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U.S. District Court Limits Privilege Protections in Compliance Investigations

On March 6, 2014, the U.S. District Court for the District of Columbia held in *United States ex. rel. Harry Barko v. Halliburton Company, et. al.*,[1] that documents relating to an internal investigation conducted by defendant Kellogg Brown & Root Services, Inc. ("KBR") were not legally privileged and therefore were subject to disclosure.

This was notwithstanding the fact that KBR's in-house legal department was involved in the initial and final phases of the internal investigation.[2] Although non-lawyer investigators conducted the investigation, including by interviewing witnesses and preparing the investigation reports, they were subject to an attorney's supervision.[3] In addition, the subject matter of the investigation was similar to more than a thousand pending reports of war-zone contract breaches that individually and collectively presented real risks of litigation (and in fact did result in the *Barko* litigation).

This article examines the reasoning that led to the Court's conclusion, analyzes the extent to which it is consistent with the established law on legal privileges in the context of internal investigations,[4] and suggests steps that companies and compliance departments might take to maximize their chances of successfully asserting legal privilege over internal investigation materials.

The Facts of the Case

In 2005, Harry Barko, a contract administrator of KBR, filed a complaint under the whistleblower provisions of the False Claims Act,[5] alleging that KBR, Halliburton

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1. No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014) ("Mar. 6 Opinion").
2. *United States ex. rel. Harry Barko v. Halliburton Co., et. al.*, No. 1:05-CV-1276, KBR Defendants' Opposition to Relator's Motion to Compel at 4-5 (D.D.C. Feb. 12, 2014).
3. *Id.* at 3-5. On March 11, 2014, the Court upheld its prior ruling and denied KBR's motion for interlocutory appeal and its request to stay the disclosure order pending appeal. *United States ex. rel. Harry Barko v. Halliburton Co., et. al.*, No. 1:05-CV-1276 (D.D.C. Mar. 11, 2014) ("Mar. 11 Opinion"). On March 14, 2014, KBR filed an emergency motion for a stay of the March 6 ruling, a petition for writ of mandamus, and a motion to seal. The outcomes of KBR's latest motions are pending.
4. *See* Michael B. Mukasey & Andrew J. Ceresney, *Attorney-Client Privilege and Issues for Corporate Counsel*, N.Y. L.J., Nov. 18, 2011 at 3.
5. 31 U.S.C. §§ 3729-3733 (2012).

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Company, and other contractors (collectively, the "Defendants") overbilled the U.S. government under certain war-zone construction contracts.[6]

On February 3, 2014, Barko moved to compel the Defendants to produce certain documents relating to a Code of Business Conduct ("COBC") investigation ("COBC Documents") conducted by KBR between 2004 and 2006. These documents related to an internal investigation of the alleged billing misconduct that was at issue in Mr. Barko's underlying complaint.[7] The Defendants resisted producing the COBC Documents, asserting that the attorney-client privilege applied and that the investigation was conducted under counsel's direction for the purpose of obtaining legal advice.[8] The Defendants also relied on the work-product doctrine, arguing that litigation was anticipated as KBR was facing over 1,000 other reports of similar war-zone contract breaches when the investigation was conducted.[9]

As a government contractor, KBR was required by the U.S. Federal Acquisition Regulations, and under its contract award obligations, to undertake to establish and administer an "ongoing business ethics awareness and compliance program" and an "internal control system."[10] KBR's Law Department was responsible for implementing the COBC compliance program, which included a code of business conduct, internal controls, whistleblowing channels, and policies and procedures on internal investigations. Under this program, reports of potential COBC violations would be directed to the Law Department or transmitted as "a tip to a dedicated P.O. Box, email address, or third-party operated hotline."[11] These reports would then be delivered to the COBC Director (an attorney),[12] who would decide whether to commence an investigation. Investigators (who were typically not lawyers) would conduct witness interviews, obtain witness statements, review relevant documents, and write a report of their investigative findings.[13] The investigators would conduct the investigation independently, subject to the oversight of the COBC Director. Upon completion of the investigation, the investigation file would be sent to the Law Department for assessment, including, for example, as to whether KBR should self-report a violation to the regulatory agencies.[14]

Upon an *in camera* review, the Court found the COBC Documents to be "eye-openers" with respect to Barko's underlying claim, evidencing corruption by certain

