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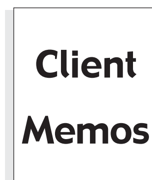

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SECURITIES ENFORCEMENT

Whistleblowers, NDAs and the SEC's KBR Enforcement Action

A recent SEC enforcement action highlights the possibility that a confidentiality provision may, in some circumstances, violate certain whistleblower protections under the federal securities laws. While companies must be attuned to these protections, there is language that companies can consider to address the SEC's concerns.

By Stewart M. Landefeld, Luis R. Mejia, Eric A. DeJong, and Ann Marie Painter

Many employers routinely require their employees to abide by nondisclosure or confidentiality obligations, whether imposed through individual agreements or various corporate policies. An enforcement action brought by the U.S. Securities and Exchange Commission (SEC) earlier this year against KBR, Inc. (KBR) highlights the possibility that confidentiality covenants may, in some circumstances, violate certain whistleblower protections under the federal securities laws.[1] Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) added Section 21F to the Securities Exchange Act of 1934 (Exchange Act), to encourage whistleblowers to communicate directly with the SEC and to enhance the protection of these whistleblowers.[2] In 2011, the SEC adopted Regulation 21F (Rules 21F-1 through 21F-17) to implement Section 21F.[3] Rule 21F-17, a cornerstone rule in this series, prohibits actions to impede individuals from communicating directly with the SEC staff about possible securities law violations.[4] Subject to certain exceptions, this prohibition explicitly extends to enforcing or threatening to enforce a confidentiality agreement to impede such communications.[5]

In *KBR*, the SEC charged the employer, KBR, with violating Rule 21F-17 because it required employees involved in internal investigations to acknowledge a confidentiality statement that, among other things, threatened discipline (including termination) if the employees discussed the particulars of the investigation interview or related matters with outside parties without the prior authorization of KBR's legal department.[6]

As the first enforcement action under Rule 21F-17, *KBR* has left many companies wondering whether confidentiality agreements and policies routinely used to protect corporate intellectual property and other competitively sensitive or proprietary information may violate federal securities laws. This concern has been widely expressed even though the confidentiality obligation in *KBR* was imposed in connection with an internal investigation—not a standard nondisclosure agreement or policy.[7] An understanding of the SEC's views on Rule 21F-17 and confidentiality agreements requires reading *KBR* in the context of other SEC statements, including the warnings of Andrew Ceresney, Director of the SEC's Division of Enforcement,[8] and the more nuanced, post-*KBR* comments of SEC Chair Mary Jo White.[9]

Against this backdrop, while companies should be attuned to the Rule 21F-17 issue as it

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relates to general employee confidentiality agreements and policies, it is most important to focus on those agreements or policies designed for or used in circumstances (such as an internal investigation) in which the employee's interaction with the company relates to facts that may give rise to securities law violations. Customary nondisclosure agreements and confidentiality provisions in employee handbooks, codes of conduct and other corporate policies, which are designed to protect trade secrets, intellectual property or other competitively sensitive information, are less likely to be interpreted as discouraging communications with the SEC.[10]

Rule 21F-17 expressly protects privileged communications from disclosure to the SEC.

Below we suggest "savings clause" language that companies could consider including in their confidentiality agreements or policies to address the Rule 21F-17 issue. Unlike the language KBR agreed to include in its confidentiality statement as part of the resolution of the SEC's enforcement action, our suggested language recognizes the important fact that Rule 21F-17 expressly protects privileged communications from disclosure to the SEC and does not prohibit the protection of other types of information. We also discuss the tension between the Regulation 21F series of rules and European Union mandates, and provide practical recommendations for how boards of directors can fulfill their oversight duties after *KBR*.

Background

For decades, federal laws have provided broad protection for "whistleblowers" to many classes of employees. Congress implemented whistleblower protection in the 1970s, including for federal employees in the aftermath of Vietnam and Watergate, with the Civil Service Reform Act of 1978 (CSRA), to protect federal employees who sought to report fraud, waste and abuse.

