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The Whistleblower Rules & Revisiting Confidentiality

December 19, 2024

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The Securities Exchange Commission ("SEC") has, in furtherance of its whistleblower program, taken actions recently that have led to lenders updating the confidentiality sections of credit agreements to allow for the disclosure of confidential information by potential whistleblowers. This week, we provide a brief overview of these SEC actions and, importantly, provide sample language that can be used to update confidentiality provisions.

Background

The Dodd-Frank Act added Section 21F to the Securities Exchange Act of 1934, which required the SEC to formalize a whistleblower program and to pay awards to whistleblowers who provide them with original information regarding violations of Federal securities laws. Pursuant to Section 21F, the SEC promulgated the Whistleblower Rules available at ***17 C.F.R. § 21F-1, et seq.*** The Whistleblower Rules, which have been amended in 2018 and 2022, prohibit any person from taking an action to impede a potential whistleblower from communicating directly with the SEC about a possible securities law violation, including enforcing or threatening to enforce, agreements with confidentiality provisions.

Recent SEC enforcement actions have found that various confidentiality provisions breached the Whistleblower Rules, requiring the payment of penalty fines to settle the charges in question. Below we have summarized some recent SEC enforcement actions to illustrate how the SEC has challenged confidentiality provisions, which are often viewed as standard legal language and are rarely changed from agreement to agreement:

- On September 26, 2024, **the SEC announced settled charges against Florida-based GQG Partners LLC**, a registered investment adviser, for entering into standard non-disclosure agreements with candidates for employment and a settlement agreement with a former employee that expressly prohibited them from reporting confidential information to governmental authorities. The SEC found that GQG violated the Whistleblower Rules because the language in the agreements constituted taking an action to impede an individual from communicating directly with the SEC staff about possible securities law violations. Without admitting or denying the SEC's findings, GQG agreed to be censured, to cease and desist from violating the Whistleblower Rules, and to pay a $500,000 civil penalty.
- On September 9, 2024, **the SEC announced settled charges against seven public companies** for using employment, separation, and other agreements to impede whistleblowers from reporting potential misconduct to the SEC, in violation of the Whistleblower Rules. To settle the SEC's charges, the companies agreed to pay more than $3 million combined in civil penalties. The SEC's Chief of Office of the Whistleblower was quoted as saying "*Ensuring that potential whistleblowers can communicate directly with the Commission is a critical part of the SEC's oversight mandate*".
- On September 4, 2024, **the SEC announced settled charges against three affiliated registrants**, Commission-registered broker-dealer Nationwide Planning Associates, Inc. and investment adviser NPA Asset Management, LLC, and state-registered investment adviser Blue Point Strategic Wealth Management, LLC, for impeding brokerage customers and advisory clients from reporting securities law violations to the SEC by allegedly asking these clients to sign confidentiality agreements. The agreements were in connection with payments made by the entities to the clients' investment accounts, which payments were intended to compensate the clients for losses

caused by the firms' alleged breaches of federal or state securities laws. The firms agreed to pay combined civil penalties of $240,000 to settle the SEC's charges.

Revisiting Confidentiality

The recent enforcement actions may not obviously point to the need to update confidentiality provisions in other kinds of agreements. But consider that credit agreements require borrowers to deliver a substantial amount of information to lenders, which often includes highly sensitive information. As such, the confidentiality provisions are of utmost importance to a sponsor when putting a credit agreement in place, since disclosure of the sensitive information could affect their position with customers, employees or competitors. Similarly, lenders need to ensure that they have enough information and flexibility with respect to such information to operate their business and administer the credit being provided appropriately. Having a clear understanding as to what is confidential and what is not confidential also helps the lender with its compliance requirements under securities laws.

Today, confidentiality provisions in credit agreements already typically allow for disclosure to regulators, but such disclosure is usually premised on allowing the disclosure of confidential information in the context of an examination or specific regulator demand. For this reason, we think that it is important to review the confidentiality provisions to ensure that they are written so that they in no way impede potential whistleblowers from disclosing information that would be considered confidential to the SEC proactively. Taking the time to update these provisions actually reduces liability for all of the parties, because any party could be liable for impeding whistleblowers under the Whistleblower Rules. For this reason, making such changes to confidentiality provisions should not be controversial. Below is sample language that we have seen in the market and that lenders have begun to request (and expect):

- ***Sample Language***

"*For the avoidance of doubt, nothing in this Credit Agreement is intended or shall be deemed to prohibit or restrict any Borrower Party or any other person in any way from initiating communications directly with, reporting to, providing information to, causing information to be provided to, filing a charge or complaint with, cooperating with, responding to any inquiry from, or providing testimony to the Securities and Exchange Commission, Commodity Futures Trading Commission, Financial Industry Regulatory Authority, or any other self-regulatory organization, or any other federal or state regulatory authority, or governmental agency or entity, regarding any possible securities violation or other violation of law*."

Conclusion

We hope this short article has provided you with a helpful background on the Whistleblower Rules and why you may be seeing redlines of confidentiality provisions in credit agreements. The Cadwalader team remains available to assist with relevant queries.

This article was previously featured in *Fund Finance Friday* **here**.