



SHARTSIS FRIESE LLP

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May 5, 2015

VIA E-MAIL

To Our Investment Adviser Clients and Other Friends

Re: SEC Case Challenges Confidentiality Provisions that Restrict Whistleblowing

A recent enforcement action by the SEC serves as a warning to employers against including confidentiality clauses in employment-related agreements that may restrict employees from reporting violations of the securities laws to the SEC. Rule 21F-17 of the Dodd Frank Act prohibits any person from taking any action to impede an individual from communicating directly with the SEC about possible securities law violations, including enforcing or threatening to enforce a confidentiality agreement that bars such communications. The recent case¹ is the first enforcement action in which the SEC has charged a company with violating Rule 21F-17 based solely on its use of improperly restrictive language in confidentiality agreements.

The action was against KBR, a Houston-based technology firm that required employees to sign a confidentiality agreement before being interviewed in certain internal compliance investigations, including some involving potential securities violations. That agreement prohibited the employees from discussing the details or subject matter of their interviews with outside parties without prior approval from KBR's legal department, and warned that they could be disciplined or fired for unauthorized disclosure. The SEC found that the agreement potentially discouraged employees from reporting illegal conduct and accordingly violated Rule 21F-17. The decision was based solely on the potential chilling effect of the agreement, as there was no allegation that KBR had ever enforced the confidentiality provisions or directly prevented any employee from communicating with the SEC. KBR was fined \$130,000 and agreed to add an express carve-out to the agreement stating that it does not bar the signatory from reporting possible violations of law to the SEC or any other government agency without any prior approval from the company.

Because the agreement at issue pertained only to internal investigations rather than to general employment or company policies, the case may not herald a broader SEC crackdown on other types of agreements or policies that might be construed as restricting whistleblowing. The SEC's press release announcing the settlement noted, though, that Rule 21F-17 bars employers

¹ *In re KBR, Inc.*, Exchange Act Release No. 74619 (April 1, 2015).

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from taking measures through confidentiality, employment, severance or other agreements that may silence potential whistleblowers, and suggested that employers “review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC.” Please contact us if you would like to discuss your firm’s confidentiality and employment-related agreements and policies in light of the KBR case.

This letter is not intended as specific or complete advice, and is subject to change as the industry develops best practices for online business. For further assistance, please contact John Broadhurst, Geoff Haynes, Chris Rupright, Carolyn Reiser, Neil Koren, Jim Frolik, Christina Hamilton, Joan Grant, Ellyn Roberts, Anthony Caldwell, David Suozzi or Kathryn Miller.

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