



GLOBAL INVESTIGATIONS AND COMPLIANCE

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Navigant Consulting, Inc. (NYSE: NCI) is a specialized, global professional services firm that helps clients take control of their future. Navigant's professionals apply deep industry knowledge, substantive technical expertise, and an enterprising approach to help clients build, manage and/or protect their business interests. With a focus on markets and clients facing transformational change and significant regulatory or legal pressures, the Firm primarily serves clients in the healthcare, energy and financial services industries. Across a range of advisory, consulting, outsourcing, and technology/analytics services, Navigant's practitioners bring sharp insight that pinpoints opportunities and delivers powerful results. More information about Navigant can be found at navigant.com.

RECENT SEC ENFORCEMENT ACTIONS NOTE THE IMPORTANCE OF PROTECTING WHISTLEBLOWERS

BACKGROUND

The previous two months have seen the Securities and Exchange Commission ("SEC") bring four cases in which the SEC has sanctioned companies for violating the whistleblower protection provisions of the Dodd-Frank Wall Street Reform Act ("Dodd-Frank Act").¹ These cases filed in such quick succession send a clear message that the SEC places a high value on whistleblowers and the role they play in helping the SEC fulfill its mission of protecting investors and that they will take all necessary steps to ensure that whistleblowers are adequately protected.

In a recent report announcing that since the 2011 implementation of the whistleblower program, the SEC has granted awards to whistleblowers in excess of \$100 million and information from whistleblowers has led to more orders of financial remedies of more than \$500 million, SEC Chair Mary Jo White stated:

The SEC's whistleblower program has proven to be a game changer for the agency in its short time of existence, providing a source of valuable information to the SEC to further its mission of protecting investors while providing whistleblowers with protections and financial rewards.²

Set forth in the following table is a summary of the seven cases that the SEC has brought since 2014 in which they sanctioned companies for violating the Whistleblower Anti-Retaliation and Anti-Impeding provisions of the Dodd-Frank Act.

1. In addition to providing financial rewards to individuals who provide information to the SEC about potential violations of the federal securities laws, the Dodd-Frank Act includes provisions to protect the rights of whistleblowers. These protections prohibit companies from (1) retaliating against whistleblowers ("Anti-Retaliation Provision"); and (2) impeding whistleblowers from communicating with the government ("Anti-Impeding Provisions")

The Anti-Retaliation Provision, which is contained in Section 21F(h) of the Securities Exchange Act of 1934 prohibits "...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 in, among other things, providing information to the Commission"

The Anti-Impeding Provision, which is contained in Section 21F-17 of the Securities Exchange Act of 1934 states prohibits any person from taking "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 . . . with respect to such communications."

2. SEC Press Release, SEC Whistleblower Program Surpasses \$100 Million in Awards, (August 30, 2016) available at <https://www.sec.gov/news/pressrelease/2016-173.html>

CASE NAME	FACTS	SANCTION
In the Matter of Paradigm Capital Management, Inc.³ (“Paradigm”)	Paradigm retaliated against a whistleblower by among other things removing him from his position as the firm’s head trader after he had reported potential securities laws violations to the SEC.	First case in which company was sanctioned for violating the Whistleblower Anti-Retaliation provisions. Paradigm was also found to have violated certain provisions of the Investment Advisers Act and was ordered to reimburse investors \$2.2 million.
In the Matter of KBR, Inc.⁴	During the course of an internal investigation, KBR required employees to sign confidentiality agreements stating that they could be disciplined or fired if they discussed matters relating to the investigation with outside parties prior to receiving approval from KBR’s legal department.	First case in which company was sanctioned for violating the Whistleblower Anti-Impeding provisions. KBR was ordered to pay a civil penalty of \$130,000.
In the Matter of Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch Professional Clearing Corp.⁵ (“ML”)	ML’s severance agreements, though permitting disclosure regarding potential securities laws violations in response to court or agency order, prohibited <i>voluntary</i> disclosure of such information. Severance agreements also limited the nature and scope of information which could be disclosed to only the underlying facts and circumstances.	Though ML was ordered to pay fines and penalties of approximately \$415 million for violations of various provisions of the Securities Exchange Act, ML was not required to pay any financial penalties for violating the Whistleblower Anti-Impeding provisions due to the fact that they eliminated the restrictive language in their severance agreements.
In the Matter of Blue Linux Holdings, Inc.⁶	While Blue Linux’s standard separation/severance agreements did not prohibit employees from providing information to the SEC or other federal agencies regarding potential violations of the federal securities laws, employees were required to waive their rights to monetary recoveries in connection with any such disclosures.	Blue Linux was ordered to pay a penalty of \$265,000 for violations of the Whistleblower Anti-Impeding provisions.