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6. *United States ex. rel. Harry Barko v. Halliburton Co., et. al.*, No. 1:05-CV-1276, Amended Complaint (D.D.C. June 13, 2007).
7. *United States ex rel. Harry Barko v. Halliburton Co. et al.*, No. 1:05-CV-1276, Motion to Compel (D.D.C. Feb. 3, 2014).
8. KBR Defendants' Opposition to Relator's Motion to Compel, note 2, *supra* at 11-21.
9. *United States ex. rel. Harry Barko v. Halliburton Co., et. al.*, No. 1:05-CV-1276, Reply in Support of Plaintiff-Relator's Motion to Compel at 13-16, 24 (D.D.C. Feb. 18, 2014).
10. 48 C.F.R. § 52.203-13(c) (2010). The provision also confirms a contractor's right to legal privilege. *Id.* at § 52.203-13(a)(2)(i) & (ii).
11. Mar. 6 Opinion, note 1, *supra* at 3.
12. KBR Defendants' Opposition to Relator's Motion to Compel, note 2, *supra* at 2.
13. *Id.* at 4-5.
14. *Id.*

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U.S. government contractors and sub-contractors, double-billing, kickbacks, and bid riggings.[15]

The Court's Reasoning

The Court rejected the Defendants' claims that the COBC Documents were protected by the attorney-client privilege and work-product doctrine. With respect to the Defendants' attorney-client privilege claim, the key question before the Court was whether the COBC Documents were prepared and transmitted for the purpose of obtaining legal advice (and therefore privileged), or were merely factual reports connected with routine business operations (and therefore not privileged). Applying the well-known "but for" test, the Court examined whether "the communication would not have been made 'but for' the fact that legal advice was sought,"[16] and found that the COBC Documents failed the test for the following five reasons:

1. KBR's compliance program "merely implement[ed]" regulatory requirements to investigate allegations of fraud that applied generally to government contractors.[17]
2. The investigation would have been performed in the "ordinary course of business," regardless of whether legal advice was sought.[18]
3. Witnesses interviewed were not informed that each interview was intended to facilitate legal advice. Indeed, the confidentiality agreement the witnesses signed mentioned only the "possible adverse business impact unauthorized disclosure could have on KBR's work."[19]
4. The investigators were not attorneys and witnesses interviewed "certainly would not have been able to infer the legal nature of the inquiry."[20]
5. KBR's internal investigation could be distinguished from the investigation at issue in *Upjohn Company v. United States*,[21] as no external counsel was consulted before its investigation began.[22]

> "[T]he key question before the Court was whether the COBC Documents were prepared and transmitted for the purpose of obtaining legal advice (and therefore privileged), or were merely factual reports connected with routine business operations (and therefore not privileged)."

Next, the Court considered the purpose of the COBC Documents with respect to the work-product claim. Under the work-product doctrine, a document containing "mental impressions, conclusions, opinions, or legal theories" of an attorney (or someone working under the supervision or direction of an attorney)[23] is protected if it can "fairly be said to have been prepared or obtained because of the prospect of litigation" (the "because of" test).[24] Under this test, an articulable claim must exist, and merely a remote possibility of litigation is insufficient.[25] The Court in *Barko* stated that the "because of" test required both a subjective belief of an attorney involved "that litigation was a real possibility," as well as an objectively reasonable basis for that belief.[26] The Court found these requirements were not met because KBR's investigation was conducted before any

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15. Mar. 6 Opinion, note 1, *supra* at 2.
16. *Id.* at 5-6.
17. *Id.*
18. *Id.* at 6, 8.
19. *Id.* at 6-7.
20. *Id.* at 7.
21. 449 U.S. 383 (1981).
22. Mar. 6 Opinion, note 1, *supra* at 5-6.
23. Attorney-client privilege can attach to communications: (i) with agents and employees if they are directly supervised by a lawyer; or (ii) with experts and investigators who are retained to assist the lawyer. A wider scope of protection exists under the work-product doctrine; materials prepared by third parties can be protected if the purpose of preparation is in anticipation of litigation. Dennis J. Block & Nancy E. Barton, *Internal Corporate Investigations* 25-27 (Barry F. McNeil & Brad D. Brian eds., 3rd ed. 2007).
24. *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 134 (D.D.C. 2012) (internal quotations omitted).
25. *See* Block & Barton, note 23, *supra* at 48.
26. Mar. 6 Opinion, note 1, *supra* at 7.

