

Cady Bar the Door

Spuds MacKenzie Runs into FCPA/Whistleblower Buzzsaw

Ha. I'm just kidding. I don't think [Spuds MacKenzie](#) has been a thing for years. But his former patron, Anheuser-Busch InBev, ran into some FCPA problems last month, and tacked on a whistleblower charge for good measure. [Here's](#) what the SEC says happened:

FCPA

This [administrative order](#) partially concerned AB InBev's violations of the books and records and internal controls provisions of the FCPA at its wholly owned Indian subsidiary, Crown Beers India Private Limited ("Crown"). From 2009 to 2012, AB InBev held a 49% interest in an Indian joint venture, InBev India International Private Limited ("IIPL"), which managed the marketing and distribution of Crown beer. The SEC says IIPL used third-party sales promoters to make improper payments to Indian government officials to obtain beer orders and increase brewery hours for Crown in 2011. IIPL invoiced Crown for reimbursement of some of these expenses, and Crown paid or accrued them. In doing so, Crown allegedly recorded certain of these expenses in its books as legitimate promotional costs. Crown had inadequate internal accounting controls to detect and prevent these improper payments and to ensure that transactions involving these promoters were recorded properly in its books. Allegedly! As a result, Crown's books, which were consolidated into AB InBev's books and records, did not accurately and fairly reflect the nature of the promoters' transactions.

Separation Agreement

In 2010 and 2011, a Crown employee told AB InBev personnel that IIPL may have been using a third party to make improper payments to Indian government officials. The Crown Employee also raised concerns about another third party, questioning its lack of sales experience, staff, and infrastructure. The Crown Employee reported to AB InBev personnel that the Principal had a local reputation for "taking care of" government officials and suggested that AB InBev perform due diligence on him. The Crown Employee was employed by an AB InBev subsidiary, but he was terminated in early 2012. After mediation regarding potential employment law claims, the Crown Employee and AB InBev's subsidiary entered into a separation agreement that resolved the Crown Employee's claims.

The separation agreement included these provisions:

[The Crown Employee] agrees to keep in strict secrecy and confidence any and all unique, confidential and/or proprietary information and material belonging or relating to [the AB InBev subsidiary] that is not a matter of common knowledge or otherwise generally available to the public including, but not limited to, business, government affairs, communications, financial, trade, technical or technological information.

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[The Crown Employee] acknowledges and agrees that [the Crown Employee] remains subject to the “Employment Agreement as to Intellectual Property and Confidentiality,” which [the Crown Employee] previously signed and is incorporated into the Agreement by reference. . .

[The Crown Employee] agrees not to disclose, directly or indirectly, any information regarding the substance of this Agreement to any person other than [the Crown Employee’s] spouse, attorney, or financial or tax advisor, except to the extent such disclosure may be required for accounting or tax purposes or as otherwise required by law. . . .

[The Crown Employee] agrees that, if [the Crown Employee] violates in any way any of the terms and conditions of paragraph 7, [the Crown Employee] shall be liable to [the AB InBev subsidiary], and shall 7 immediately pay to [the AB InBev subsidiary] as liquidated damages and not as a penalty, the total sum of \$250,000.00 which represents reasonable compensation for the loss incurred by [the AB InBev subsidiary] as a result of such breach. . . .

The Crown Employee had previously been voluntarily communicating directly with the SEC. But after signing the separation agreement, the Commission says he stopped out of fear of triggering the liquidate damages provision. Only after the SEC issued an administrative subpoena for testimony and documents did the Crown Employee resume communicating directly with the Commission staff. The SEC says AB InBev has used the same or similar language in other agreements in the past.

In September 2015, AB InBev amended its separation agreements to include the following language: “I understand and acknowledge that notwithstanding any other provision in this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity, and I am not required to inform the Company if I make such reports.”

AB InBev was charged with violating Sections 13(b)(2)(A) (books and records) and 13(b)(2)(B) (internal controls) of the Exchange Act, as well as Rule 21F-17(a) (impeding whistleblowers). It is paying disgorgement of \$2,712,955, prejudgment interest of \$292,381, and a civil penalty of \$3,002,955, for a total payment of \$6,008,291 to resolve the matter. It’s impossible to tell what is attributable to the FCPA violations and which of the total is for the problems with the separation agreement.

Putting AB InBev in Context

This didn’t work out well for Anheuser-Busch. When the Crown Employee went dark after previously speaking with the Commission staff, the sudden turn obviously raised questions. Once the staff figured out the reason, the company had two problems: (1) the separation agreement and its likely incompatibility with Rule 21F-17(a), and (2) the staff was almost certainly determined to make something stick on the original FCPA investigation. The liquidated damages provision is harsher than the prohibitions on collecting a whistleblower award from the Commission that we saw in [BlueLinx](#) and [HealthNet](#). For the rest of us, one positive from this matter is the plain language the Commission has essentially sanctioned that can make separation agreements or other confidentiality agreements acceptable in its eyes.

Thus endeth Whistleblower Week at *Cady Bar the Door*. Go forth and conquer.