

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74497 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16435

In the Matter of

SHUIPAN LIN

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 Shuipan Lin (“Lin” 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 it 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 that:

Summary

1. This matter concerns violations of the reporting provisions of Section 13(d) of the Exchange Act by Lin, the Chairman and Chief Executive Officer of Exceed Company Ltd. (“Exceed”), a China-based sports apparel and footwear company. Section 13(d)(1) of the

Exchange Act, together with Rule 13d-1(a), requires the filing of a Schedule 13D, commonly referred to as a “beneficial ownership report,” when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company’s equity securities. Section 13(d)(2) and corresponding Rule 13d-2(a) thereunder also require the filing of an amendment when there is a material change in the facts contained in the Schedule 13D.

2. As early as October 2012 Lin began to take steps to take Exceed private, an extraordinary corporate transaction that triggers a reporting obligation. Lin, however, failed to file an amendment to his Schedule 13D Item 4 disclosure until August 20, 2013 to report that his plans or proposals concerning Exceed’s shares had materially changed. In addition, Lin incurred a reporting obligation under Section 13(d) on October 21, 2009, when he owned approximately 20% of Exceed’s ordinary shares, but did not file his initial Schedule 13D until May 16, 2011. Finally, Lin failed to amend his Schedule 13D to report a subsequent acquisition of Exceed’s shares.

Respondent

3. Shuipan Lin, age 45, is Chairman and Chief Executive Officer of Exceed Company Ltd., a sports apparel and footwear company incorporated in the British Virgin Islands with business operations and headquarters in China.¹ Lin was formerly a controlling shareholder of Windrace International Company Ltd. (“Windrace”), a Chinese company that Exceed acquired in 2009. On December 19, 2013, Lin and a group of other shareholders filed a Schedule 13E-3 in connection with a going-private transaction that will have the effect of taking Exceed private and eliminating all public shareholders of the company. Lin is a Chinese national, who currently resides in China.

Legal Framework

4. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten days after they accumulate beneficial ownership of more than five percent of the class of equity security.

5. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;² (2) a description of the purpose(s) of the acquisition,

¹ Exceed is a foreign private issuer as defined in Exchange Act Rule 3b-4, and its ordinary shares are registered under Exchange Act Section 12(b). Exceed’s shares trade on the NASDAQ Global Select Market.

² Whether a person is a “beneficial owner,” a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes “any person who, directly or indirectly,
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including any plans (i) to affect the issuer’s Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Industries*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scierter is not required to establish a violation of Section 13(d), however. *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

6. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose “the purpose or purposes of the acquisition of securities of the issuer” in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.³ Specifically, the Rule provides that any plan or proposal that relates to the “acquisition by any person of additional securities of the issuer[subpart (a)]” or “[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]” or “[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]” is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person’s plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

7. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require that a Schedule 13D must be promptly amended when there are material changes or developments in the information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corporation*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (September 3,

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through any contract, arrangement, understanding, relationship or otherwise” has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

³ *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as “going private” under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a “going private” transaction).

2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a “material change occurs in the facts set forth in the” Schedule 13D.

Lin’s Failure to Timely File his Initial Schedule 13D

8. On October 21, 2009, Exceed completed its acquisition of all of the issued and outstanding ordinary shares of Windrace from Lin, the controlling shareholder of Windrace, and other selling shareholders. Exceed issued shares to Windrace’s sellers, including Lin, in a private placement as consideration for the acquisition. As reflected in the selling shareholders disclosure on the Form F-1 filed by Exceed, Lin owned 20.31% of Exceed as of November 16, 2009. In subsequent filings, including the security ownership disclosure in Exceed’s 2009 Form 20-F, Lin is reflected as owning 19.5% of Exceed as of March 31, 2010. Lin, however, did not file his initial Schedule 13D until May 16, 2011, nineteen months after October 2009—when he had incurred a reporting obligation.

