

Securities Regulation Daily Wrap Up, ENFORCEMENT— BlueLinx settles SEC charges that it chilled whistleblowing, (Aug. 10, 2016)

By [Anne Sherry, J.D.](#)

Atlanta-based BlueLinx Holdings agreed to pay a \$265,000 civil penalty for requiring outgoing employees to waive their right to a whistleblower award. The action is the latest in an ongoing SEC [crackdown](#) on confidentiality or other agreements that impede communication between employees and regulators. BlueLinx' severance agreements did not bar employees from approaching regulators, but required them to waive any monetary recovery that resulted (*In the Matter of BlueLinx Holdings Inc.*, [Release No. 34-78528](#), August 10, 2016).

Rule 21F-17. In 2011 the Commission adopted Exchange Act Rule 21F-17, which begins, "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..." KBR Inc., the first respondent in an action enforcing this rule, [agreed](#) in 2015 to pay a \$130,000 penalty and amend its confidentiality agreements. Merrill Lynch also [settled](#) charges of violating the rule as part of a broader proceeding. But the Chamber of Commerce had [concerns](#) with the SEC's action against KBR, suggesting that the agency should clarify the contractual language it finds appropriate instead of taking a piecemeal approach to enforcement after the fact.

BlueLinx' provisions. BlueLinx's 2013 review of its severance agreements led to the introduction of a confidentiality clause and a clause to the general release provision addressing interactions with governmental agencies. The confidentiality clause required employees to notify the legal department before disclosing confidential information or trade secrets as required by law. The release clause stated that the employee was not

prevented from filing a charge with administrative agencies if that avenue was required by law to be left open. "However," the clause continued, the employee "is waiving the right to any monetary recovery in connection with any such complaint or charge."

Approximately 160 employees signed severance agreements containing these provisions, which impeded participation in the SEC's whistleblower program, according to the agency. By failing to expressly exempt the SEC from the requirement that employees notify the legal department before disclosing information to third parties, "BlueLinx forced those employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits." The waiver of monetary recovery from whistleblowing activity "removed the critically important financial incentives" encouraging people to come forward about possible securities law violations.

Penalty and undertakings. In addition to paying the penalty, BlueLinx agreed to include a provision in its severance agreements clarifying that the agreement does not limit the employee's ability to file charges or communicate with any governmental agencies or limit the right to receive an award for information provided to any agencies. BlueLinx must also try to contact former employees to alert them to the new language.

The release is [No. 34-78528](#).

Companies: BlueLinx Holdings Inc.

LitigationEnforcement: DoddFrankAct Enforcement WhistleblowerNews