April 2, 2015

The SEC Opens a New Front in Whistleblower Protection

For some time, SEC officials have expressed concern about confidentiality agreements that may deter corporate employees from submitting whistleblower reports. The SEC has now brought its first enforcement action in this area, a settled case in which the respondent agreed to pay a $130,000 civil penalty without admitting or denying the SEC's findings. According to the SEC's order, the company required its employees to sign confidentiality agreements at the outset of interviews in internal investigations. The agreements prohibited witnesses from communicating with anyone else any of "the subject matter discussed during the interview." Such communication was permissible only if the employee first obtained authorization from the company's legal department. The SEC found that this practice violated Rule 21F-17, which prohibits taking "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."

The confidentiality language at issue was broadly phrased and did not specifically refer to communications with any governmental agency. In addition, the SEC's order acknowledged that no employee had in fact been prevented from communicating with the SEC, and no actions had been taken to enforce the restrictions. In the SEC's view, the confidentiality language was nonetheless improper because it was at odds with the purpose of the Dodd-Frank provisions intended to encourage individuals to report possible wrongdoing to the SEC.

The issue presented in this case arose in the somewhat unusual context of written agreements entered into at the outset of witness interviews. Although its order does not make this explicit, the SEC is presumably not intending to call into question the long-established, and ethically required, practice of providing so-called *Upjohn* warnings, by which lawyers clarify at the beginning of a witness interview whom they are representing and who holds the privilege as a consequence of that representation, and further instruct witnesses to maintain the confidentiality of attorney-client communications to avoid inadvertent waivers of privilege. This case counsels caution, however, in other contexts. For example, a common scenario involves an employee who chooses to leave for another job while an investigation is pending. Standard separation agreements commonly include broad confidentiality provisions that are written to protect the employers' proprietary information, and without any thought to governmental investigations. It is important to review this language with care and ensure that such agreements include a clear statement that they are <u>not</u> intended to prevent the employee from communicating with government agencies regarding any ongoing investigation.

The SEC's action reinforces the importance of communicating with employees in ways that do not suggest an effort to deter them from protected whistleblower activity. Careful planning and attention to these concerns is critically important at the outset of any internal investigation. The fact that the SEC brought this case despite the absence of actual harm also underlines the importance that the SEC continues to place on its whistleblower program, and the vigor with which the SEC will take steps to protect and promote that program. The SEC proceeding citation is *In the Matter of KBR, Inc.*, Exchange Act Rel. No. 74619 (Apr. 1, 2015).

John F. Savarese
Wayne M. Carlin
David B. Anders