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SEC's recent enforcement actions confirm whistleblower protections

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The U.S. Securities and Exchange Commission's (SEC) whistleblower program has been a tremendous success. Much of this success can be attributed to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), enacted in 2010, which enhanced the SEC's whistleblower program by providing significant rewards for any whistleblower who submits a successful tip to the agency. The results far exceeded initial expectations. In the SEC's last fiscal year alone, the SEC's Office of the Whistleblower received a record 18,000 tips (or approximately 70 tips per business day), exceeding the prior record by almost 50%. Even if only ten percent of those tips warrant investigation, the SEC would have opened 1,800 new investigations based solely on those tips. The SEC also set a record by issuing whistleblower awards totaling nearly $600 million, including a $279 million award to one whistleblower. These lottery-sized awards certainly explain the huge increase in whistleblowing activity.

Given these results, the SEC is highly protective of its whistleblowers. In addition to protecting whistleblowers from employment retaliation, the SEC prohibits companies from discouraging whistleblower activity. In particular, shortly after Dodd-Frank was enacted, the SEC adopted Rule 21F-17, which provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications." 17 CFR § 240.21F-17. Recent enforcement actions demonstrate that Rule 21F-17 remains a powerful weapon for the SEC to wield against any company that uses confidentiality agreements to restrict whistleblowers.

The SEC brought its first Rule 21F-17 enforcement action on April 1, 2015 against KBR, Inc. The SEC alleged that KBR required employees in internal investigations to sign confidentiality agreements that prohibited those employees "from discussing any particulars regarding [their] interview and the subject matter discussed during [their] interview, without the prior authorization of the Law Department." *In the Matter of KBR, Inc.*, Exchange Act Release No. 74619, (April 1, 2015). KBR consented to an administrative order that concluded that the confidentiality agreements violated Rule 21F-17, even though the SEC conceded that there was no evidence that

any employee was prevented from contacting the SEC. KBR also paid a $130,000 penalty.

The SEC followed KBR with a series of enforcement actions that challenged agreements that arguably restricted whistleblower activity, although the SEC offered little evidence in these cases that any whistleblower was actually discouraged by the contractual provisions. These cases are instructive to the extent they identify conduct the SEC believes violates Rule 21F-17, which includes:

- Entering into severance agreements that restrict former employees from providing confidential information to third parties, including the SEC. *In the Matter of BlueLinx Holdings, Inc.*, Exchange Act Release No. 78528 (Aug. 10, 2016) ($265,000 penalty); *In the Matter of SandRidge Energy, Inc.*, Exchange Act Release No. 79607 (Dec. 20, 2016) ($1.4 million penalty).
- Entering into severance agreements that require former employees to waive financial recovery from charges filed with government agencies (including the SEC). *In the Matter of BlueLinx Holdings, Inc.*, Exchange Act Release No. 78528 (Aug. 10, 2016) ($265,000 penalty); *In the Matter of Health Net, Inc.*, Exchange Act Release No. 78590 (Aug. 16, 2016) ($340,000 penalty); *In the Matter of HomeStreet, Inc., and Darrell Van Amen*, Exchange Act Release No. 3852 (Jan. 19, 2017) ($500,000 penalty).
- Entering into separation or severance agreements with confidentiality provisions that require former employees to pay liquidated damages for violating those provisions. *In the Matter of Anheuser-Busch InBev SA/NV*, Exchange Act Release No. 78957 (Sept. 28, 2016) ($6,008,291 in penalties, disgorgement, and prejudgment interest for this and other securities law violations); *In the Matter of the Brinks Company*, Exchange Act Release No. 95138 (June 22, 2022) ($400,000 penalty).
- Retaliating against whistleblowers by terminating them. *Anheuser-Busch InBev SA/NV; SandRidge Energy, Inc.*
- Entering into severance agreements that discharge the employer from claims for misconduct under, among other things, Dodd-Frank, and require former employees to waive their right to recover any incentives for reporting such misconduct. *In the Matter of BlackRock, Inc.*, Exchange Act Release No. 79804 (Jan. 17, 2017) ($340,000 penalty).

In a flurry of recent enforcement actions, the SEC confirmed its staunch protection of whistleblowers and enforcement of Rule 21F-17. In the first case, on Sept. 8, 2023, the SEC announced a $225,000 settlement with Monolith Resources, Inc., a privately held energy and technology company, for entering into employee separation agreements that violated Rule 21F-17. The SEC's administrative order found that from 2020 to 2023, Monolith used separation agreements that required employees to waive their rights to monetary whistleblower awards, an important financial incentive that was intended to encourage people to communicate directly with the SEC. In its press release the SEC stated that "both private and public companies must understand that they cannot take actions or use separation agreements that in any way disincentivize employees from communicating with the SEC staff about potential violations of the federal securities laws." In addition to paying the financial penalty, Monolith agreed to take remedial actions, including notifying former employees that the improper separation agreements do not in any way limit their ability to obtain financial awards. *In the Matter of Monolith Resources, Inc.*, Exchange Act Release No. 98322 (Sept. 8, 2023).

Next, on Sept. 19, 2023, the SEC announced it settled charges against CBRE, Inc., a commercial real estate and investment firm, for violating Rule 21F-17. CBRE conditioned employees' separation pay on their signing a release attesting they had not filed a complaint against CBRE with any federal agency. Once the SEC initiated its investigation, CBRE began taking extensive remedial action, including revising all versions of its releases and other similar agreements. It also communicated with more than 800 former employees who signed the release, clarifying the whistleblower protections afforded to them. CBRE agreed to pay a $375,000 penalty. *In the Matter of CBRE, Inc.*, Exchange Act Release No. 98429 (Sept. 19, 2023).

Finally, on Sept. 29, 2023, the SEC announced its largest Rule 21F-17 penalty ever with a $10 million settlement with D.E. Shaw & Co. ("DESCO"), a registered investment adviser whose employment agreements allegedly impeded whistleblowing. Between 2011 and 2019, DESCO required new employees to sign agreements that prohibited the disclosure of confidential information unless authorized by DESCO or required by law. Additionally, between 2011 and 2023 DESCO required approximately 400 of its departing employees to sign releases affirming they had not filed any complaints with any government agency, department or official to receive deferred compensation and other benefits. Unlike many prior 21F-17 cases, the order found that at least one former employee was discouraged from communicating with the SEC. In its press release, the SEC warned "entities employing confidentiality, separation, employment and other related agreements [to] take careful notice of today's enforcement action," and reiterated that the SEC takes whistleblower protection seriously. *In the Matter of D. E. Shaw & Co, L.P.*, Exchange Act Release No. 98641 (Sept. 29, 2023).

The SEC's message is loud and clear: It will do whatever is necessary to protect whistleblowers from potentially restrictive employment or separation agreements, even when no evidence exists that whistleblowers are actually impeded. Employers should review their existing and historic confidentiality agreements, as well as separation and severance agreements, to ensure that they permit whistleblowers freely to report confidential information to the SEC without any financial disincentive. If companies still have such agreements, they should communicate with current and former employees to inform them that those agreements do not prohibit their employees from voluntarily communicating with the SEC or other authorities regarding possible violations of law or from recovering SEC whistleblower awards.

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