Federal law also evolved to encourage whistleblowing in the private sector, with the enactment of whistleblower protection laws covering matters ranging from transportation, to hazardous materials, to securities laws. Whistleblower protections for those who report securities law violations came as part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley),[11] enacted in response to the Enron and WorldCom corporate scandals of the late 1990s.[12] Sarbanes-Oxley's whistleblower provisions focus principally on public companies and their officers, employees, agents, contractors and subcontractors.[13] Section 806 of Sarbanes-Oxley protects an employee of any company with a class of securities registered under Section 12 of the Exchange Act from retaliation when the employee provides information that he or she reasonably believes constitutes a violation of SEC rules or certain federal laws relating to fraud.[14] Dodd-Frank extended whistleblower protections to the subsidiaries and affiliates of a registrant, where the subsidiary's or affiliate's information is included in the public company's consolidated financial statements.[15] Dodd-Frank also gave to the SEC significant regulatory oversight of whistleblowers.[16]

The Department of Labor (DOL), the SEC and the federal courts all have a role in protecting whistleblowers under Sarbanes-Oxley and Dodd-Frank. The DOL's Occupational Safety and Health Administration (OSHA), through its whistleblower protection programs, is responsible for protecting whistleblowing employees from unlawful retaliation for engaging in protected activity, such as filing a complaint under Section 806 of Sarbanes-Oxley.[17] Unlawful retaliatory conduct, for example, includes termination or laying off, demotion, failure to pay overtime, subjecting an employee to intimidating or harassing conduct, failing to promote, or making a reassignment that affects promotion prospects.[18] Sarbanes-Oxley, as amended by Dodd-Frank, provides 180

days for an individual to file a complaint with the Secretary of Labor, through OSHA, after the individual becomes aware of the action.[19]

Dodd-Frank expands the right of whistleblowers who believe they have been retaliated against to seek redress. There is no requirement to make a complaint to OSHA first.[20] Claimants have up to ten years, not 180 days, to pursue a private right of action in federal district court.[21] Dodd-Frank protects individuals "providing information to the Commission in accordance with this section … initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or … making disclosures that are required or protected under" Sarbanes Oxley, the Exchange Act and certain other federal laws.[22]

Exchange Act Section 21F and Dodd-Frank

Dodd-Frank's Section 21F and SEC Regulation 21F apply to all employers and establish a program for whistleblowers to report securities law violations to the SEC in exchange for monetary awards.[23] In adopting Section 21F, Congress authorized monetary awards to eligible whistleblowers who voluntarily provide the SEC with "original" information about a possible violation of federal securities laws that leads to the successful enforcement of a federal court or administrative action, with sanctions imposed by the SEC of over $1 million.[24] In addition to providing financial incentives to whistleblowers, Section 21F provides that an employee who is subjected to retaliation for whistleblowing may seek relief in the form of reinstatement of employment, double back pay plus interest, expert witness fees, litigation costs and attorneys' fees.[25]

The SEC, through Rule 21F-17, has focused not only on retaliatory behavior but also potentially chilling behavior that could discourage whistleblowers from contacting the SEC. Rule 21F-17(a) provides:

> 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 (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.[26]

In the Adopting Release, the SEC clarified that an attempt to enforce a confidentiality provision to prevent communication with Commission staff about a possible securities law violation could inhibit such communications even if the underlying agreement is legally unenforceable.[27]

KBR Enforcement Action

The SEC's enforcement action against KBR originated with a federal False Claims Act lawsuit filed in 2005 against U.S. defense construction and engineering contractor Kellogg Brown & Root, a subsidiary of Halliburton Company, by a former employee.[28] KBR, Inc., as the company later came to be known, was spun off from Halliburton in 2007. Lawyers for the former employee, Mr. Barko, learned that KBR routinely required employees involved in KBR's internal investigations to agree to confidentiality statements that barred them from discussing the particulars of their interviews without the authorization of KBR's legal department—a practice that pre-dated Dodd-Frank. When, in early 2014, the judge in the False Claims Act case ordered the release of the confidentiality statements, the SEC opened its own investigation into KBR's use of the confidentiality statements in connection with its internal investigations.