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relevant litigation was filed and before Barko's complaint was unsealed. The Court referred to the findings it made with respect to the attorney-client privilege in further support and found that the COBC Documents failed to meet either limb of the "because of" test.

What appears to have been critical to the Court's rulings was the fact that KBR's investigation was conducted "pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."[27] The Court accorded little, if any, weight to the facts that witness statements and reports produced during the investigation were labeled "attorney-client privilege" and kept highly confidential.[28] The Court was also unswayed by the facts that KBR was facing more than 1,000 other reports of similar war-zone contract breaches when the investigation was conducted; the COBC Director, a lawyer, had called for the investigation; and the final investigative report was submitted to the General Counsel's office for assessment at the conclusion of the investigation.[29] Taking a strict and literalist approach, the Court held that no request for the provision of legal advice could be evidenced by the transmission of the investigative report to the General Counsel's office because the documents themselves did not expressly contain such a request.[30]

Significance of *Barko* for Compliance Departments

The *Barko* decision reflects many tensions in the law governing the attorney-client privilege and work-product doctrines, but is not the first of its kind. The decision follows *United States v. ISS Marine Services, Inc.*,[31] a factually similar decision by the same District Court. In *ISS Marine*, the Court refused to apply the protections of the attorney-client privilege and work-product doctrine to an investigation report that was drafted by an internal auditor who was not a lawyer. External counsel was consulted initially on the underlying investigation and again two months after the investigation concluded. The final report was marked "confidential" but not "privileged." With respect to attorney-client privilege, the Court found that the investigation was conducted for a business purpose (the audit was conducted in connection with a contractual duty to return overpayments), and the limited interaction with external counsel was insufficient to support attorney-client privilege.[32] Likewise, with respect to the work-product doctrine, the Court found that the report was created primarily for a business purpose and litigation was not impending at the time the report was created, and that ISS Marine would have ordinarily investigated the matter whether or not litigation was anticipated.[33]

For compliance departments, the practical significance of the *Barko* and *ISS Marine* decisions is the position taken by the courts that: (i) compliance-driven investigations are presumptively "part of the ordinary course of business" that do not automatically attract the protection of legal privileges, even if lawyers are involved in the process; and (ii) for such privileges to apply, direct and clear evidence will need to be shown that materials created in connection with compliance-related investigations were for the purpose of seeking legal advice and/or created in anticipation of litigation. [34]

These conclusions are well-illustrated by the literalist approach adopted by the *Barko* Court in determining whether the COBC Documents were created for the purpose of obtaining legal advice.[35] As discussed above, one of the Defendants' arguments for the application of work-product protection was that the COBC Documents touched upon issues similar to more than 1,000 other potential contract breaches, and thus the risk of litigation was present.

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27. *Id.* at 5. This point was reemphasized in Mar. 11 Opinion, note 3, *supra* at 8.
28. KBR Defendants' Opposition to Relator's Motion to Compel, note 2, *supra* at 4-5.
29. Mar. 6 Opinion, note 1, *supra* at 6-7. *See* Mar. 11 Opinion, note 3, *supra* at 3-4.
30. Mar. 11 Opinion, note 3, *supra* at 4.
31. 905 F. Supp. 2d 121 (D.D.C. 2012).
32. *Id.* at 129-132.
33. *Id.* at 136-138.
34. *See also Allied Irish Banks plc. v. Bank of America, N.A., et. al.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2008). The case concerned a rogue trading investigation and the purpose of investigative materials uncovered during a routine external audit.
35. Judge James Gwin noted that his view of the non-legal nature of regulatory compliance was not "a close question." Mar. 11 Opinion, note 3, *supra* at 3.

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Despite this circumstance, the Court found that the lack of an express written request for legal advice in the COBC Documents was fatal to the Defendants' assertion of work-product protection. It did not help that KBR took an almost "assembly-line" approach in reviewing its 1,000-plus complaints.[36] Yet the gravity and volume of the reports of breaches and resulting litigation risk could have been factors weighing in favor of the application of work-product protection.

