

## SEC Warns Companies and Lawyers not to Mute Whistleblowers through Confidentiality Agreements

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Companies should take note that the Securities and Exchange Commission has charged KBR Inc., a technology and engineering firm based in Houston, with violating Rule 21F-17 under the Securities Exchange Act of 1934, as amended. The rule provides in part that “no 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.”<sup>1</sup>

In its settlement order with KBR the SEC recited that KBR would conduct interviews with employees in the course of internal investigations regarding complaints the company had received regarding unethical and unlawful conduct. Employees subject to interview were required to sign a form confidentiality agreement that contained the following language: “I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.”

The SEC noted that it was not aware of any circumstances in which KBR had enforced this provision or had attempted to prevent an employee from communicating with the SEC but said that the language of the contract undermines the purpose of the whistleblower protection statute which is to encourage individuals to report violations of the securities law the SEC.

The SEC fined KBR \$130,000 and entered an order enjoining KBR to cease and desist from committing or causing any violations and any future violations of Rule 21F-17. KBR also agreed to contact all employees in the United States who signed the confidentiality statement from August 21, 2011 (the date on which the rule became effective) to the present, and provide them with a copy of the order and a statement that KBR does not require the employee to seek permission from the General Counsel of KBR before communicating with any governmental agency or entity regarding possible violations of federal law or regulation.

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<sup>1</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, amended the Exchange Act by adding Section 21F, “Whistleblower Incentives and Protection.” The congressional purpose underlying these provisions was “to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.”

In addition, KBR amended the confidentiality provision to include the following carve-out:

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.

In its press release announcing the settlement order, the SEC reminded companies that its rules prohibit employers from taking measures through employment and other types of agreement that may have the effect of chilling communications with the SEC. It warned employers to review and amend existing and historical agreements that stop their employees from reporting potential violations to the SEC.

The order confirms the aggressive enforcement stance articulated by Sean McKessy, head of the SEC's Whistleblower Office in a recent speech at the Georgetown University Law Center Corporate Counsel Institute. "We are actively looking for examples of confidentiality agreements, separations agreements, employee agreements that ... in substance say 'as a prerequisite to get this benefit you agree you're not going to come to the commission or you're not going to report anything to a regulator.'" Mr. McKessy warned in-house attorneys not to draft such contracts and if the SEC found that kind of language, "not only are we going to go to the companies, we are going to go after the lawyers who drafted it."



Please contact Paul De Rosa by phone at (412) 297-4821 or by e-mail at [pderosa@cohenlaw.com](mailto:pderosa@cohenlaw.com) or Christie Tillapaugh by phone at (412) 297-4603 or by e-mail at [ctillapaugh@cohenlaw.com](mailto:ctillapaugh@cohenlaw.com) for further information or if you have any questions concerning this topic.

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