The confidentiality statement that KBR had used before and after Rule 21F-17 was adopted provided:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.[29]

KBR included this confidentiality statement as an enclosure to its Code of Business Conduct Investigation Procedures manual, and on occasion, KBR's internal investigators required employees to actually sign the statement.[30] The SEC acknowledged that it was "unaware of any instances" in which any KBR employee was in fact prevented from communicating with the SEC about possible securities law violations or in which KBR took action to enforce the confidentiality statement or otherwise prevent communications with the SEC.[31]

Nonetheless, the SEC found that KBR had violated Rule 21F-17 because "the language found in the form confidentiality statement impedes…communications [with the SEC] by prohibiting employees from discussing the substance of their interview without clearance from KBR's law department under penalty of disciplinary action including termination of employment."[32] The SEC found that this language "undermines the purpose of Section 21F and Rule 21F-17(a), which is 'to encourage individuals to report to the Commission.'"[33]

In addition to paying a $130,000 penalty, KBR agreed to amend the text of its confidentiality statement to provide:

> 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.[34]

At first blush, it may seem unusual that the SEC took this action even though it was "unaware of any instances" in which KBR sought to enforce the confidentiality statement or in which KBR employees were prevented from reporting violations of securities law to the SEC. However, *KBR* underscores the position articulated by the SEC in the Adopting Release that the mere fact that an employee has agreed to such a restriction may have an intimidating impact, and thereby violate Rule 21F-17.[35]

Chair White Clarifies SEC Intentions After *KBR*

The SEC intended *KBR* to send a warning about the use of confidentiality agreements that may stifle the whistleblowing process. In the SEC's press release announcing the KBR action, SEC Division of Enforcement Director Andrew Ceresney stated, "SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC."[36] This and other contemporaneous statements from SEC staff raised an alarm in the business community about the impact of Rule 21F-17 on routine confidentiality agreements or policies.

However, later the same month *KBR* was announced, Chair White publicly acknowledged two legitimate purposes of confidentiality agreements: protection of privileged attorney-client communication and preservation of trade secrets and proprietary information.[37] It is important to

read *KBR* in the context of Chair White's April 2015 speech. Without her clarifications, *KBR* can seem to suggest that all confidentiality agreements may violate Rule 21F-17 because the agreements have the potential to impede whistleblowers from talking to the SEC. For example, when it quoted Rule 21F-17 in *KBR*, the SEC left out the following key italicized phrases, which protect attorney-client privilege:

> 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 *(other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client)* with respect to such communications.[38]

A company may legitimately protect against the disclosure of trade secrets.

In her speech, Chair White clarified that "[c]ompanies conducting internal investigations can still give the standard *Upjohn* warnings that explain the scope of the attorney-client privilege in that setting."[39] She noted further that "[c]ompanies may continue to protect their trade secrets or other confidential information through the use of properly drawn confidentiality and severance agreements."[40] Chair White's comment clarifies that agreements prohibiting the disclosure of privileged information are lawful and expressly permitted by Rule 21F-17, that a company may legitimately protect against the disclosure of such privileged information to the SEC, and that a company may legitimately protect against the disclosure of trade secrets and similar proprietary or competitively sensitive information to third parties, including the SEC.

Upjohn warnings derive from the Supreme Court's decision in *Upjohn Co. v. United States*,[41] in which the Court held that a company could invoke the attorney-client privilege to protect communications made between company lawyers and employees. Generally, *Upjohn* warnings include the following language: (1) We represent the company only, we do not represent you personally; (2) our interview is confidential and subject to the attorney-client privilege; (3) the privilege belongs to the company, not to you personally; (4) in the future, the company may decide to waive the privilege and disclose the information we learn in the investigation; and (5) if the company chooses to waive the privilege, it can do so without your consent and without telling you.

Because *KBR* involved an internal investigation, where companies typically provide *Upjohn* warnings to protect privileged information, the SEC's action may seem to imply that the SEC disfavors the *Upjohn* warning. In her April 2015 speech, Chair White clarified that this is not the case as long as the warning is made in an appropriate way. *Upjohn* warnings given to protect attorney-client communications are lawful, and, as Chair White noted, companies conducting internal investigations can still give the warnings to explain the scope of the attorney-client privilege without violating Rule 21F-17.

