MOSES & SINGER LLP

Newsflash April 2015

SEC TAKES ACTION ON CONFIDENTIALITY AGREEMENTS

Since the enactment of the whistleblower provisions of Section 21F of the Securities and Exchange Act of 1934, the Securities and Exchange Commission (the "SEC" or "Commission") has promised that it would flex its enforcement muscle to prevent companies from using confidentiality agreements to stop individuals from communicating directly with Commission staff about possible violations of the securities laws. On April 1, 2015 the SEC made good on its promise, issuing its first ever enforcement action, *In the Matter of KBR, Inc.*, Exchange Act Release No. 74619, against a company for using improperly restrictive language that could potentially stifle the whistleblowing process in its confidentiality agreements. The enforcement action was instituted by the SEC even though the company did not otherwise take any affirmative steps to prevent any employee from speaking to Commission staff. In light of this recent pronouncement, companies should take care to review confidentiality statements presented to employees in order to ensure that they do not, directly or indirectly, silence potential whistleblowers.

Brief Summary of KBR Enforcement Action

The SEC charged KBR, Inc. ("KBR"), a Houston-based global technology and engineering firm, with violating whistleblower protection rule 21F-17 enacted under the Dodd-Frank Act. Rule 21F-17 provides, in relevant part:

> (a) 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.

In connection with its internal investigation process, KBR was using a form confidentiality statement. The statement was included as an enclosure to the Company's Code of Business Conduct Investigation Procedures manual, and KBR investigators had witnesses sign the statement at the start of an interview. The confidentiality statement required that the witness agree to the following provision:

> 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 interpreted this provision as prohibiting an employee from reporting misconduct to the Commission without prior authorization, essentially undermining the purpose of the whistleblower laws. Notably, the SEC brought the enforcement action against KBR and fined the Company $130,000 despite the fact that (1) no KBR employee was prevented from communicating directly to the Commission staff about potential securities laws violations and (2) KBR took no action to enforce the form confidentiality statement or otherwise prevent such communications by prohibiting employees from discussing the substance of their interview without clearance from KBR's law department under penalty of a disciplinary action, including termination of employment.

KBR, to the satisfaction of the SEC, amended its confidentiality statement to include the following statement:

> 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.

Key Takeaways

The SEC appears to be taking an aggressive approach to the interpretation and enforcement of Rule 21F-17. Companies who fall under the SEC's jurisdiction should consider engaging counsel to review their confidentiality statements to make sure they are in line with the SEC's current position. Companies should be mindful that employees should not be prohibited, either directly or indirectly, from reporting possible violations of federal law or regulation to the SEC and/or other governmental agencies. At the same time, companies must also remain mindful of the need to protect confidential business information. These interests should be balanced when reviewing and/or amending confidentiality statements.

The KBR action dealt with a confidentiality statement contained in KBR's internal investigation procedures manual. While it is not clear yet how the SEC will treat confidentiality statements that may arise in other circumstances - - such as for instance in employee handbooks, compliance manuals, severance and/or settlement agreements - - those statements should also be reviewed with an eye toward ensuring that they do not silence potential whistleblowers. This is especially important where, as reported by the Wall Street Journal[1], the SEC has sent requests to a number of companies seeking years of non-disclosure agreements, employment contracts and other documents as part of an agency probe.

[1] Rachel Louise Ensign, *SEC Probes Companies' Treatment of Whistleblowers*, Wall St. Journal, Feb. 25, 2015. http://www.wsj.com/articles/sec-probes-companies-treatment-of-whistleblowers-1424916002

MOSES & SINGER LLP

Since 1919, Moses & Singer has provided legal services to diverse businesses and to prominent individuals and their families. Among the firm's broad array of U.S. and international clients are leaders in banking and finance, entertainment, media, real estate, healthcare, advertising, and the hotel and hospitality industries. We provide cost-effective and result-focused legal services in the following areas:

- Accounting Law Practice
- Advertising
- Asset Protection
- Banking and Finance
- Business Reorganization, Bankruptcy and Creditors' Rights
- Corporate/M&A
- Corporate Trust
- Equipment Lease Financing
- Family Offices
- Global Outsourcing and Procurement
- Healthcare
- Hospitality, Food Service and Restaurants
- Income Tax
- Intellectual Property
- Internet/Technology
- Labor, Employment & Employee Benefits
- Legal Ethics & Law Firm Practice
- Litigation
- Matrimonial and Family Law
- Privacy and Cybersecurity
- Private Funds
- Promotions
- Real Estate
- Securities and Capital Markets
- Securities Litigation
- Sports & Entertainment
- Trusts and Estates
- White Collar Criminal Defense and Government Investigations

---

Moses & Singer LLP is the New York City law firm member of the MSI Global Alliance (MSI). MSI is one of the world's leading international alliances of independent legal and accounting firms, with over 250 member firms in 100 countries - www.msiglobal.org.

Moses & Singer LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
Tel: 212.554.7800, Fax: 212.554.7700

2200 Fletcher Avenue
Fort Lee, NJ 07024
Tel: 201.363.1210, Fax: 201.363.9210
Abraham Y. Skoff, Esq.
Managing Attorney for New Jersey

10 Cuttermill Road – Suite 201
Great Neck, NY 11021
Tel: 516.498.8828, Fax: 516.498.8810
James Alterbaum, Esq.
Managing Attorney for Long Island

Disclaimer
Viewing this or contacting Moses & Singer LLP does not create an attorney-client relationship.

This does not contain a complete legal analysis or constitute an opinion of Moses & Singer LLP or any member of the firm on the legal issues herein described. This contains information that may be modified or rendered incorrect by future legislative or judicial developments. It is recommended that readers not rely on this in structuring or analyzing individual transactions or matters but that professional advice be sought in connection with any such transaction or matter.

Attorney Advertising
It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.