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WHISTLEBLOWERS

New SEC Settlements Show Continued Focus On Whistleblower Protection and Severance Agreements

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The Securities and Exchange Commission (SEC) continues to pursue enforcement actions against companies for whistleblower-related violations. The latest in a recent string of settled orders, which include the SEC's first case based solely on retaliation for whistleblower reporting, further highlight the agency's resolve to prevent corporate actions that could chill reporting of possible legal violations. These cases, along with other recent settlements, send a message to companies about the importance of enhancing anti-retaliation controls and ensuring that employee severance agreements and company policies are consistent with the SEC's whistleblower rules.

First Standalone Retaliation Action – International Game Technology

On September 29, 2016, casino-gaming company International Game Technology (IGT) settled a whistleblower retaliation claim brought by the SEC by agreeing to a \$500,000 penalty and to cease and desist from committing or causing any further violations of Section 21F(h) of the Securities Exchange Act of 1934.¹ This is the second whistleblower retaliation case that the SEC has brought since it was authorized to do so under the Dodd-Frank Act,² and the first case in which the SEC has focused on retaliation as a standalone issue.

¹ Order Instituting Cease-And-Desist Proceedings, *In the Matter of International Game Technology*, No. 3-17596 (SEC Sept. 29, 2016) (IGT Order). Rule 21F-17 provides that “[n]o person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation.”

² Press Release, SEC, *Casino-Gaming Company Retaliated Against Whistleblower* (Sept. 29, 2016).

The SEC alleged that IGT fired a whistleblower after he raised concerns regarding IGT's accounting methodology.³ Beginning in June 2013, the whistleblower became concerned that IGT's standard cost model was arbitrarily inflated and could result in inaccuracies in the company's financial statements.⁴

The whistleblower presented his concerns to his supervisors in July 2014.⁵ According to the SEC's order, the presentation was followed by internal communications about terminating the whistleblower.⁶ Immediately following the presentation, a company supervisor sent an e-mail stating, “I can't allow [the Whistleblower] to place those inflammatory statements into presentations, if there is no basis in fact.”⁷ Two weeks later, that supervisor recommended that the whistleblower be terminated.⁸

In August 2014, the whistleblower submitted a complaint to the company's internal grievance hotline detailing his concerns about the company's accounting model.⁹ He also submitted a complaint to the SEC the following day, and on September 11, 2014, notified the company that he had done so.¹⁰ At some point subsequent to submitting the internal grievance, the whistleblower claimed that he was retaliated against for raising the accounting concerns to his supervisors.¹¹

Following the complaint to the internal grievance hotline, IGT hired outside counsel and conducted an internal investigation.¹² The SEC's order states that, while the investigation was pending, the whistleblower was removed from a project that involved cost savings

³ IGT Order ¶¶ 3-19.

⁴ *Id.* ¶¶ 6, 9.

⁵ *Id.* ¶ 11.

⁶ *Id.* ¶ 12-14.

⁷ *Id.* ¶ 12.

⁸ *Id.* ¶ 13.

⁹ *Id.* ¶ 15.

¹⁰ *Id.* ¶ 15 fn.2.

¹¹ IGT Order ¶ 15.

¹² *Id.* ¶ 17.

analysis and was directed not to attend a global industry convention, which the whistleblower had attended in previous years.¹³ The company concluded its internal investigation on October 30, 2014, finding that the cost accounting model was appropriate and that the financial statements were not distorted.¹⁴ IGT terminated the whistleblower the same day.¹⁵

The SEC found that the termination violated Section 21F(h) of the Exchange Act, which prohibits an employer from discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower including, among other things, providing information regarding potential violations of the securities laws to his employer or to the Commission.¹⁶ SEC Enforcement Division Director Andrew Ceresney stated that “[s]trong enforcement of the anti-retaliation protections is critical to the success of the SEC’s whistleblower program.”¹⁷ The Chief of the SEC’s Office of the Whistleblower, Jane Norberg, said 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” and that the SEC will “continue to exercise our anti-retaliation authority when companies take reprisals for whistleblowing efforts.”¹⁸

Continued Scrutiny of Separation Agreements – Anheuser-Busch InBev

The SEC announced the IGT settlement one day after settling with Anheuser-Busch InBev (AB InBev) for alleged violations of the Foreign Corrupt Practices Act and SEC Rule 21F-17(a).¹⁹ According to the SEC’s September 28, 2016 order, in December 2012, AB InBev entered into an employee separation agreement with an employee who had reported potentially improper payments to Indian government officials.²⁰ The separation agreement required the employee to maintain the company’s confidential and proprietary information “in strict secrecy and confidence,” and also included a \$250,000 liquidated damages penalty if the employee violated the non-disclosure terms.²¹ The SEC’s order alleges that, after signing the separation agreement, the employee, who was previously voluntarily communicating directly with SEC staff, stopped doing so.²² The SEC said that AB InBev’s separation agreement “chilled an employee from communicating with the SEC” in violation of SEC Rule 21F-17(a).²³

AB InBev agreed to settle the SEC’s FCPA and Rule 21F-17(a) charges for \$6 million.²⁴ The company fur-

ther agreed to cooperate with the SEC and report its FCPA compliance efforts for a two-year period, and make reasonable efforts to notify certain former employees that AB InBev does not prohibit employees from contacting the SEC about possible legal violations.²⁵

In light of the SEC’s continued focus on severance agreements and whistleblower protection, companies are encouraged to review existing form agreements and other employee policies for compliance with the SEC’s whistleblower rules. Companies also must remain cognizant of the importance of preventing retaliation against persons who report internally or to government agencies. For additional suggestions for mitigating whistleblower risks, see our two-part article *Don’t Tread on Whistleblowers: Mitigating and Managing Retaliation Risks*.²⁶

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²⁵ *Id.* at 10-12.

²⁶ William McLucas, Laura Wertheimer, & Arian June, *Don’t Tread on Whistleblowers: Mitigating and Managing Retaliation Risks*, 46 Bloomberg BNA Sec. Reg. & Law Rep. 77 (Jan. 13, 2014), and William McLucas, Laura Wertheimer & Arian June, *Don’t Tread on Whistleblowers: Mitigating and Managing Retaliation Risks – Part II*, 46 Bloomberg BNA Sec. Reg. & Law Rep. 167 (Jan. 27, 2014).

¹³ *Id.* ¶ 18.

¹⁴ *Id.* ¶ 17.

¹⁵ *Id.* ¶ 19.

¹⁶ *Id.* ¶ 20.

¹⁷ Press Release, SEC, *SEC Charges Anheuser-Busch InBev with Violating FCPA and Whistleblower Protection Laws* (Sept. 28, 2016) (AB InBev Press Release).

¹⁸ *Id.*

¹⁹ Order Instituting Cease-And-Desist Proceedings, *In the Matter of Anheuser-Busch InBev SA/NV*, 3-17586 (SEC Sept. 28, 2016) (Anheuser-Busch Order).

²⁰ *Id.* ¶ 2.

²¹ *Id.* ¶ 26.

²² *Id.* ¶ 27.

²³ AB InBev Press Release at 1.

²⁴ *Id.* ¶ 9.

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