

CLIENT ALERT

SEC Announces First Whistleblower Enforcement Action Involving Restrictive Language In Confidentiality Agreements

April 13, 2015

The Securities and Exchange Commission recently announced its “first enforcement action against a company for using improperly restrictive language in confidentiality agreements with the potential to stifle the whistleblowing process,” according to a recent SEC press release. The SEC initiated a cease-and-desist action against KBR, Inc., a technology and engineering firm based in Houston, alleging violations of Rule 21F-17 promulgated under the Dodd-Frank Act. KBR settled the matter in anticipation of the SEC proceedings.

KBR’s internal investigations into allegations from its employees regarding potential securities law violations typically involved interviewing employees. At the beginning of those interviews, KBR’s investigators required the employee to sign a confidentiality agreement that included language prohibiting the employee from discussing the subject matter of the interview with any third party without first receiving permission from the company’s legal department.

Rule 21F-17 prohibits companies from taking “any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.” The SEC found no instances where a KBR employee was actually prevented from communicating with the SEC about a potential securities law violation or where KBR took action to enforce the confidentiality agreement to prevent whistleblower activity. Nevertheless, the SEC found that KBR violated Rule 21F-17 because the language in its confidentiality agreement impedes such reporting to the SEC and undermines the policy behind the whistleblower protection rules of encouraging reporting.

In addition to paying a civil penalty of \$130,000, KBR agreed to amend its confidentiality agreements to include the following language:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

The case is *In the Matter of KBR, Inc.*, Exchange Act Release No. 74619 (April 1, 2015).

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