Lessons of *KBR*

The confidentiality statement used by KBR in its internal investigations surely had appropriate objectives: to protect the attorney-client privilege, to protect and preserve confidential, proprietary business information and to ensure the integrity of the investigative process. On its face, KBR's confidentiality statement did not specifically prohibit employees from communicating concerns regarding potential securities law violations to the SEC. However, the SEC's view was that the breadth of the prohibition, plus the warning that failure to obey could result in discipline up to termination,

went too far.[42] In settling the enforcement action, KBR agreed to add language to its confidentiality statement to address the Rule 21F-17 concerns. Nevertheless, the language that KBR agreed to include in its confidentiality statement may not be a perfect model, as it includes language that goes beyond the conduct Rule 21F-17 is designed to prohibit.

In thinking about the impact of *KBR* on employee confidentiality provisions, prudent employers should consider these two suggestions:

- First, confidentiality provisions should be drafted to cover clearly protectable interests. For example, they should be designed to preserve the attorney-client privilege and/or protect trade secrets, intellectual property or other competitively sensitive or proprietary business information.
- Second, if an employer does request an employee to enter into a confidentiality agreement acknowledging *Upjohn* in connection with an internal investigation or in another context in which there is a possibility of a violation of the U.S. securities laws, it may be more prudent to simply make this part of a verbal *Upjohn* statement. Remind the employee that the company expects her to preserve the attorney-client privilege as well as to protect confidential, proprietary information. Recognize that anything that touches on a possible violation of the U.S. securities laws is a very sensitive context and that it is critical to not threaten adverse action as a consequence of violating confidentiality obligations. *KBR* makes clear that warning of potential adverse employment actions contributes to the overall chilling effect of a confidentiality obligation imposed (or reiterated) in the context of an internal investigation. A carefully crafted verbal reminder can both underscore the significance of the confidentiality obligations and remind the employee of the need for appropriate compliance without threatening the conduct that Rule 21F-17 prohibits, or chilling communications with the SEC.

EU and Other Considerations

Complicating matters of compliance for multinational corporations is the fact that many employers are subject to potentially conflicting non-U.S. directives. SEC registrants with non-U.S. employees[43] will need to consider potentially conflicting foreign regulatory regimes, especially the EU, whose well-developed privacy and worker protection laws may conflict with the whistleblower regimes of Sarbanes-Oxley and Dodd-Frank.

In 2006, the Article 29 Data Protection Working Party (Working Party), an independent EU advisory body, provided an opinion on the interaction of Sarbanes-Oxley's whistleblower regime with the EU data directive.[44] The opinion provides recommendations for the establishment of a directive-compliant whistleblower system, including limiting the number of employees eligible to blow the whistle; discouraging anonymous reporting by whistleblowers; deleting data collected by a whistleblowing scheme in a timely manner after its collection; and informing the reported employee about the facts of which he or she is accused. Shortly after the publication of this opinion, the chairman of the Working Party initiated a correspondence with the SEC to discuss how companies can harmonize their whistleblower policies in light of the opinion. The correspondence clarified that all employees are allowed to be whistleblowers and that data can be archived if needed instead of deleted. However, the EU indicated that while anonymous reporting is allowed, named reporting in which employees blowing the whistle are identified with appropriate confidentiality protections should be a firm's default position.[45]

The United Kingdom does not disregard the EU opinion but advises that allowances should be made for anonymous reporting by employees. Section 3.6 of the UK Whistleblowing

Arrangements Code of Practice states that companies that must comply with both US and UK jurisdictions may have reporting in which employees identify themselves when filing a whistleblower report (with promises of confidentiality by the company) but should make sure to provide for anonymous reporting as an alternative.[46]

Many employers are subject to potentially conflicting non-U.S. directives.