> "On the facts before it, the Barko Court could well have upheld legal privileges and remained consistent with established case law, and compelling arguments could be made that it should have done so."

In this era of increasingly aggressive regulatory enforcement, regulatory and compliance-related internal investigations virtually always entail the need at some point for legal input, analyses, and advice. On the facts before it, the *Barko* Court could well have upheld legal privileges and remained consistent with established case law, and compelling arguments could be made that it should have done so. As the Supreme Court observed in *Upjohn*, because there is a "vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter."[37] Accordingly, a strict and rigid approach in the compliance context is counter-intuitive and counter-productive, arguably undercutting the importance of building and investing in robust compliance programs that include self-investigation of potential regulatory violations, even where the substantial involvement of a lawyer is not possible.[38]

Lessons From The *Barko* Decision

There are important lessons to be drawn from the *Barko* decision, the most essential being that the involvement of in-house or external counsel in internal investigations should be substantive and not merely a formality. In addition, companies and compliance departments should consider implementing some or all of the "best practices" from the following list:

a. Companies should appoint one or more lawyers (internal or external) to assess and document in writing whether the allegations/issues to be investigated warrant legal involvement, and the extent of legal involvement required.

b. Written policies should be disseminated to: (i) provide threshold guidance for when attorneys should be involved; (ii) identify clear examples of non-routine matters in connection with which litigation or enforcement proceedings could reasonably be expected (*e.g.*, allegations of fraud, improper payments, etc.); and (iii) flag other situations regularly encountered in the company's operating environment, requiring prompt escalation to the legal department.

c. One or more attorneys should be appointed to monitor investigative processes and act as gatekeepers for key investigative decisions (*e.g.*, timeline planning, witness selection, report drafting and review),[39] regardless of whether the relevant function with overall responsibilities for investigating a given matter is audit, compliance, or legal.

d. When being interviewed by a lawyer, witnesses should be given *Upjohn* warnings informing them that the content of their interviews are subject to legal privilege and the duty of confidentiality, both held by and owed to the company.[40]

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36. Reply in Support of Plaintiff-Relator's Motion to Compel, note 9, *supra* at 13-16.
37. 449 U.S. 383, 392 (1981) (internal quotation and citation omitted).
38. *Cf. In re Vioxx Products Liability Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).
39. *See ISS Marine Servs., Inc.*, 905 F. Supp. 2d at 127 & 138.
40. In *Upjohn*, the Supreme Court held that communications between the in-house counsel and employees of a company could attract legal privilege, but the company controls the privilege as the client-beneficiary of the communications. 449 U.S. at 390-391. Hence, the provision of the *Upjohn* warning has become typical practice in investigations to protect the company's interest in legal privilege vis-à-vis potential third parties, including its employees.

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e. Attorneys should conduct sensitive investigations and supervise non-attorney investigators. Outside counsel should be retained for the most sensitive, high-risk investigations. Companies should consider sending "*Upjohn* letters" to non-lawyer investigators to deputize them with powers to act under the direction and supervision of a lawyer, and to include explicitly their work product within legal privilege.[41]

f. External experts and investigators should be retained and supervised by counsel.

g. In appropriate cases, investigation reports drafted by non-lawyers should be addressed and sent to counsel expressly requesting legal advice.

h. Documents should be labeled as being subject to attorney-client privilege and the work-product doctrine. However, as the courts are suspicious of over-usage and potential abuse, these labels should not be applied blindly.

Conclusion

The *Barko* and *ISS Marine* decisions demonstrate that courts can be hesitant to recognize and give effect to the protections of legal privilege over documents generated in connection with compliance-driven internal investigations. Although it remains to be seen if *Barko* will be upheld or overturned on appeal, and to what extent other courts will follow suit, it provides a caution against complacency and serves as a timely reminder of the need for companies and compliance departments to take conscientious steps to protect privileged and otherwise protected communications.

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41. *Id.* The provision of *Upjohn* letters can be critical to preserving a company's legal privilege during investigations conducted principally by non-lawyers. It does so by memorializing the purposes of the investigation (*e.g.*, to facilitate the provision of legal advice and the creation of litigation work product, and to maintain confidentiality), and by providing relevant instructions to and conferring authority on the investigators in respect of such purposes.

