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SEC May Seek Companies' Agreements to Determine Whistleblower Treatment

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The SEC continues to focus on its whistleblower initiative.

According to a February 25 *Wall Street Journal* article titled "SEC Probes Companies' Treatment of Whistleblowers," the ***U.S. Securities and Exchange Commission (SEC)*** has recently "sent letters to a number of companies asking for years of nondisclosure agreements, employment contracts and other documents." These inquiries are the latest action by the SEC to further its stated concern that confidentiality and nondisclosure provisions in employment, separation, and settlement agreements and related policies may be chilling reporting to the SEC. The SEC's inquiries follow the ***Financial Industry Regulatory Authority's*** action last year to warn regulated companies about overbroad confidentiality provisions. Companies should review their agreements and policies in light of the latest SEC actions.

SEC's Requests to Targeted Companies

The SEC's Office of the Whistleblower has made clear that it will use its authority to ensure that companies do not use agreements and policies to impede whistleblowers from reporting information to regulators. In public comments last year, Sean McKessy, chief of the SEC's Office of the Whistleblower, stated, "[W]e are actively looking for examples of confidentiality agreements, separat[ion] agreements, employee agreements . . . that in substance say 'as a prerequisite to get this benefit you agree you're not going to come to the commission or you're not going to report anything to a regulator.'" He also explained that if the SEC finds language that creates a chilling effect for potential whistleblowers to report to the SEC, "not only are we going to go to the companies, we are going to go after the lawyers who drafted it" and may revoke the lawyers' ability to appear before the SEC.

According to the *Wall Street Journal* article, "[t]he agency has asked the firms to turn over every

nondisclosure agreement, confidentiality agreement, severance agreement and settlement agreement they entered into with employees since Dodd-Frank went into effect, as well as documents related to corporate training on confidentiality, according to the letter and the people familiar with the matter. The agency letter viewed by the *Journal* also asked for 'all documents that refer or relate to whistleblowing' and a list of terminated employees."

To date, however, the SEC has not articulated specific guidance regarding what language or clauses it considers permissible or impermissible. Its position may become clear through enforcement actions.

FINRA's Guidance in Last Year's Regulatory Notice

The SEC's actions come after FINRA issued a Regulatory Notice in which it "remind[ed] firms that it is a violation of FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade) to include confidentiality provisions in settlement agreements or any other documents, including confidentiality stipulations made during a FINRA arbitration proceeding, that prohibit or restrict a customer or any other person from communicating with the [SEC], FINRA, or any federal or state regulatory authority regarding a possible securities law violation."

FINRA's Regulatory Notice provided "an example of an acceptable confidentiality provision" in a settlement agreement:

Any non-disclosure provision in this agreement does not prohibit or restrict you (or your attorney) from initiating communications directly with, or responding to any inquiry from, or providing testimony before, the SEC, FINRA, any other self-regulatory organization or any other state or federal regulatory authority, regarding this settlement or its underlying facts or circumstances.

Notably, although the SEC and FINRA have been the most vocal in their concerns that agreements and policies should not chill reporting, it is likely that other regulators share those concerns and may follow their lead in scrutinizing such agreements and policies.

Practical Guidance

Companies should review employment, separation, and settlement agreements and related policies in light of the latest actions by the SEC. In particular, companies should review agreements and policies that contain confidentiality and nondisclosure provisions, nondisparagement provisions, releases, covenants not to sue, and clauses relating to cooperation, internal reporting, and company notification.

In addition, a company that receives a request from the SEC or another regulator to produce its agreements, policies, and related documents should consult with an SEC, FINRA, or other regulatory lawyer. Interactions with, and disclosure of information to, the SEC can have significant ramifications, and companies would be well served to obtain sound advice with respect to such a request.

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