In considering their policies and procedures, companies also should be aware of the law in some EU countries and the rulings of the Court of Justice of the European Union, which provide that the attorney-client privilege does not cover communications with in-house counsel.[47]

Practical Take-Aways

By taking four practical steps, companies may comply with Rule 21F-17 in drafting confidential covenants and delivering *Upjohn* warnings.

Policies and Procedures

As a threshold matter, companies should continue to protect trade secrets and other proprietary information, and remind their employees that their communications with company lawyers and outside lawyers for the company are privileged and cannot be disclosed.

In addition, to encourage employees to think about the ramifications of an SEC disclosure and internal reporting as a first step, companies can set forth factors in their policies for employees to reflect on as part of carrying out compliance procedures. For example, companies can suggest in their policies that employees confronted with a compliance issue consider the following:

- Do I have all the facts? Do I need additional facts or advice?
- Is the conduct at issue unethical, improper, or illegal? What is the magnitude of the issue within the context of the company's overall business?
- Would it be helpful to discuss the issue with my supervisor, or others in the company who may have more information or knowledge about the issue?
- If you are unsure about what to do in any situation, you may seek guidance from your supervisor. If you are not comfortable approaching your supervisor, you may discuss the issue with others in the supervisory chain, with your chief legal officer, chief compliance officer or appropriate human resources officer.

Companies also should continue to promote the use of ethics hotlines and anonymous internal reporting processes, and remind employees that they may report anonymously and without fear of retaliation. These suggested factors do not impede or prohibit employees from reporting to the SEC or violate Rule 21F-17, and can help employees to consider carefully the conduct that they may think is a possible violation before making a premature disclosure to the SEC.

Include 21F Compliant Language in Confidentiality Policies or Covenants

The "savings clause" language KBR agreed to include in its confidentiality statement to resolve the SEC's charges is broader in its application than Rule 21F-17 requires. We suggest a shorter version:

> Nothing in this [policy] is intended to or will be used in any way to limit employees' rights to communicate with a government agency, as provided for, protected under or warranted by applicable law.

This shorter "savings clause" avoids two risks of the too-broad *KBR* language:

- First, the *KBR* clause would allow employees to disclose to the SEC not just the underlying

facts known to the employee, but also privileged attorney-client communications. In fact, the language could be read to waive the privilege with respect to otherwise privileged communications. By contrast, Rule 21F-17 expressly permits companies to enforce confidentiality provisions relating to privileged communications.

- Second, the *KBR* clause may prompt employees with internal audit and compliance responsibilities to make hasty disclosures to the SEC and avoid reporting issues internally. Internal audit and compliance employees should understand that they are not eligible for a whistleblower award unless 120 days have elapsed since the employee provided the information to responsible parties within the company.[48]

Standing alone, the *KBR* savings clause can be read as an open invitation to employees to report issues to the SEC without stopping to remember that certain information is lawfully protected from disclosure to the SEC. Companies can and should continue to maintain policies that advise employees of the confidentiality of information they learn as a result of their employment, including trade secrets or other proprietary information.

No confidentiality obligation (whether policy or agreement) can prohibit employees from reporting possible violations of federal law to the appropriate authorities.

Employers can add our suggested savings clause to an employee handbook, code of conduct or other internal policy that addresses Rule 21F-17 without compromising the important exceptions that Chair White acknowledged in her April 2015 speech. This suggested savings clause is intended for incorporation into a policy to cover all matters *except* for the conduct of internal investigations.

Our suggested language seeks to neither impede employees from reporting to the SEC, nor to chill behavior by threatening employees who do report. It also serves as a reminder to employees that there are certain protections and procedures under the law. It should make clear that no confidentiality obligation (whether policy or agreement) can prohibit employees from reporting possible violations of federal law to the appropriate authorities, require pre-authorization, or threaten disciplinary action for making that report. An employee can review the protections and procedures at the SEC's website before making a report in addition to reviewing applicable eligibility requirements and waiting periods. Further, the language also prompts employees to consider whether a report is warranted—i.e., do the circumstances at issue in fact represent a possible securities law violation?

