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Words Matter: Three Key Steps to Mitigate SEC Enforcement Risks Relating to Whistleblower Carveout Language

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Since 2015, the SEC has brought nearly two dozen enforcement actions for violations of the whistleblower protection rules under Rule 21F-17(a) against employers for actions taken to impede reporting to the SEC. The bulk of these actions have focused on language in employee-facing agreements that allegedly discouraged such reporting. The SEC shows no sign of slowing down; indeed, the Commission has brought five enforcement actions in this past fiscal year alone, and the penalties imposed for these violations appear to be increasing. The settlements – and the risk they represent – serve as a reminder for companies to review their existing employment documents and internal policies, including confidentiality policies, to ensure that restrictive language is removed and that appropriate whistleblower carveout language is included. Conducting this review, and making any appropriate changes, will help ensure compliance with Rule 21F-17(a).

1. ***Identify Types of Agreements Subject to Rule***

The majority of SEC actions alleging violations of Rule 21F-17(a) involve employee/employer relationships, and specifically focus on agreements that contain restrictive language deemed to impede SEC reporting. The types of agreements include employment agreements, severance agreements, non-disclosure agreements, release agreements, and other confidentiality agreements. Those are hardly the only sources of potentially restrictive – and sanctionable – language. The SEC has warned companies that improperly restrictive language may also be included in a company's internal policies, procedures, and guidance, such as codes of conduct, compliance manuals, training materials, and other such documents.

Of course, employers are not the only ones who may run afoul of Rule 21F-17(a). The Rule is broader and not limited to employer/employee agreements and policies. For example, the SEC has brought actions involving agreements presented to customers and investors. The SEC has also brought actions against an employee who sought to impede a fellow employee's reporting.

1. ***Amend Restrictive Language that Could be Violative***

In settlements to date, the SEC has focused on a variety of provisions that have been found to impede whistleblowers from reporting violations:

- Release stating that the individual would not discuss the matter with FINRA, the SEC, or anyone else.
- Language stating that the employee was "waiving your right to any monetary recovery or other individual relief" in connection with any charge or complaint filed with governmental agencies.
- Separation agreement providing that reporting to administrative agencies was allowed, "but only if I notify the Company of a disclosure obligation or request within one business day after I learn of it and permit the Company to take all steps it deems to be appropriate to prevent or limit the required disclosure."
- Separation or similar agreements requiring the employee to certify that they had "not filed any complaint or charges against [the company], or any of its respective subsidiaries, affiliates, divisions, predecessors, successors, officers, directors, shareholders, employees, representatives or agents…with any state or federal court or local, state or federal agency."
- Separation agreements providing that employees would not "at any time in the future voluntarily contact or participate with any governmental agency in connection with any complaint or investigation pertaining to the Company, and [may] not be employed or otherwise act as an expert witness or consultant or in any similar paid capacity in any litigation, arbitration, regulatory or agency hearing or other adversarial or investigatory proceeding involving the Company."
- Compliance policy language stating that employees are "strictly prohibited from initiating contact with any Regulator without prior approval from the Legal or Compliance Department."
- Employee confidentiality agreements broadly defining "Confidential Information" to include all company financial information and financial reports and imposing a liquidated damages provision for violations, where the agreements did not also include "whistleblower carve-out" language.

- A settlement agreement with investors that required confirmation that investors and their counsel have not contacted, and would not in the future contact, the SEC or other governmental agencies concerning matters in the agreement.

SEC settlements have also focused on contradictory language within a particular agreement itself or conflicts between different agreements or policies. For example, the SEC has alleged a Rule 21F-17(a) violation where a company's compliance manual and compliance training material specifically prohibited employees from initiating contact with any regulator without prior approval from the legal or compliance department, even though the company's code of conduct permitted employees to report to the government about possible violations of law. The SEC has brought cases regardless of whether there was evidence that any employees had actually been impeded from reporting as a result of the restrictive language.

1. ***Add Remedial Language that Has Been Cited with Approval***

The SEC has also, by implication through its settlements, noted language that facially complies with Rule 21F-17. Examples of whistleblower carveout language that the SEC has cited with approval include the following:

- "Nothing in this Section shall be construed or deemed to interfere with any protected right to file a charge or complaint with any applicable federal, state or local governmental administrative agency charged with enforcement of any law, or with any protected right to participate in an investigation or proceeding conducted by such administrative agency, or to recover any award offered by such administrative agency associated with such charge or complaint."
- "Nothing in this policy or any other Company policy or agreement is intended to prohibit you (with or without prior notice to the Company) from reporting to or participating in an investigation with a government agency or authority about a possible violation of law, or from making other disclosures protected by applicable whistleblower statutes."
- Where restrictive confidentiality provisions exist: "Employee can provide confidential information to Government Agencies without risk of being held liable for liquidated damages or other financial penalties."

Implications for Employers and Others Subject to Rule

Employers and other companies subject to the requirements of Rule 21F-17 should take note of the SEC's enforcement actions. These actions emphasize the SEC's continued focus on identifying Rule violations and protecting potential whistleblowers, even in the absence of affirmative acts to impede reporting. As a result, companies should revisit and carefully examine policies and employment-related agreements that address confidentiality to ensure that restrictions and carveouts promote compliance with Rule 21F-17. Even a minor deviance from the SEC's recommended verbiage could result in a costly enforcement action – scrutiny which may be avoided by closely hueing to language the SEC has previously approved in other enforcement actions.

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