Heads of SEC Whistleblower Office and FCPA Unit Warn Against Interference with Potential Whistleblowers

During the last fiscal year, the SEC received 149 tips from whistleblowers related to potential FCPA violations and a total of 404 tips from individuals located in 55 different foreign countries. Indeed, whistleblower tips represent one of the primary sources for FCPA cases brought by the SEC, according to comments made by the Chief of the SEC's FCPA unit, Kara Brockmeyer, at this year's "SEC Speaks" conference. As whistleblower tips to the SEC assume greater prominence, including with respect to the FCPA, there is also increasing regulatory attention being paid to efforts that might silence or otherwise interfere with such whistleblowers.

This regulatory focus includes confidentiality agreements that prohibit employees from acting as SEC whistleblowers. Brockmeyer suggested that such agreements would be prohibited under the Dodd-Frank whistleblower protections. Last month, at Georgetown University Law Center's Corporate Counsel Institute, the Chief of the SEC's Office of the Whistleblower, Sean McKessy echoed Brockmeyer's statement, warning against those who would draft contracts that attempt to dissuade would-be whistleblowers from reporting company wrongdoing to the SEC. According to McKessy, his office is "actively looking for examples of confidentiality agreements, separation agreements, [and] employee agreements" that condition certain benefits on not reporting activities to regulators, including the SEC. In addition to warning of potential liability for the companies, McKessy specifically warned corporate counsel about drafting such provisions – reminding them of the SEC's power to bar a lawyer from practicing before the Commission.[1]

I. Dodd-Frank Whistleblower Provisions.

McKessy's and Brockmeyer's statements are a useful reminder to companies that the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which became law in 2010, imposed some important changes in relation to whistleblower protection.[2] First, Dodd-Frank created financial incentives for whistleblowers that report securities law violations to the SEC. If a whistleblower meets certain requirements, outlined in Exchange Act Section 21F and its implementing Rules 21F-1 through 21F-17, he or she becomes eligible to receive a bounty award between ten and thirty percent of any imposed monetary sanction (where the sanction exceeds $1 million). Especially relevant for companies that conduct business outside the United States, there is no requirement that the whistleblower lives in the United States or is a citizen of the United States to receive the whistleblower bounty.[3]

Dodd-Frank also enhanced anti-retaliation protections for whistleblowers. Rule 21F-17 prohibits "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."[4] McKessy's and Brockmeyer's recent comments make clear that the SEC is interpreting this provision broadly and taking enforcement of it seriously. Their comments are also consistent with the SEC's previous assertion that it has enforcement authority for the anti-retaliation provisions of Dodd-Frank.[5] Indeed, in March of this year, the SEC was reported to have launched an investigation of an employer related to its confidentiality agreement that barred employees from disclosing fraud allegations to anyone, including federal investigators.[6]

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1. *See* Commission's Rules of Practice, Rule 102(e), 17 C.F.R. § 201.102 (2011).
2. *See* Securities Exchange Act of 1934, Section 21F, 15 U.S.C. § 78u-6.
3. *See Liu v. Siemens AG*, No. 13-CV-317, 2013 WL 5692504, at *3 (S.D.N.Y. Oct. 21, 2013).
4. Implementation of the Whistleblower Provisions of Section 21F of Securities Exchange Act of 1934, SEC Release No. 34-64545, 76 Fed. Reg. 34,300, 34,371 (May 25, 2011).
5. *Id.* at 34,304.
6. Scott Higham, "SEC Has Opened Investigation into KBR, Whistleblower's Lawyer Says," *Wash. Post* (Mar. 10, 2014), 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.

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The anti-retaliation provision of Dodd-Frank also provides a cause of action in federal court for an individual who was retaliated against for engaging in protected whistleblowing activity. Despite the SEC's broad reading and apparent aggressive enforcement of the anti-retaliation provision of Dodd Frank, federal courts have limited the extraterritorial reach of the anti-retaliation provision in the private litigant context, finding that individuals outside of the United States may not aver themselves of its protections by bringing suit in federal court.[7] Although Dodd-Frank expanded the authority of the SEC to allow it to bring claims relating to certain extraterritorial violations of the anti-fraud provisions of the federal securities laws, that provision is expressly limited to alleged "anti-fraud" violations, and it is unlikely a court would find that the SEC's expanded authority would include extraterritorial violations of the whistleblower anti-retaliation provisions of Dodd-Frank.[8]

