

# Recent Settled Actions Reiterate SEC's Broad Interpretation of Rule 21F-17(a) Whistleblower Impediments

September 23, 2024

On September 9, 2024, the Securities and Exchange Commission (the "SEC") announced settled enforcement actions against seven public companies for Rule 21F-17(a) violations. Rule 21F-17(a) of the Securities Exchange Act of 1934 prohibits any person from taking any action to impede individuals from contacting the SEC to report a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement. For the past several years, the SEC has been vocal about its position that language in employee agreements, company policies and other material, could be interpreted as having a chilling effect on potential whistleblowers and are therefore violative of Rule 21F-17(a). The latest companies to be charged by the SEC for language contained in their agreements include Acadia Healthcare Company, Inc., a.k.a. Brands Holding Corp.; AppFolio, Inc.; IDEX Corporation; LSB Industries; Smart for Life, Inc.; and TransUnion. Without admitting or denying the charges, these companies each agreed to civil penalties ranging from \$19,500 to \$1.3 million for a combined total of over \$3 million in penalties. The penalty amounts appear to be largely driven by the number of violative agreements identified by the SEC. The recent settlements are the latest cautionary notice for companies to review a broad range of agreements, policies and other communications with individuals for any potential whistleblower impediments.

**A Closer Look at the Recent Settlements.** As with prior similar Rule 21F-17(a) enforcement actions, the SEC identified violative language in various employee and consulting agreements of the seven charged companies entered into between 2019 and 2023, including retention agreements, incentive agreements, severance agreements and settlement agreements between the seven companies and current or former employees and consultants. Specifically, the SEC interpreted agreement terms that required employees "to waive their right to recover a monetary award" for participating in government investigations or whistleblowing, despite expressly permitting employees to participate in government whistleblower programs, as an "action to impede" in violation of Rule 21F-17(a). Importantly, carve-out language in the agreement that expressly permitted whistleblower activity was not enough to overcome the alleged whistleblower impediments caused by broad restrictions on potential whistleblowers obtaining monetary awards. The SEC's orders also recognized remedial actions taken by

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the firms, including promptly revising internal agreement templates and making reasonable efforts to notify affected individuals of the changes.

Notably, in all seven orders, the SEC stated that it was unaware of any instances in which the company took action to enforce the provisions at issue or in which the affected individuals declined to communicate with government authorities as a result of the prohibitive agreement language. The SEC has repeatedly taken the position that language in an agreement alone, even without threat of enforcement or actual enforcement, creates an impediment in violation of Rule 21F-17(a).

**Rule 21F-17(a) Applies beyond Public Companies and the Employee/Employer Context.** In addition to the alleged violative language contained in employee agreements, the SEC determined that restrictive and waiver language in AppFolio and TransUnion's consulting service agreements also constituted impediments in violation of Rule 21F-17. The inclusion of consulting agreements in the SEC whistleblower enforcement activity reiterates the principle that Rule 21F-17 is not limited to the employee-employer context.

The risk of enforcement extends broadly to any agreements with individuals, including customers and investors. The SEC has also brought whistleblower impediment actions in the context of customer agreements. The SEC entered into an \$18 million settlement earlier this year with J.P. Morgan Securities LLC, which involved retail brokerage customers' and advisory clients' settlement agreements and broadened the scope of potentially at-risk agreements beyond the employment, separation and other employee-centered agreements that have typically been the subject of the SEC's focus in its enforcement of Rule 21F-17(a) of the Securities Exchange Act of 1934. (Our client alert regarding the JP Morgan settlement can be accessed [here](#).)

The SEC has also taken the approach that Rule 21F-17(a) applies to both public and private companies. Last September, the SEC also brought its first-ever Rule 21F-17(a) action against a privately held company over its separation agreements.

**Takeaways.** Given the escalation in whistleblower-related enforcement activity by the SEC and other agencies, it is prudent for public and private companies alike to review documents across their businesses to make sure those materials appropriately carve out whistleblowing activities from their confidentiality and other restrictions and avoid restricting related activity in any manner. Documents to consider reviewing for potential inclusion under the Rule include:

- employment-related agreements (e.g., employment agreements, separation agreements, confidentiality agreements, restrictive covenant agreements, equity agreements, retention agreements);

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- settlement agreements;
  - consulting agreements;
  - confidentiality agreements/NDAs;
  - policies (e.g., compliance manuals; codes of conduct; employee handbooks);
  - trainings materials; and
  - client, customer, and investor agreements, including releases and settlement agreements.

Companies should consult with counsel regarding the most effective way to address any existing or past agreements or other documents that could be read to restrict or otherwise have a chilling effect on an individual's ability to communicate with the SEC or other government agencies about potential violations of law.

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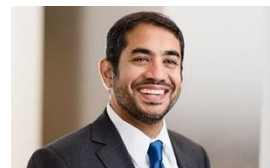
Please do not hesitate to contact us with any questions.



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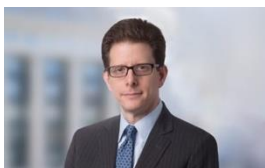
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