UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98641 / September 29, 2023

INVESTMENT ADVISERS ACT OF 1940
Release No. 6452 / September 29, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21775

In the Matter of **D. E. Shaw & Co, L.P.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act"), against D. E. Shaw & Co., L.P. ("DESCO," the "Company," or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

1. This matter concerns violations of the Exchange Act's whistleblower protection rule by registered investment adviser DESCO. From at least August 12, 2011[1] through April 2019, DESCO required new employees to sign employment agreements ("Employment Agreements") that prohibited them from disclosing "Confidential Information" to anyone outside of DESCO unless authorized by DESCO or required by law or an order of a court or other regulatory or governmental body, without any exception for voluntary communications with the Commission concerning possible securities laws violations. Confidential Information included, among other things, any information gained in the course of employment that could reasonably be expected to be deleterious to DESCO if disclosed to third parties.

2. In addition, from at least August 2011 through June 2023, DESCO, in the ordinary course of its business, required approximately 400 of its departing employees to sign General Releases and Agreements ("Releases") affirming, among other things, that they had not filed any complaints with any governmental agency, department, or official, in order to receive deferred compensation and other benefits that were sometimes worth millions of dollars.

3. In 2017, DESCO circulated a firm-wide email (the "2017 Firm-Wide Email") notifying employees that nothing in any DESCO policy or agreement (which included any Employment Agreement or Release) prohibited employees from communicating directly with or providing information to regulators, agencies, and commissions regarding possible violations of law or regulations without notice to DESCO. DESCO simultaneously updated its internal policies with similar language, and required employees to acknowledge their receipt and review of those policies annually thereafter. However, DESCO did not revise its Employment Agreements until April 2019 and did not revise the form of its Release until July 2023—after this investigation commenced—to include similar whistleblower protection language.

Respondent

4. DESCO is a Delaware limited partnership with its principal place of business in New York, New York. DESCO has been registered with the Commission as an investment adviser since January 1999 and, together with its affiliated advisers, provides advisory services to various domestic and offshore investment funds, chiefly hedge funds. DESCO reported approximately $109 billion in regulatory assets under management in its most recent annual updating amendment to Form ADV filed with the Commission on March 31, 2023, and employs over 750 persons.

[1] The whistleblower protection rule, Exchange Act Rule 21F-17(a), became effective on August 12, 2011.

Facts

A. Statutory and Regulatory Framework Protecting Whistleblowers

5. On August 12, 2011, the Commission implemented rules to fulfill its congressional mandate under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd Frank Act") to encourage whistleblowers to report possible violations of the securities laws. Adopted as part of this rulemaking, Exchange Act Rule 21F-17 prohibits any person from taking any action to impede an individual from communicating directly with the Commission staff, including by "enforcing, or threatening to enforce, a confidentiality agreement . . . ." The new rules were well-publicized at the time.

6. In April 2015, the Commission brought the first enforcement action for a violation of Rule 21F-17 based on a company's use of a restrictive confidentiality agreement.[2]

7. The Commission has since instituted nearly twenty additional enforcement actions charging violations of Rule 21F-17. These enforcement actions were widely reported in the media.

B. DESCO's Employment Agreements and Releases Raised Impediments to Whistleblowing

8. From at least August 2011 through April 2019, DESCO required new employees, as part of their onboarding process, to sign Employment Agreements that prohibited them from disclosing "Confidential Information" to anyone outside of DESCO unless authorized by DESCO or "except as may be required by any applicable law or by order of a court of competent jurisdiction, a regulatory or self-regulatory body, or a governmental body."

9. Confidential Information was broadly defined to include information about "limited partners, clients, investors, joint venturers, or customers . . . any information that would typically be included in the D. E. Shaw Group's income statements, including, but not limited to the amount of the D. E. Shaw Group's revenues, expenses, or net income; [and] information gained in the course of the Employee's employment with the Company that could reasonably be expected to [be] deleterious to D. E. Shaw Group if disclosed to third parties." The Employment Agreements provided that such prohibition "shall survive the termination of this Agreement and of the Employee's employment with the Company."

10. From at least August 2011 until June 2023, DESCO required certain of its departing employees to sign Releases before they could receive certain post-departure payments. The Release required such departing employees to represent, among other things, the following:

> The Employee represents and warrants to the Company that the Employee has not

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[2] *See In the Matter of KBR, Inc.*, Exchange Act Release No. 74619 (Apr. 1, 2015).

made, filed or lodged any complaints, charges, or lawsuits or otherwise directly or indirectly commenced any proceeding against any member of the D. E. Shaw Group and/or any Covered Persons and Entities with any governmental agency, department, or official; any regulatory authority; or any court, other tribunal, or other dispute resolution body.