Nevertheless, it is worth noting that the SEC has advocated for an expansive view of who qualifies as a whistleblower under Dodd-Frank's anti-retaliation provisions generally. As illustrated by the SEC's *amicus* filing in *Liu v. Siemens AG* – a case before the Second Circuit Court of Appeals addressing the issue of whether an internal whistleblower must report wrongdoing to the SEC to qualify for the anti-retaliation protections of Dodd-Frank – the SEC believes its Rule 21F-2 "protects any employee who engages in any of the [specified] whistleblowing activities … irrespective of whether the employee separately reports the information to the [SEC]."[9] Notably, the Fifth Circuit has taken the contrary position: whistleblowers may avail themselves of the anti-retaliation protections of Dodd-Frank only if they report wrongdoing to the SEC.[10] In the event of a division of opinion in the courts of appeals, these differing interpretations will likely be settled by the Supreme Court.

> "[T]he SEC has advocated for an expansive view of who qualifies as a whistleblower under Dodd-Frank's anti-retaliation provisions[.]"

Although a foreign individual may not have a cause of action against an employer for retaliation, we would expect that the SEC will continue to keep a watchful eye on how employers address confidentiality agreements or provisions – including those with foreign employees – to ensure that those provisions to do not run afoul of the broad protections afforded whistleblowers by Dodd-Frank or water-down the statute's incentive structure for reporting violations.

II. Conclusion

The recent publicity around whistleblower rewards[11] as well as Brockmeyer's and McKessy's comments on vigilance around confidentiality agreements are a reminder to human resource departments and legal counsel to review all agreements with current and former employees, whether foreign based or domestic. This review should include any confidentiality agreements, severance agreements and codes of conduct to ensure that those documents do not contain provisions that run afoul of the prohibitions of Rule 21F-17. That exercise, however, can prove challenging given the uncertainty around whether broad confidentiality clauses (*i.e.*, prohibiting disclosure to third parties generally) or non-disparagement clauses (*i.e.*, prohibiting employees from making disparaging remarks about the company to third parties generally) would be interpreted by the SEC as violating Rule 21F-17.

Until the SEC takes some action in this area or provides some concrete

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7. *See Liu*, 2013 WL 5692504 at *3; *Asadi v. G.E. Energy* (USA), LLC, No. 4:12-345, 2012 WL 2522599, at *4-7 (S.D. Tex. June 28, 2013).
8. *See* 15 U.S.C. § 77v(a) (2012).
9. *Liu v. Siemens AG*, No. 13-4385, Brief for SEC as Amicus Curiae Supporting Appellant at 15 (2d Cir. Feb. 20, 2014), www.sec.gov/litigation/briefs/2014/liu-siemens-0214.pdf; *see also* Sean McKessy, Statement on Court Filing by SEC to Protect Whistleblowers From Retaliation (Feb. 20, 2014) ("Today's filing makes clear that under SEC rules, whisteblowers are entitled to protection regardless of whether they report wrongdoing to their employer or to the Commission."), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370540812998.
10. *See* Debevoise & Plimpton LLP, Client Update: Circuit Court Adopts Narrow Interpretation of Anti-Retaliation Provision of Dodd-Frank Whistleblower Rules (July 19, 2013), http://www.debevoise.com/clientupdate20130719a.
11. *See, e.g.*, Rachel Louise Ensign, "SEC to Boost Award to First Whistleblower to Recover Under Dodd-Frank," *Wall St. J. Law Blog* (Apr. 8, 2014), blogs.wsj.com/law/2014/04/08/sec-to-boost-award-to-first-whistleblower-to-recover-under-dodd-frank.

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guidance, companies should be cautious about drafting and enforcing broadly-worded confidentiality or other provisions, particularly where there is a chance that the enforcement of those provisions might be viewed as impeding a purported whistleblower's ability to report conduct to the SEC or other regulatory bodies. In addition, it continues to be a best practice for employers to provide avenues for their employees to report concerns about potential wrongdoing internally with the hope that any potential problem can be addressed promptly and appropriately.

> "[C]ompanies should be cautious about drafting and enforcing broadly-worded confidentiality or other provisions[.]"

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