

Client Update

SEC Brings First Stand-Alone Anti-Retaliation Enforcement Action Under Dodd-Frank

NEW YORK

Jyotin Hamid
jhamid@debevoise.com

Mary Beth Hogan
mbhogan@debevoise.com

WASHINGTON, D.C.

Jonathan R. Tuttle
jrtuttle@debevoise.com

Ada Fernandez Johnson
afjohnson@debevoise.com

Ryan M. Kusmin
rmkusmin@debevoise.com

Mark D. Flinn
mflinn@debevoise.com

Last week, the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) announced its second whistleblower retaliation case since the enactment of Dodd-Frank’s anti-retaliation provisions in 2011. The *In the Matter of International Game Technology*¹ case is also the first enforcement action to allege retaliation based on whistleblower activity that did not lead to a settlement of a substantive violation of the securities laws. The case is a stark reminder of the importance of implementing robust anti-retaliation policies that are consistently applied to alleged whistleblowers, even in those cases where the claims raised by the whistleblowers turn out to have not been well-founded.

BACKGROUND

International Game Technology (“IGT”), a manufacturer and distributor of slot machines and other casino gaming equipment, agreed to pay \$500,000 to settle allegations that it terminated a high-performing employee for raising concerns about the company’s cost accounting methodology with senior management and the SEC. In particular, the whistleblower reported to his managers, the company’s internal complaint hotline and the SEC that IGT’s public financial statements might have been misstated because IGT applied inflated estimates to account for the cost of refurbished parts that were used in the gaming equipment that IGT leased. The settlement order emphasizes the whistleblower’s glowing performance evaluations in the years leading up to his complaint, noting that he had high potential to become one of IGT’s vice presidents.

Immediately after IGT received the complaint through its internal hotline, IGT retained outside counsel to conduct an internal investigation. The SEC’s order states that the whistleblower was removed from two of IGT’s significant

¹ *In the Matter of International Game Technology*, Exchange Act Release No. 78991 (Sept. 29, 2016).

business opportunities while this investigation was pending. The internal investigation ultimately found that IGT's cost accounting model was appropriate and that its financial statements did not contain misstatements. According to the SEC's order, the whistleblower, who is not an accountant, was terminated by IGT when the investigation concluded.

ANALYSIS

Section 21F of the Securities Exchange Act of 1934 (the "Exchange Act"), which was enacted pursuant to Dodd-Frank, provides various whistleblower protections and incentives, including a bounty program for individuals who report original information to the SEC and anti-retaliation provisions to protect individuals who report wrongdoing. Specifically, Exchange Act Section 21F(h) prohibits an employer from discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against a whistleblower in the terms of employment because the whistleblower engaged in protected whistleblowing activities, including providing information to the employer or the SEC concerning a violation of the securities laws.² In its press release announcing the settlement with IGT, the Commission stated that IGT violated Section 21F(h) because the whistleblower "was removed from significant work assignments within weeks of raising concerns about the company's cost accounting model" and "was terminated approximately three months later."³

In 2014, the SEC brought its first case alleging improper retaliation under Section 21F(h) against investment adviser Paradigm Capital Management, Inc. and its owner, Candace Weir.⁴ In that case, the SEC alleged that Paradigm and Weir retaliated against a whistleblower who had reported trading violations under the Investment Advisers Act. The SEC's charges against Paradigm and Weir involved both substantive violations of the Investment Advisers Act and retaliation charges under Exchange Act Section 21F(h). More recently, the Commission has brought two enforcement actions against employers for

² 15 U.S.C. 78u-6(h)(1)(A).

³ Press Release, SEC: Casino-Gambling Company Retaliated Against Whistleblower (Sept. 29, 2016), available at <https://www.sec.gov/news/pressrelease/2016-204.html>.

⁴ See Debevoise & Plimpton LLP, Client Update: SEC Brings First Anti-Retaliation Enforcement Action Under Dodd-Frank (June 19, 2014), available at <http://www.debevoise.com/insights/publications/2014/06/sec-brings-first-antiretaliation-enforcement-act>.

entering into contracts that can be read to impede their employees from reporting wrongdoing to the SEC.⁵

The enforcement action against IGT is unique because it is the first whistleblower retaliation case that did not also include a settlement of substantive violations of the securities laws, reflecting the SEC's continued commitment to making enforcement of these provisions a priority. When announcing the IGT enforcement action, Jane A. Norberg, the new Chief of the SEC's Office of the Whistleblower, stressed that "[b]ringing retaliation cases, including this first stand-alone retaliation case, illustrates the high priority we place on ensuring a safe environment for whistleblowers." She reiterated that the SEC "will continue to exercise our anti-retaliation authority when companies take reprisals for whistleblowing efforts."⁶

KEY TAKEAWAYS

As the IGT and Paradigm decisions make clear, employers must act cautiously and should consult with counsel before taking any adverse employment action against an employee who has reported wrongdoing, even if a determination is made that a whistleblower complaint is unsupported. Additionally, employers should avoid any activities that seek, or could be seen as seeking, to prevent or discourage whistleblowing complaints.

* * *

Please do not hesitate to contact us with any questions.

⁵ See Debevoise & Plimpton LLP, Client Update: SEC Brings Action Against Employer for Agreements Requiring Employees to Waive Recovery if They Blow the Whistle (Aug. 11, 2016), available at <http://www.debevoise.com/insights/publications/2016/08/sec-brings-action-against-employer-for-agreements>; Debevoise & Plimpton LLP, Client Update: SEC Brings First-of-Its-Kind Action for Confidentiality Agreement that Discourages Whistleblowing (Apr. 6, 2015), available at <http://www.debevoise.com/insights/publications/2015/04/sec-brings-first-of-its-kind>.

⁶ Press Release, SEC: Casino-Gambling Company Retaliated Against Whistleblower (Sept. 29, 2016), available at <https://www.sec.gov/news/pressrelease/2016-204.html>.