Securities Regulation Daily Wrap Up,TOP STORY—SEC brings first enforcement action for agreement that sought to limit whistleblower reporting,(Apr. 1, 2015)

By Jacquelyn Lumb

The SEC today announced a settled administrative proceeding against KBR Inc. for requiring confidentiality agreements that violated the whistleblower provisions of the Dodd-Frank Act. In the first enforcement action involving the use of restrictive language that could interfere with the whistleblower process, KBR agreed to pay a $130,000 penalty and amend its confidentiality agreements to make clear that employees are free to report possible violations to the SEC or to other federal agencies without fear of retaliation (*In the Matter of KBR, Inc.*, April 1, 2015).

KBR issued a press release in which the company said it had “amicably” struck a deal with the SEC. The company also said its plan all along was to use the confidentiality agreements only to safeguard privileged aspects of its internal investigations, consistent with decisions by federal appeals courts.

Stuart Bradie, KBR’s president and CEO, emphasized the company’s desire to move forward now that the SEC matter has been resolved. “The SEC's order acknowledges that it is not aware of KBR having ever prevented anyone from reporting to the SEC nor has the company taken any action to enforce the agreement and that is because we have never done so,” said Bradie.

Confidentiality agreements. KBR required witnesses that were interviewed in certain internal investigations to sign confidentiality agreements. The agreements warned that they could be subject to disciplinary actions or they could be terminated if they discussed the investigation with outside parties without prior approval of the legal department. Those investigations could have included possible securities violations. Rule 21F-17 prohibits companies from taking any action that may impede whistleblowers from reporting possible securities violations to the SEC.

Risk of chilling effect. According to the SEC's press release, it did not appear that there were any incidences in which employees were prevented from communicating with the SEC. However, the SEC noted that a blanket prohibition against discussing the substance of an interview could have a chilling effect on whistleblowers' willingness to report illegal conduct. KBR settled the proceeding without admitting or denying the charges and agreed to cease and desist from committing or causing any future violations of Rule 21F-17.

Sean McKessy, the chief of the SEC's Office of the Whistleblower, urged other companies to review their agreements and ensure that in "word or effect" they do not prevent employees from reporting possible securities violations to the SEC.

Media briefing. During a media briefing, Enforcement Director Andrew Ceresney advised that KBR had required the confidentiality agreements for the past four years. Rule 21F-17 went into effect on August 12, 2011. He also pointed to the language in the SEC's order that KBR regularly receives complaints and allegations from its employees about potential illegal or unethical conduct by KBR or its employees, including allegations of potential violations of the securities laws.

Revised confidentiality agreement. KBR has amended its confidentiality agreement to include the following statement:

"Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures."

Ceresney noted that KBR voluntarily adopted language that is now broader than what the Dodd-Frank Act requires.

In addition to amending the confidentiality agreement language, KBR also agreed to make reasonable efforts to contact its U.S. employees who signed the confidentiality agreement between August 21, 2011 and the present to provide them with a copy of the SEC's order and to advise that employees do not have to seek permission from KBR's general counsel before communicating with any governmental agency or entity regarding possible violations of the federal laws or regulations. The SEC took these undertakings into account in determining to accept KBR's settlement offer.

Other investigations underway. Ceresney echoed McKessy's remark that all companies that are using confidentiality agreements should review the language employed to ensure that it does not violate Rule 21F-17. He added that companies should consider any other agreements they have with their employees to ensure those documents too are consistent with the rule. Ceresney also acknowledged that other investigations are underway that relate to these same issues.

The release is No. 34-74619.

Companies: KBR, Inc.

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