11. Although most employees' Employment Agreements did not reference the Release, a small number of employees signed letter amendments to their employment agreements ("Amendments") requiring them to sign a Release in order to receive post-termination payments. Additionally, managing directors signed supplements to their employment agreements ("Supplements") stating that the payment of certain profit-sharing amounts following termination of employment was subject to, among other things, execution of a Release.

12. From at least August 2011 to 2023, DESCO also required certain of its employees to sign termination agreements in order to receive post-departure payments. In doing so, DESCO differentiated between the following employee categories: (1) employees who departed voluntarily and were not bound by non-compete agreements; (2) employees who departed voluntarily and *were* bound by non-compete agreements or otherwise received post-departure payments; and (3) employees who departed involuntarily.

13. Employees who fell into category 1 and employees who fell into category 2 prior to September 2019 were not required to sign termination agreements. Rather, they were provided with exit letters. The exit letters specified that "[a]fter the termination date, all provisions of your Employment Agreement [subject to certain exceptions] shall remain in full force and effect." For investment professionals in DESCO's business units focused on quantitative investing strategies, such letters reiterated the Employment Agreements' prohibition against divulging Confidential Information, stating, "in Section 4(b) of the Employment Agreement, you agreed that during the term of your employment and at any time thereafter, you would not use or cause to be used any Confidential Information of the D. E. Shaw Group except in connection with the business of the D. E. Shaw Group, and that you would not disclose any Confidential Information to any third parties, unless such disclosure has been authorized in writing by the Company."

14. Employees who fell into category 3 and employees who fell into category 2 and left DESCO after September 2019 *were* required to sign termination agreements in order to receive post-departure payments.

15. The termination agreements signed by category 2 employees ("Voluntary Termination Agreements"), *i.e.*, voluntary departures bound by non-compete agreements or otherwise receiving post-departure payments, stated that the employee may be entitled to certain deferred compensation following execution of a Release. The Voluntary Termination Agreement further stated that if the employee failed to execute or revoked the Release, DESCO would require the employee to return any deferred compensation that had been paid, along with attorneys' fees incurred by DESCO to recover such payment.

16. The Termination Agreements signed by category 3 employees ("Involuntary Termination Agreements"), *i.e.*, involuntarily terminated employees, stated that they would receive deferred compensation, as well as certain additional compensation,[3] provided that the employee executed a Release.

17. Both the Voluntary Termination Agreements and the Involuntary Termination Agreements provided that "[a]ll provisions of your Employment Agreement that are meant to survive the termination of your employment with the Company shall remain in full force and effect." As discussed in Paragraph 8 above, one such provision was the requirement that employees not disclose Confidential Information. In addition, both the Voluntary Termination Agreements and a number of the Involuntary Termination Agreements, like the exit letters, reiterated the Employment Agreements' prohibition on divulging Confidential Information, stating, "in Section 4(b) of the Employment Agreement, you agreed that during the term of your employment and at any time thereafter, you would not use or cause to be used any Confidential Information of the D. E. Shaw Group except in connection with the business of the D. E. Shaw Group, and that you would not disclose any Confidential Information to any third parties, unless such disclosure has been authorized in writing by the Company."

18. The overall result of the above-described clauses in DESCO's Employment Agreements, Supplements, Amendments, and Releases was to (1) raise impediments to DESCO employees from engaging in whistleblowing activity upon onboarding until DESCO revised its Employment Agreement in 2019, (2) remind certain departing employees of DESCO's prohibition on unauthorized disclosure of Confidential Information upon departure until June 2023, and (3) condition payout of significant profit-sharing amounts or amounts of additional compensation—sometimes amounting to millions of dollars—on certain departing employees signing Releases that included an attestation that they had not filed any complaints with any governmental agency, until June 2023.

19. Notably, DESCO required employees who departed involuntarily, those who departed voluntarily and were bound by non-compete agreements, and managing directors to sign Releases in order to receive certain post-departure payments. Employees who were required to sign non-compete agreements and managing directors were, on the whole, employees with greater access to Confidential Information.

20. Furthermore, DESCO's exit letters for investment professionals in DESCO's business units focused on quantitative investing strategies included language reiterating the Employment Agreements' prohibition on divulging Confidential Information. Investment professionals were, on the whole, employees with greater access to Confidential Information.

21. The Commission is aware of one former DESCO employee who was initially discouraged from communicating with Commission staff about potential violations of securities

[3] The additional compensation could include several months of base salary, a lump sum payment, subsidized premiums for COBRA insurance, and three months of outplacement services through an employment agency.

laws due to the provisions relating to Confidential Information contained in DESCO's Employment Agreement and Release.

