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SEC "Levels Up" in $35M Resolution of Alleged Whistleblower Protection Violations and Compliance Program Failures Against Activision Blizzard

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On February 3, the U.S. Securities and Exchange Commission (SEC) announced that video game developer Activision Blizzard, Inc. (Activision) agreed to pay $35 million to settle accusations that it violated whistleblower protection rules and that its compliance program lacked essential elements — the ability to collect, track, and analyze workplace complaints — even though the commission failed to identify any harm to investors.[1] The SEC thus delivered on its 2022 end-of-year promise to protect whistleblowers by both "vigorously safeguarding whistleblowers' anonymity" and pursuing enforcement actions against those who impede them.

According to the February 3 administrative order, the SEC found that Activision violated Section 21F and Rule 21F-17(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) through its use of a template separation agreement that required "a significant number" of former employees over the past several years to notify the company if a disclosure obligation arose with a government agency or regulatory body. Notably, the commission conceded that it was not aware of any instance in which a former Activision employee actually was discouraged or prevented from communicating with the SEC or in which Activision sought to enforce the notice requirement, but nevertheless found the language used "undermine[d] the purpose" of Dodd-Frank. The commission gave little credence to all-too-familiar language in a countervailing clause that explicitly disclaimed restraint: "Nothing in this Separation Agreement shall prohibit … disclosures that are truthful representations in connection with a report or complaint to an administrative agency." Indeed, some but not all agreements used by Activision included a *second* disclaimer: "Nothing in this Release prevents me from … giving truthful testimony, or truthfully responding to a valid subpoena, or communicating or filing a charge with government or regulatory entities … ."

Creatively capitalizing on Activision's well-publicized issues with discrimination and sexual harassment (including, for instance, an $18 million settlement last year with the U.S. Equal Employment Opportunity Commission), the SEC also found that Activision lacked controls and procedures designed to ensure that information related to such complaints was collected and analyzed with an eye toward public disclosure. According to the SEC, Activision's management was in the dark about the "volume and substance of employee complaints of workplace misconduct" and therefore, could not assess "related risks" to the company's business, which risk the SEC pegged as Activision's ability to attract, retain, and motivate skilled workers in the tech industry. Again, conspicuously absent in the order is any finding that Activision's disclosures about retention and recruitment were at any time false, fraudulent, misleading, or incomplete.

In sum, the SEC continues to flex its enforcement muscle and expansive agenda in 2023. Companies should closely reevaluate their policies, procedures, and agreements at the intersection of HR and regulatory compliance to avoid the appearance of interference whistleblower incentives and protections. The SEC will challenge any agreements or policies that do not permit current and former employees from contacting the government, including the SEC, with regard to suspected violations of law.

Further, the SEC's findings in Activision's case reinforce the foundational principle that companies must invest in a compliance program that is resourced, empowered, and prepared in all facets — not only to foster reporting by employees, but also to accurately track and swiftly address complaints internally. Although Commissioner Hester M. Peirce's staunch dissent rebuffed "setting up internal data tracking systems *with an eye toward placating the SEC*," common-sense monitoring and measuring of employee complaints — regardless of subject matter — are essential to heading off whistleblowers, demonstrating continuous improvement, and defending your company against creative thinking by regulators, as demonstrated here.

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[1] U.S. Sec. and Exchange Comm'n, Statement of Comm'r Hester M. Peirce, "The SEC Levels Up: Statement on *In re Activision Blizzard*"(Feb. 3, 2023), https://www.sec.gov/news/statement/peirce-statement-activision-blizzard-020323#_ftn1.

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