Item 405 Disclosures**

10. As an issuer required to file annual reports on Form 10-K, Respondent is and has been at all relevant times required to disclose information concerning delinquent Section 16(a) filings by its insiders to the extent required by Item 405 of Regulation S-K.

11. Respondent made misstatements and failed to disclose, as required, failures to file on a timely basis pursuant to Item 405. These failures include:

a. Respondent failed to make the required Item 405 disclosure for Respondent's 2010 fiscal year, misstating that "[b]ased solely on a review of Forms 3, 4, and 5 and amendments thereto furnished to us, we know of no failure in Section 16(a) beneficial

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<sup>3</sup> Ownership Reports and Trading by Officers, Directors and Principal Security Holders, SEC Release 34-28869 (Feb. 21, 1991); 17 C.F.R. § 229.405.

<sup>4</sup> SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978).

ownership reporting compliance except that through inadvertence certain directors or executives filed late.” (KMG Definitive Proxy Statement filed on October 29, 2010, incorporated by reference into Form 10-K filed on October 14, 2010). Respondent was required to review the forms filed and identify by name each such insider who failed to file on a timely basis and set forth the number of late reports and the number of transactions that were not reported on a timely basis, which Respondent failed to do. During such fiscal year, multiple KMG insiders filed one or more untimely Form 4 reports.

b. Respondent failed to make the required Item 405 disclosure for Respondent’s 2011 fiscal year, misstating that “[b]ased solely on a review of Forms 3, 4, and 5 and amendments thereto furnished to us, we know of no failure in Section 16(a) beneficial ownership reporting compliance except that through inadvertence certain directors or executives filed late.” (KMG Definitive Proxy Statement filed on October 31, 2011, incorporated by reference into Form 10-K filed on October 14, 2011). Respondent was required to review the forms filed and identify by name each such insider who failed to file on a timely basis and set forth the number of late reports and the number of transactions that were not reported on a timely basis, which Respondent failed to do. During such fiscal year, multiple KMG insiders filed one or more untimely Form 4 reports, including one director with untimely filed Forms 4 with respect to stock sale transactions that occurred on 7 dates.

c. Respondent failed to make the required Item 405 disclosure for Respondent’s 2012 fiscal year, misstating that “[b]ased solely on a review of Forms 3, 4, and 5 and amendments thereto furnished to us, we know of no failure in Section 16(a) beneficial ownership reporting compliance except that through inadvertence certain directors or executives filed late.” (KMG Definitive Proxy Statement filed on October 29, 2012, incorporated by reference into Form 10-K filed on October 15, 2012). Respondent was required to review the forms filed and identify by name each such insider who failed to file on a timely basis and set forth the number of late reports and the number of transactions that were not reported on a timely basis, which Respondent failed to do. During such fiscal year, multiple KMG insiders filed one or more untimely Form 4 reports, including one director with untimely filed Forms 4 with respect to stock sale transactions that occurred on 11 dates.

d. Respondent failed to make the required Item 405 disclosure for Respondent’s 2013 fiscal year, misstating that “[b]ased solely on a review of Forms 3, 4, and 5, and amendments thereto furnished to us, we know of no failure in Section 16(a) beneficial ownership reporting compliance, except that Mr. Urbanowski filed late for one transaction, Mr. Leonard filed late for two transactions, and Mr. Hatcher filed late for 20 transactions.” (KMG Definitive Proxy Statement filed on November 18, 2013, incorporated by reference into Form 10-K filed on October 30, 2013). However, during such fiscal year, other KMG insiders also filed untimely Form 4 reports, including untimely filed Forms 4 by Respondent’s then-CEO and then-CFO with respect to stock sale transactions that occurred on 3 dates each, which Respondent failed to disclose as required.

12. As a result of the conduct described above, Respondent failed to comply with its disclosure obligation to the extent required by Item 405 and violated Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.

### **Respondent Was a Cause of Certain Violations of Section 16(a) by its Insiders**

13. Although the Commission encourages the practice of many issuers to assist insiders in complying with Section 16(a) filing requirements, issuers who voluntarily accept certain responsibilities and then act negligently in the performance of those tasks may be liable as a cause of Section 16(a) violations by insiders.

14. Respondent has voluntarily agreed with certain of its current and former officers and directors to perform certain tasks in connection with the filing of Section 16(a) reports on their behalf, including the preparation and filing of all such reports for which Respondent had timely notification of the required information concerning the transactions. However, on multiple occasions, Respondent acted negligently in its performance of such tasks and was a cause of KMG insiders failing to file Section 16(a) reports on a timely basis. KMG personnel responsible for tasks relating to the preparation and filing of Section 16(a) reports repeatedly failed to perform on a timely basis the tasks Respondent had agreed to perform.

15. For example, Respondent had agreed to perform all tasks relating to the preparation and filing of Forms 4 for one director who had entered into pre-arranged “10b5-1 plans” to sell KMG stock on a frequent basis. Although Respondent received timely notification of all necessary information for such filings from the director’s brokerage firm, Forms 4 were filed late for sales executed on more than 40 dates between February 2011 and April 2013. The practices employed by Respondent’s personnel to perform these tasks were negligent to the extent they resulted in a recurrent failure to meet the two-business day filing deadline. The fact that the majority of transactions were timely reported does not excuse Respondent’s practices.

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

### **Respondent’s Remedial Efforts**

17. In determining to accept the 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 KMG’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(a) and 16(a) of the Exchange Act and Rules 13a-1 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 \$150,000 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 KMG Chemicals, Inc. 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