



Don't Tell Anyone! (Except the SEC)



By Lance Currie

214.855.3122 | lcurrie@ccsb.com

Review your company's confidentiality agreements and investigation procedures in light of Dodd-Frank. That is the lesson of the recent consent order entered in *In re: KBR, Inc.*—the first case brought by the SEC against a company for using a confidentiality agreement to silence whistleblowers (even if unintentionally). KBR, Inc. had failed to update its policies and confidentiality agreements in light of Dodd-Frank, and its oversight led to a \$130,000 penalty.

Enacted under Dodd-Frank and effective August 12, 2011, Rule 21F-14 prohibits impeding whistleblowers from communicating with the SEC about potential securities law violations. For years, Houston-based KBR had asked employees that it interviewed as part of any internal investigations to sign a confidentiality statement prohibiting them from discussing the interview with anyone absent prior authorization by KBR's legal department, or face company discipline that could include termination. Asking interviewees to sign these types of confidentiality statements is not uncommon, as absent such production interviewees could disclose to anyone—including persons being investigated—the questions asked by KBR's counsel or internal investigators. But though KBR had used the confidentiality statements prior to Dodd-Frank, it made no changes after Dodd-Frank. That, in the SEC's eyes, was a violation.

The SEC viewed the confidentiality statement as impeding whistleblowers in violation of Rule 21F-14. KBR argued there were no apparent instances where the statement prevented any employee from speaking with the SEC about securities law violations. But the SEC took the position that KBR's blanket prohibition on speaking with anyone without the consent of KBR's counsel created a chilling effect that could impede a whistleblower's willingness to contact the SEC. Ultimately, KBR paid a \$130,000 penalty and was required to change its confidentiality statement and inform prior interviewees that they could contact federal enforcement agencies without company retaliation.

The consent order contains useful language that KBR agreed to include in its revised confidentiality 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.

Companies should consider adding similar language to their employee confidentiality agreements and internal investigation procedures. And as *In re: KBR, Inc.* demonstrates, ignorance and reliance on an old agreement or policy will not be a defense.

The order and SEC press release are available on the SEC's website at http://www.sec.gov/news/pressrelease/2015-54.html#.VRwb-PnF_HX. ■