3. SEC Press Release – *SEC Charges Hedge Fund Adviser With Conducting Conflicted Transactions and Retaliating Against Whistleblower*, (June 16, 2014), available at (<https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542096307>); SEC Order Instituting Proceedings, *In the Matter of Paradigm Capital Management, Inc. and Candace King Weir*, Exchange Act Release 34-72393 (June 16, 2014), available at <https://www.sec.gov/litigation/admin/2014/34-72393.pdf>.

4. SEC Press Release – *SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements*, (April 1, 2015), available at (<https://www.sec.gov/news/pressrelease/2015-54.html>); SEC Order Instituting Proceedings, *In the Matter of KBR, Inc.*, Exchange Act Release 34-74619 (April 1, 2015), available at <https://www.sec.gov/litigation/admin/2015/34-74619.pdf>.

5. SEC Press Release – *Merrill Lynch to Pay \$415 Million for Misusing Customer Cash and Putting Customer Securities at Risk*, (June 23, 2016), available at (<https://www.sec.gov/news/pressrelease/2016-128.html>); SEC Order Instituting Proceedings, *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch Professional Clearing Corp.*, Exchange Act Release 34-78141 (June 23, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78141.pdf>.

6. SEC Press Release – *Company Paying Penalty for Violating Key Whistleblower Protection Rule*, (August 10, 2016), available at (<https://www.sec.gov/news/pressrelease/2016-157.html>); SEC Order Instituting Proceedings, *In the Matter of Blue Linux Holdings, Inc.*, Exchange Act Release 34-78528 (August 10, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78528.pdf>.

CASE NAME	FACTS	SANCTION
In the Matter of Health Net, Inc.⁷	While Health Net's standard separation/severance agreements did not prohibit employees from providing information to the SEC or other federal agencies regarding potential violations of the federal securities laws, employees were prohibited from bringing a lawsuit or any other proceeding against the company and were required to waive their rights to monetary recoveries in connection with any such disclosures.	Health Net was ordered to pay a penalty of \$340,000 for violations of the Whistleblower Anti-Impeding provisions.
In the Matter of Anheuser-Busch InBev SA/NV⁸ ("AB")	During the course of internal and SEC investigations into potential violations of the FCPA, the whistleblower was required to sign a separation agreement that in effect prohibited him from continuing to communicate with the SEC about the alleged misconduct. The whistleblower resumed communication with the SEC only after receiving a subpoena from the SEC.	AB was ordered to pay fines, penalties and disgorgement of approximately \$6 million for violations of the books and records provisions of the FCPA and the Whistleblower Anti-Impeding provisions.
In the Matter of International Game Technology⁹ ("IGT")	Subsequent to submitting a complaint to the company's whistleblower hotline, the whistleblower's duties and responsibilities were significantly curtailed and restricted despite the fact that he just recently had received positive performance feedback.	In the first standalone Whistleblower Anti-Retaliation case, IGT was ordered to pay a civil penalty of \$500,000.

SIGNIFICANT PROTECTIONS FOR WHISTLEBLOWERS

These cases make clear that the SEC views whistleblowers as an integral tool to maintaining an organization's accountability to its employees, shareholders and integrity of the capital markets. The whistleblower protection rules are designed to promote and protect this accountability by prohibiting any actions that in any way impede or otherwise restrict their employee's ability to freely communicate with the SEC regarding potential violations of the federal securities laws. To confirm that such protections are maintained, organizations should develop and implement

processes and controls to ensure all employment and separation agreements are reviewed for potentially restrictive language. Also, it is imperative that companies encourage internal reporting through anonymous hotlines and have a policy that prohibits retaliation in any form. Further, employees need to know that their complaints will be investigated fairly and handled in a comprehensive and consistent fashion. Therefore, companies need to provide sufficient qualified resources to investigate and timely disposition all allegations.

7. SEC Press Release - *Company Punished for Severance Agreements That Removed Financial Incentives for Whistleblowing*, (August 16, 2016, available at <https://www.sec.gov/news/pressrelease/2016-164.html>); SEC Order Instituting Proceedings, In the Matter of Health Net, Inc., Exchange Act Release 34-78590 (August 16, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78590.pdf>.

8. SEC Press Release - *SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws*, (September 28, 2016), available at <https://www.sec.gov/news/pressrelease/2016-196.html>); SEC Order Instituting Proceedings, In the Matter of Anheuser-Busch InBev SA/NV, Exchange Act Release 34-78597 (September 28, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78597.pdf>.

9. SEC Press Release - *SEC: Casino Gaming company Retaliated Against Whistleblower*, (September 29, 2016), available at <https://www.sec.gov/news/pressrelease/2016-204.html>); SEC Order Instituting Proceedings, In the Matter of International Game technology, Exchange Act Release 34-78991 (September 29, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78991.pdf>.

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Navigant's Global Investigations and Compliance practice brings critical expertise and resources to clients to assist them with identifying, assessing and managing the compliance and business risks related to financial economic crimes, money laundering, sanctions, bribery and corruption matters, investigative due diligence, FATCA, monitoring and investigations related to fraud, waste and abuse.