Lin’s Failure to Amend his Schedule 13D to Report Later Acquisition of Exceed Shares

9. At the time Lin filed his initial Schedule 13D on May 16, 2011, he reported that he beneficially owned 10,395,571 ordinary shares of Exceed, representing 40.9% of Exceed (based on 25,411,730 ordinary shares outstanding). At the time, Lin also disclosed that he acquired the shares in Exceed as consideration for his interest in Windrace, which Exceed acquired in 2009. In addition, Lin disclosed that he might acquire additional shares pursuant to escrow and earn-out arrangements⁴ if Exceed achieved certain performance targets.

10. In Exceed’s 2012 Form 20-F, filed February 28, 2013, the company disclosed that Lin owned 12,822,986 of Exceed’s ordinary shares. Lin’s ownership increase in Exceed’s shares resulted from additional shares that he acquired in 2012 pursuant to an earn-out arrangement from the acquisition of Windrace. Specifically, Lin acquired additional shares as a result of Exceed achieving its performance targets under the earn-out arrangement. Although Mr. Lin disclosed the existence of these arrangements in his Initial May 2011 Schedule 13D, he failed to amend his report to reflect that he acquired additional shares.

Lin’s Failure to Report Material Change to Plans or Proposals for Exceed

11. In May 2011, when Lin filed his Initial Schedule 13D Item 4 disclosure, a required disclosure pertaining to the filer’s plans, proposals or purpose with regard to the beneficial ownership of shares, he stated: “[t]he Reporting Person may acquire or dispose of the Shares in market transactions or negotiated purchase transactions from time to time but does not

⁴ Earn-out arrangements are generally agreements providing that additional compensation will be provided to affiliates of a target company in a business combination if certain specified future performance measures are met by the target company after the acquisition occurs.

have current plans or proposals that relate or would result in any of the actions set forth in items (b) to (j) of Item 4 of Schedule 13D.”

12. As early as October 2012, as described in Exceed’s Schedule 13E-3 and related amended proxy statement, filed February 26, 2014 (“Exceed Amended Proxy Statement”), Lin began to consider a going-private transaction involving Exceed. The Exceed Amended Proxy Statement states, in October 2012, “Mr. Lin began to consider and evaluate a going private transaction as one of the potential alternatives to his stake in the Company.”

13. By November 2012, as later described in Exceed’s Amended Proxy Statement, Lin took significant steps to further the going-private transaction, including studying the feasibility of such a transaction and reviewing other going-private transactions involving China-based issuers. In the same month, Lin discussed a going private transaction with Wisetech Holdings Ltd. (“Wisetech”) and Windtech Holdings Ltd. (“Windtech”), two other significant shareholders of Exceed who ultimately formed part of the consortium of shareholders participating in the going-private transaction. Exceed’s Amended Proxy Statement, in fact, disclosed that “[a]fter studying the feasibility of a going private transaction and learning about the successful completion of going private transactions involving a number of U.S.-listed China-based issuers, Mr. Lin began to seriously consider a going private transaction.” Exceed’s filing also disclosed that Lin held discussions with Wisetech Holdings Ltd. and Windtech Holdings Ltd. At this point, his intentions for purposes of Item 4 of Schedule 13D had materially changed; he was no longer considering a sale of his shares; and had taken steps in pursuit of a going private transaction.

14. By July 2013, as later described in Exceed’s Amended Proxy Statement, Lin took additional steps towards the going-private transaction, including having discussions with attorneys and the consortium members about working together to submit a proposal to Exceed’s board of directors to take Exceed private.

15. On August 17, 2013, Lin and the Consortium submitted a “preliminary non-binding letter” to Exceed’s board of directors proposing to take Exceed private for \$1.72 per share.

16. Notwithstanding his steps to take Exceed private that began as early as October 2012—an extraordinary corporate transaction that triggers a reporting obligation—Lin did not file an amendment to his Schedule 13D Item 4 disclosure until August 20, 2013.

Violations

17. As a result of the conduct described above, Lin violated Sections 13(d)(1) and 13(d)(2) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder.

Lin’s Cooperation

18. In determining to accept the Offer, the Commission considered cooperation by Lin afforded to Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Lin shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(1) and 13(d)(2) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder;

B. Lin shall within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of \$30,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payments 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](https://www.pay.gov) through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay 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 Lin 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 Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by

Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary