wiley

ALERT

SEC Is Looking at Your Vendor Contracts for Whistleblower Restraints – Fines Seven More Companies

September 10, 2024

The U.S. Securities and Exchange Commission (SEC) recently settled charges against seven companies for violating SEC Rule 21F-17(a), which prohibits conduct that hinders whistleblowing to the SEC. The settlements focus on consulting and employment agreement provisions that the SEC alleged impeded individuals from voluntarily providing information to the Commission. The SEC's announcement comes on the heels of the Commodity Futures Trading Commission (CFTC) stepping up enforcement of its whistleblower protections and the U.S. Department of Justice (DOJ) unveiling its new Corporate Whistleblower Pilot Program. As federal agencies continue to focus on whistleblowing and whistleblower protections, public and private companies should review their programs, agreements, and policies to ensure they are not inadvertently running afoul of regulators' very broad view of what it means to impede whistleblowing activity.

Consulting Agreements

Two of the seven SEC settlements challenged mandatory notification provisions in agreements with the Respondents' contractors that required notification before the contractor could cooperate with a government investigation. Specifically, the agreements included language in confidentiality and non-disclosure provisions requiring written notice to the company before the contractor could disclose confidential or proprietary information to investigators or in response to a subpoena – standard language that appears in many commercial agreements. The SEC stated that these notice provisions "prohibited individual contractors from voluntarily providing information about [company's] business operations to government

Authors

Diana R. Shaw
Partner
202.719.3379
dshaw@wiley.law

Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

Securities Enforcement and Litigation

White Collar Defense & Government Investigations

agencies and required that these contractors notify [company] of any legally compelled disclosure of such information." This was the case despite the Commission noting that it found no evidence the provisions actually impeded any whistleblowing.

Employment and Separation Agreements

All seven settlements involved language in employment and/or separation agreements that attempted to curb post-employment whistleblowing or prohibit the collection of whistleblower awards. One company included a general release in its separation agreements requiring the departing employee to affirm they have not and will not file any complaints or charges with a governmental agency against the company.

Each company had employment or separation agreements permitting participation in whistleblower programs but included language that the employee waives their right to "damages," "monetary or equitable relief," or a "monetary award" from reporting. The SEC found in each case that "[s]uch restrictions on accepting financial awards for providing information regarding possible securities law violations to the Commission undermine the purpose of Section 21F and Rule 21F-17(a), which is to 'encourag[e] individuals to report to the Commission,' Adopting Release at p. 201, and violate Rule 21F-17(a) by impeding individuals from communicating directly with the Commission staff about possible securities law violations." Notably, the SEC objected to these monetary award waivers even when they were only aimed at senior management.

Takeaways

As federal agencies continue to increase enforcement of whistleblower protections, public and private companies should conduct routine reviews to ensure compliance. While these most recent SEC settlements involved public companies, others have demonstrated the SEC's willingness to also enforce whistleblower protection rules against *privately held companies*.

As a result, companies should pay particular attention to contractor and vendor agreements with confidentiality and non-disclosure provisions. The SEC's most recent actions illustrate the Commission's focus on *all* agreements, not just employment-related ones. Indeed, the SEC seems to view all language requiring notification before disclosing confidential information to the government as an impediment to whistleblowing. Given this, a comprehensive review of all agreements, not just employment-related ones, is essential to ensure compliance. Government contractors subject to the Federal Acquisition Regulations (FAR) should also review compliance with their duty to ensure that certain language regarding whistleblower rights and remedies is included in all subcontracts. *See* FAR 52.203-17.

Finally, recent enforcement by the SEC and CFTC has focused on employment and separation agreement language. On top of reviewing confidentiality, release, and non-disclosure language in these agreements, companies should consider all sources of employee confidentiality or non-disclosure language, including handbooks, codes of conduct, internal compliance guides, whistleblower resources, and employee training. Because of the Commission's ever-expanding view of what qualifies as an "impediment" under Rule 21F-17(a), consideration should be given to all language that could be deemed a roadblock to communicating with the government or participating in a whistleblower program.

For more information about the topics discussed in this alert, please contact one of the authors.