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Alert

SEC Whistleblower Update: New Enforcement Actions for 'Chilling' Language in Severance Agreements

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The Securities and Exchange Commission ("SEC") continues to actively enforce Rule 21F-17 under the Securities Exchange Act of 1934, which provides that "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 ... with respect to such communications."[1] In its most recent actions, the SEC charged companies with violating Rule 21F-17 by including language in severance agreements that specifically prohibited former employees from communicating disparaging information about the company to the SEC and that prohibited former employees from voluntarily communicating with or contacting any governmental agency in connection with a complaint or investigation.

On Dec. 19, 2016, the SEC announced an enforcement action against NeuStar, Inc., a Virginia-based technology company.[2] NeuStar entered into severance agreements with former employees containing a non-disparagement provision which prohibited former employees from engaging "in any communication that disparages, denigrates, maligns or impugns" the company. The language at issue specifically stated that such communications could not be made to "regulators" including the SEC. When the SEC began its investigation, NeuStar, on its own accord, removed the reference to "regulators" including the SEC, and added language specifying that nothing in the agreement prohibited the former employee from "communicating, without notice to or approval by NeuStar, with any federal government agency" about a potential violation of a federal law or regulation. These amendments were apparently sufficient to satisfy the SEC. NeuStar agreed to make reasonable efforts to inform former employees who signed the severance agreements between Aug. 12, 2011 (the date Rule 21F-17 became effective) and the date of the amendments. NeuStar also agreed to pay a civil monetary penalty of $180,000.

On Dec. 20, 2016, the SEC announced a settlement in an enforcement action against SandRidge Energy, Inc., an oil and natural gas exploration and production company headquartered in Oklahoma City.[3] As with NeuStar, SandRidge entered into severance agreements with former employees that contained

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[1] 17 C.F.R. § 240.21F-17(a). The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 21F to the Securities Exchange Act of 1934. Section 21F provides for monetary awards for whistleblowers who provide original information that leads to a successful SEC enforcement action. In August 2011, the SEC adopted Rule 21F-17.

[2] *See In re NeuStar, Inc.*, Exch. Act Release No. 79593 (Dec. 19, 2016).

[3] *See In re SandRidge Energy, Inc.*, Exch. Act Release No. 79607 (Dec. 20, 2016).

non-disparagement provisions that prohibited former employees from making any disparaging remarks or statements to any "governmental or regulatory agency." In addition, SandRidge's form severance agreement prohibited employees from disclosing confidential or proprietary information to governmental agencies without SandRidge's consent and from assisting or contacting any governmental agency in connection with a complaint or investigation. The SEC determined that these provisions violated Rule 21F-17. In response to the SEC's investigation, SandRidge revised its form agreement and advised former employees that the problematic provisions were no longer in effect. SandRidge also added a provision to its form agreement stating that nothing in the agreement was intended to prohibit employees from reporting violations of law to governmental agencies.

In light of the SEC's actions, employers should review employment and separation agreements, as well as employment and compliance policies and codes of conduct and ensure that they do not contain any contractual or policy provisions that may be interpreted to run afoul of Rule 21F-17, without express carve-outs. Any prohibition or restriction on communications with individuals outside a firm, whether concerning confidential information, disparaging information or general communications with third parties, which does not include a specific carve-out for communications with the SEC without prior notice to the employer, may violate Rule 21F-17.

Authored by Mark E. Brossman, Ronald E. Richman, Holly H. Weiss, Aaron S. Farovitch and Adam B. Gartner.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

Schulte Roth & Zabel
New York | Washington DC | London
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