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Key Takeaways from the SEC's Latest Enforcement Sweep Regarding Violations of the Whistleblower Protections Rule

Client Alerts

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Introduction

Earlier this week, the SEC announced an enforcement sweep charging seven public companies with violating the whistleblower protections rule in various employment-related agreements. These charges reflect the SEC's continuing prioritization of whistleblower protections, as well as its broad approach in penalizing companies for entering agreements with the mere potential to discourage whistleblowers. This client alert provides an overview of the SEC whistleblower program, summarizes these charges, and discusses steps companies can take to ensure compliance with SEC whistleblower provisions.

The SEC Whistleblower Program and Its Rule Relating to Impeding Whistleblowing

Congress established the SEC's whistleblower program to incentivize the reporting of specific, timely, and credible information about potential violations of federal securities laws. Under the SEC's whistleblower program, eligible individuals who present high-quality original information that leads to an SEC enforcement action may be awarded 10 to 30 percent of the monetary sanctions the government collects.[1] According to Creola Kelly, Chief of the SEC's Office of the Whistleblower, direct communication between the whistleblower and the SEC is a "critical part of the SEC's oversight mandate."[2]

To that end, the whistleblower rule, Rule 21F-17(a) of the Securities Exchange Act of 1934 states that "[n]o 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."[3] Since enacting this rule, the SEC has repeatedly used it to bring cases against companies that have included provisions in standard separation agreements that could be read to disincentivize departing employees from raising concerns to the SEC. The SEC has brought these cases even where there is no evidence that

the company enforced the provision to chill any particular whistleblower or that these provisions actually discouraged any whistleblowers from coming forward.[4]

The SEC's Enforcement Actions Against Seven Public Companies

As part of the sweep announced earlier this week, the SEC charged seven public companies for including a provision in their employment-related agreements that violated the whistleblower protection rule. The settlements determined that the companies' agreements "created impediments to participation in the Commission's whistleblower program" by requiring individuals to forgo the right to provide information to the SEC or by "having the employees forego the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations."[5] In particular, the orders focused on language in the companies' employment-related agreements that required employees to waive the right to receive any financial award from their participation in any investigation or administrative claim. The agreements at issue included employment agreements with new employees, retention agreements, severance agreements, separation agreements, and settlement agreements.

Significantly, and consistent with prior enforcement actions, the orders stated there was no determination that any of the companies "took action to enforce these provisions" or that "the affected employees declined to speak with the Commission staff about potential violations of securities laws."[6] In effect, the SEC concluded that the *potential* chilling effect on whistleblowers was sufficient to form the basis of a violation of the whistleblower protections rule.

The SEC's settlements imposed civil penalties ranging from $19,500 to $1.39 million for each company. Each of the settlements noted that the companies had undertaken remediation measures, including changing relevant agreements and notifying affected employees that their agreements do not limit their ability to contact the SEC "or to obtain an award in connection with information they provide."[7]

Takeaways

The SEC's latest whistleblower sweep underscores the need for companies to proceed carefully with employees to ensure compliance with the SEC's broad view of the whistleblower protection rule. In particular, companies should:

- ***Review existing employment-related agreements.*** Companies should review their agreements with employees to ensure that no provision requires employees to forego giving information to the government or their right to possible whistleblower monetary awards.
- ***Educate and train relevant employees on the SEC's whistleblower provisions.*** Companies should ensure that relevant team members, including human resources and in-house counsel, are aware of the SEC's whistleblower provisions and the enforcement landscape regarding

whistleblower protections. Teams responsible for onboarding, retaining, and separating employees should be mindful of actions and restrictions that could be interpreted as discouraging employees from acting as whistleblowers. To ensure compliance with these rules, companies can also consider training key personnel on these risks on a periodic basis. These steps can help prevent employees focused on obtaining a full release for the company inadvertently creating liability for the company.

In sum, given the SEC's broad view of the whistleblower protection rule, companies should take action to make sure they do not—even unintentionally—run afoul of Rule 21F-17.

Footnotes

[1] 17 CFR § 240.21F-5 Amount of award.

[2] Press Release, SEC, SEC Charges Seven Public Companies with Violations of Whistleblower Protection Rule (Sept. 9, 2024), https://www.sec.gov/newsroom/press-releases/2024-118.

[3] 17 CFR § 240.21F-17 (2022). Staff communications with individuals reporting possible securities law violations. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 922, 111thCong., 2d sess. (July 21, 2010) amended the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6, to add the whistleblower program pursuant to Section 21F, entitled "Securities Whistleblower Incentives and Protection."

[4] *See, e.g.,* Order Instituting Cease-And-Desist Proceedings, *In the Matter of CBRE, Inc.*, Exchange Act Release No. 98429, Sept. 19, 2023; Order Instituting Cease-And-Desist Proceedings, *In the Matter of MONOLITH*

RESOURCES, LLC, Exchange Act Release No. 98322, Sept. 8, 2023; Order Instituting Cease-And-Desist Proceedings, *In the Matter of HOMESTREET, INC. and DARRELL VAN AMEN*, Exchange Act Release No. 79844, Jan. 19, 2017.

[5] *See* Order Instituting Cease-And-Desist Proceedings, *In the Matter of IDEX Corporation*, Exchange Act Release No. 100972, Sept. 9, 2024.

[6] *See* Order Instituting Cease-And-Desist Proceedings, *In the Matter of Acadia Healthcare Company, Inc.*, Exchange Act Release No. 100970, Sept. 9, 2024.

[7] *See* Order Instituting Cease-And-Desist Proceedings, *In the Matter of Acadia Healthcare Company, Inc.*, Exchange Act Release No. 100970, Sept. 9, 2024.

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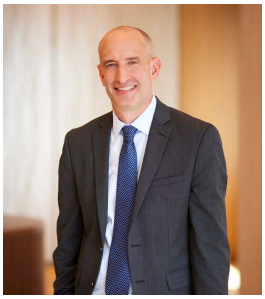

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