Rule 21F-17 does not require companies to educate employees about a potential SEC reward or encourage whistleblowing at the expense of a company's right to protect privileged, confidential, or proprietary information. The foregoing approach should strike the right balance between a company's right to protect confidential information and employees' protections under the relevant whistleblower laws.

Upjohn Warning: No Need to Modify, but Keep It Verbal

As a matter of policy for internal investigations, we suggest that companies provide verbal *Upjohn* warnings, as opposed to requiring a signed statement or investigation-related confidentiality agreement. As Chair White stated in her speech, companies can still provide *Upjohn* warnings in the course of internal investigations. Typically, the delivery of an *Upjohn* warning, and the obtaining of an employee's agreement that the employee understands such warnings, is

done orally. *Upjohn* warnings are permissible and consistent with Rule 21F-17, as the rule permits companies to take appropriate steps to protect attorney-client communications.

Audit Committee/Board Oversight Suggestion

The Board of Directors is responsible for overseeing the business and affairs of a corporation. In that role, directors must satisfy themselves that the corporation has adequate policies and procedures in place to ensure its compliance with applicable laws, rules and regulations.[49] A Board may delegate these responsibilities to a Board committee such as the Audit or Compliance Committee.

To comply with their oversight responsibilities, and to avoid the risks associated with enforcement actions such as *KBR,* directors generally should be aware of relevant SEC enforcement actions, and ask about the company's practices and exposure. To prompt a helpful discussion, a director (or the general counsel) can ask these simple questions:

- Do we ask all of our employees to sign a confidentiality agreement at the time of hire or departure? Annually? Or is it part of our code of conduct, employee handbook or other corporate policies? At the time of an internal investigation? What approach are we taking to the SEC's enforcement action on confidentiality agreements?
- Have we had to modify our form of agreement—or our policies—to clarify that employees, while protecting the attorney-client privilege, may talk directly to the SEC about violations of laws without checking internally?
- How do we do all this—and have a robust internal compliance and reporting culture that encourages our employees to talk to us (or report on our 1-800 number) rather than exclusively or prematurely report to the SEC?

These questions, with appropriate follow-up, can help the Audit Committee and the Board to demonstrate that they are fulfilling their oversight responsibilities.

Conclusion

Taken together with Chair White's clarifications, *KBR* is a useful reminder of the need to comply with Rule 21F-17 and to avoid impeding a whistleblower from communicating with the SEC. Following the practical suggestions that we outline above can help companies protect their proprietary business information, preserve the attorney-client privilege and provide appropriate *Upjohn* advice while complying with Regulation 21F.

Notes

1. *KBR, Inc.*, Exchange Act Release No. 74619 (Apr. 1, 2015) (*KBR*).
2. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 922, 124 Stat. 1376 (2010).
3. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-64545, at 198 (eff. Aug. 12, 2011) ("Adopting Release").
4. 17 C.F.R. § 240.21F-17 (2015).
5. *Id.*
6. *KBR*, at 2.
7. *Id.*
8. Press Release, SEC, SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements (Apr. 1, 2015) ("Press Release"), available at *http://www.sec.gov/news/pressrelease/2015-54.html.*
9. Chair White later had to address the many concerns raised by the KBR action, and conceded that companies can legitimately protect confidential and trade secret information. Mary Jo White, The SEC as the Whistleblower's Advocate, Address at the Roy Garrett, Jr. Corporate and Securities Law Institute, Northwestern University School of Law (Apr. 30, 2015) ("White"), available at *http://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.*
10. *Id.*
11. Sarbanes-Oxley Act, Pub L. No. 107-204, § 806(a), 116 Stat. 745 (codified in 18 U.S.C. § 1514A (2002)).
12. Melissa Maleske, *8 ways SOX changed corporate governance*, InsideCounsel (Jan. 1, 2012), available at *http://www.insidecounsel.com/2012/01/01/8-ways-sox-changed-corporate-governance.*
13. Sarbanes-Oxley § 806(a), 18 U.S.C. § 1514A(a).
14. 18 U.S.C. § 1514A.