22. By including clauses prohibiting unauthorized disclosure of Confidential Information in its Employment Agreements prior to 2019, DESCO raised impediments to its employees' participation in the Commission's whistleblower program. Similarly, by requiring certain departing employees to sign Releases certifying that they had not previously lodged complaints against DESCO with any governmental agency as a condition to receiving post-departure payments, DESCO raised impediments to whistleblowing.

23. Restrictions on the ability of employees to share confidential corporate information regarding possible securities law violations with the Commission, such as those contained in DESCO's Employment Agreements and General Releases, undermine the purpose of Section 21F, which is to "encourage individuals to report to the Commission," and violate Rule 21F-17(a) by impeding individuals from communicating directly with the Commission staff about possible securities law violations.

C. DESCO Revised its Policies and Employment Agreement, but Not its Release

24. On March 15, 2017, in response to several enforcement actions charging violations of Rule 21F-17 brought by the Commission,[4] DESCO sent a firm-wide email to all employees stating as follows (emphasis in original):

> As described more fully below, **the firm wishes to emphasize that you also have the ability to communicate directly with regulators and other governmental agencies regarding possible violations of law or regulation without notice to the firm.** Accordingly, the firm is clarifying employees' obligations with respect to the use and disclosure of confidential information as described in each employee's respective employment or confidentiality agreement with the firm, as applicable, and in other policies of the firm.
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> **Nothing in any D. E. Shaw group employment agreement, confidentiality agreement, or any other firm policy or agreement shall prohibit an employee from communicating directly with or providing information, including documents, not otherwise protected from disclosure by any applicable law or privilege, to any regulator or any other national, federal, state or local governmental agencies or commissions regarding possible violations of law or regulation, without disclosure to the D. E. Shaw group. The D. E. Shaw group will not retaliate against you for reporting a possible violation or raising a concern in good faith**.

[4] The Commission brought ten Rule 21F-17(a) actions between the end of June 2016 and January 2017.

25. DESCO's Internal Reporting Policy, Code of Ethics, and Employee Handbook (and the Privacy and Confidentiality Policy included therein) were simultaneously revised to include substantially similar language. DESCO required employees to acknowledge their receipt and review of the Internal Reporting Policy and Code of Ethics every year, and of the Employee Handbook at the commencement of their employment at the firm.

26. DESCO, however, did not add whistleblower protection language to its template Employment Agreement or form of Release at that time.

27. More than two years later, in April 2019, DESCO revised its Employment Agreements ("Revised Employment Agreements") to add the following whistleblower carveout:

> Notwithstanding the provisions of Section 4(b)(i), the Employee shall be free to communicate directly with and provide Confidential Information, including documents, not otherwise protected from disclosure by any applicable law or privilege, to any regulator or any other national, federal, state, or local governmental agencies or commissions regarding possible violations of law or regulation, without disclosure to the D. E. Shaw Group.

28. Between April and September 2019, DESCO required substantially all then current employees to sign Revised Employment Agreements.

29. DESCO did not simultaneously revise its Release, but rather continued to use unchanged language in its Release that raised impediments to employee whistleblowing until June 2023, during the pendency of the Commission's investigation into this matter.

Violation

30. As a result of the conduct described above, DESCO willfully[5] violated Exchange Act Rule 21F-17(a), which prohibits any person from taking any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation.

[5] "Willfully," for purposes of imposing relief under Section 203(e) of the Advisers Act, "'means no more than that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (*quoting Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

DESCO's Remedial Efforts

31. In determining to accept the Offer, the Commission considered remedial acts voluntarily undertaken by Respondent and cooperation afforded the Commission staff.

32. In June 2023, DESCO revised its Release ("Revised Release") by adding language affirmatively advising employees of their right to contact regulators with concerns about potential legal or regulatory violations without notice to DESCO. Since July 2023, the Revised Release, rather than the original Release, has been issued to all DESCO employees required to sign a release in order to receive post-departure payments.

33. Beginning in September 2023, DESCO has made reasonable efforts to send letters to (1) all former employees who commenced their employment after March 15, 2017 and who departed without signing a Revised Employment Agreement and (2) all former employees who signed a Release on or after March 15, 2017, to notify them that DESCO permits current and former employees to provide information and/or documents to, and/or communicate with, Commission staff without notice to or approval from the Company.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent DESCO's Offer.

Accordingly, pursuant to Section 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent DESCO cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 21F-17(a).

B. Respondent DESCO is censured.

C. DESCO shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $10,000,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying D. E. Shaw & Co., L.P. as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sheldon Pollock, Division of Enforcement, Securities and Exchange Commission, 100 Pearl Street, New York, NY 10004.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary