
SEC and CFTC Step Up Enforcement of Whistleblower Protection in Confidentiality Agreements

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Many companies in recent years have revised the templates they use for confidentiality agreements with employees to include exceptions meant to satisfy the requirements of Securities and Exchange Commission (“SEC”) Rule 21F-17, which prohibits any person from taking action “to impede an individual from communicating directly with the Commission staff about a possible securities law violation.” A seminal case was brought by the SEC against KBR Inc. in 2015, followed by a slew of other settlements across industries over the next several years. After a quiet period, we have now seen a series of new actions and settlements focusing not only on confidentiality agreements with employees, but also on a wide variety of other things that can be construed as an “impediment” to whistleblowing activity, including confidentiality requirements set forth in compliance manuals, codes of conduct, and employee handbooks; training materials; employee affirmations and certifications; third party vendor agreements; and even settlement agreements with adversaries in litigation. In this memorandum, we provide a brief summary of the history of enforcement in this area (including a new settlement announced just last week by the Commodities Futures Trading Commission), the broader trend of expanded enforcement, and tips for companies to ensure compliance going forward.

Attorney

- Brian T. Markley