15. *Id.*; Dodd-Frank § 929A. The Supreme Court has extended Sarbanes-Oxley to include the employees of a contractor or subcontractor of a public company in addition to the company's own employees. *See* Lawson v. FMR LLC, 134 S. Ct. 1158 (2014).

16. Dodd-Frank § 922. Oversight had previously been principally with the Department of Labor.

17. 18 U.S.C. § 1514A; 29 C.F.R. pt. 1980 (2015).

18. 29 C.F.R. § 1980.102.

19. Dodd-Frank § 922(c); 18 U.S.C. § 1514A(b)(2)(D).

20. 15 U.S.C. § 78u-6(h)(1)(B)(i) (2015).

21. 15 U.S.C. § 78u-6(h)(1)(B)(iii)(II).

22. 15 U.S.C. § 78u-6(h)(1)(A).

23. *Id.;* 15 U.S.C. § 78u-6(b)(1).

24. 17 C.F.R. § 240.21F-3.

25. SEC Office of the Whistleblower, Frequently Asked Questions, *https://www.sec.gov/about/offices/owb/owb-faq.shtml;* 15 U.S.C. § 78u-6(h)(1)(C).

26. 17 C.F.R. § 240.21F-17(a).

27. Adopting Release, at 201 n.408 (citing In re JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127), 1137 (N.D. Cal. 2002).

28. Scott Higham, *SEC has opened investigation into KBR, whistleblower's lawyer says*, Wash. Post (Mar. 10, 2014), available at *http://www.washingtonpost.com/world/national-security/sec-has-opened-investigation-into-kbr-whistleblowers-lawyer-says/2014/03/10/d09ed14e-a883-11e3-8d62-419db477a0e6_story.html.*

29. *KBR*, at *2*.

30. *Id.*

31. *Id*. at 3.

32. *Id.*

33. *Id.* (alteration and citation omitted).

34. *Id.*

35. Adopting Release, at 201.

36. Press Release.

37. White.

38. *KBR,* at 2; 17 C.F.R. § 240.21F-17(a).

39. White. This statement is the subject of Rule 21F-4(b)(4)(i), (ii).

40. White.

41. 449 U.S. 383 (1981).

42. The National Labor Relations Board found in Banner Estrella Medical Center, Case 28–CA–023438 (2015), that the employer's use of a similarly-worded written request to employees not to discuss ongoing investigations of employee misconduct violated Section 8(a)(1) of the National Labor Relations Act and found that any request for confidentiality in the context of an investigation must be determined on a case-by-case basis and "based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." *Id.* at p. 3.

43. *See* Liu Meng-Lin v. Siemens AG*,* 763 F.3d 175 (2d Cir. 2014); Asadi v. GE Energy (USA) LLC, No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *aff'd*, 720 F.3d 620 (5th Cir. 2013); Carnero v. Boston Scientific Corp., 433 F.3d 1, 19 (1st Cir. 2006).

44. WP 117, Opinion 1/2006 on the Application of EU Data Protection Rules to Internal Whistleblowing Schemes in the Fields of Accounting, Internal Accounting Controls, Auditing Matters, Fight Against Bribery, Banking and Financial Crime, 00195/06/EN, (adopted Feb. 1, 2006), available at *http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf.*

45. Letter from Peter Schaar, Chairman, Article 29 Data Protection Working Party, to Christopher Cox, Chairman, SEC (Feb. 16, 2006), available at *http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2006-16-02-whistleblowing_en.pdf.*

46. Brit. Standards Inst., PAS 1998:2008, *Whistleblowing Arrangements Code of Practice* (July 2008), available at *http://wbhelpline.org.uk/wp-content/uploads/2012/07/PAS1998_Whistleblowing1.pdf.*

47. Ben W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers*, Harv. Law Sch. Forum on Corp. Governance & Fin. Regulation (Oct. 2, 2010), available at *http://corpgov.law.harvard.edu/2010/10/02/european-rejection-of-attorney-client-privilege-for-inside-lawyers/.*

48. 17 C.F.R. § 240.21F-4(b)(v)(C).

49. *See* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).