

THE SEC'S RECENT WHISTLEBLOWER ENFORCEMENT ACTIONS HIGHLIGHT THE NEED FOR PRIVATE AND PUBLIC COMPANY VIGILANCE OVER EMPLOYEE SEPARATION AGREEMENT TERMS

In an address to the [New York City Bar Association's Compliance Institute](#) on October 24, 2023, the Director of the Security and Exchange Commission's ("SEC") Enforcement Division, Gurbir S. Grewal, warned companies about the SEC's continuing and heightened enforcement of whistleblower protections. The address came after notable shifts in the SEC's enforcement practices under the Biden Administration and an increased focus on whistleblowing domestically and abroad. Originating from the 2010 Dodd-Frank Act, whistleblower protection rules (known formally as [Rule 21F-17](#)) prevent companies from taking actions that impede employees from reporting possible securities law violations to the SEC. In September 2023, the SEC issued the largest standalone penalty of [\\$10 million](#) for a company's overbroad post-employment confidentiality provision under the rule. Grewal's recent address provided guidance regarding the SEC's broad application of the rule and the increased need for compliance vigilance over the clauses used in employee separation agreements.

RECENT SEC ENFORCEMENT ACTIONS

The Commission's recent enforcement actions outline key aspects of employee separation agreements which it considers violations of the Dodd-Frank whistleblower protection rule. The SEC considers separation agreements which (a) force employees to [waive rights](#) to whistleblower rewards, (b) [condition separation pay](#) on an attestation that the employee did not file any complaint with a federal agency, or (c) contain broad [confidentiality provisions](#) without an SEC exception to be impediments under Rule 21F-17. Every company that cooperated

with an SEC investigation still faced substantial civil penalties, even after they revised agreements and changed their policies and employment practices.

A departure from historical practice, the SEC is emphasizing compliance with Rule 21F-17 by private companies. Grewal's address highlighted a privately held company that paid a [\\$225,000 penalty](#) after including a clause in their separation agreement that "required certain departing employees to waive their rights to monetary whistleblower awards in connection with filing claims with or participating in investigations by government agencies." The [order](#) did not find that the company ever attempted to enforce the waiver of rights under the agreement. The SEC determined that the mere inclusion of the clause in the agreement was sufficient to discourage employees from communicating with the SEC. In the SEC's subsequent [press release](#), Jason J. Burt put private companies on notice that for "both private and public companies [...] any attempt to stifle or discourage this type of communication undermines our regulatory oversight and will be dealt with appropriately."

As part of the SEC's ongoing whistleblower enforcement strategy, within two weeks of the \$225,000 penalty, the SEC issued civil penalties on two companies under the same rule. The SEC required a real-estate company to pay a civil [penalty of \\$375,000](#) for conditioning departing employees' separation pay on signing a release declaring that they had not filed a complaint against the company with any federal agency. The SEC emphasized that the conditionality present in the separation agreement violated the whistleblower protection rule. Similarly, a hedge fund was required to pay a [civil penalty of \\$10 million](#) for requiring new employees "to sign agreements that prohibited them from disclosing confidential information to anyone outside the company." The hedge fund required certain departing employees to similarly affirm that they had not filed any complaints with the federal government. To remediate the SEC's requests, the company updated its procedures and issued a companywide email emphasizing the ability for employees to contact the SEC. The SEC did not find these measures sufficient and found that the company "willfully violated" the rule and settled the matter in exchange for a \$10 million civil penalty. The subsequent [press release](#) established that the SEC intended the enforcement action to serve as a warning that the price of non-compliance in both employee separation agreements and confidentiality will likely be the new norm.

THE LARGER MOVEMENT TOWARD INCREASED WHISTLEBLOWER PROTECTION

The SEC's interest in whistleblower protection is implicit in its wider whistleblower award program which has grown substantially over the last year. The SEC's whistleblower program awarded a total of [\\$230 million in 2022](#) to whistleblowers who provided information critical to SEC investigations. In May 2023, the SEC issued an award of nearly [\\$279 million to a single whistleblower](#) who aided in a successful SEC enforcement action.

The SEC's stance is part of a larger movement in the United States and internationally to tighten whistleblower protections. The Commodity Futures Trading Commission ("**CFTC**") has an [active whistleblower program](#), having awarded approximately [\\$365 million](#) to whistleblowers since its creation in 2014. In October 2023, the CFTC announced an award of [\\$18 million](#) to a single

whistleblower for their assistance in an enforcement action by virtue of the same anti-retaliation authority as the SEC under [7 U.S.C. 26\(h\)](#). The United States Department of the Treasury's Financial Crimes Enforcement Network ("**FinCEN**") is [expected](#) to further explain the parameters of its anti-money laundering and sanctions whistleblower protection program with long awaited proposed regulations.

Outside the United States, but of impact to multinational companies, the EU Whistleblower Protection Directive (which we wrote about [here](#) and [here](#)) continues to reshape how companies develop and implement whistleblower programs, including protections for whistleblowers and how reports are investigated and resolved.

TAKEAWAYS

The Commission's recent enforcement actions indicate both a continued emphasis on encouraging unfettered whistleblowing by employees and an aggressive SEC approach to both private and public company compliance with Rule 21F-17 not only where a company actively prevents employees' ability to contact government agencies but also in cases where a company merely has provisions in separation agreements that might dissuade employees from contacting the SEC. The enforcement actions indicate that companies should consider not only reviewing the terms of their standard separation agreements going forward, but also consider reviewing their existing employee separation agreements to determine whether they need to be amended to bring them within the current SEC interpretation or risk enforcement simply on the basis that the clauses are in the agreements.

CONTACTS

David DiBari
Partner

T +1 202 912 5098
E david.dibari
@cliffordchance.com

Dr. Ines Keitel
Partner

T +49 697 199 1250
E ines.keitel
@cliffordchance.com

Paul Koppel
Partner

T +1 212 878 8269
E paul.koppel
@cliffordchance.com

Daniel Silver
Partner

T +1 212 878 4919
E daniel.silver
@cliffordchance.com

Michelle Williams
Partner

T +1 202 912 5011
E michelle.williams
@cliffordchance.com

Jamal El-Hindi
Counsel

T +1 202 912 5167
E jamal.elhindi
@cliffordchance.com

Benjamin Peacock
Counsel

T +1 212 878 8051
E benjamin.peacock
@cliffordchance.com

Catrina Crittenden
Law Clerk

T +1 202 912 5099
E catrina.crittenden
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

© Clifford Chance 2023

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Delhi •
Dubai • Düsseldorf • Frankfurt • Hong Kong •
Houston • Istanbul • London • Luxembourg •
Madrid • Milan • Munich • Newcastle • New
York • Paris • Perth • Prague • Riyadh • Rome
• São Paulo • Shanghai • Singapore • Sydney
• Tokyo • Warsaw • Washington, D.C.

AS&H Clifford Chance, a joint venture entered
into by Clifford Chance LLP.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.