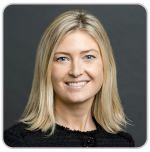
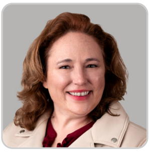
The Whistleblower Rules & Revisiting Confidentiality

December 6, 2024



By Katie McShane
Special Counsel | Fund Finance



By Mercedes Kelley Tunstall
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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*."

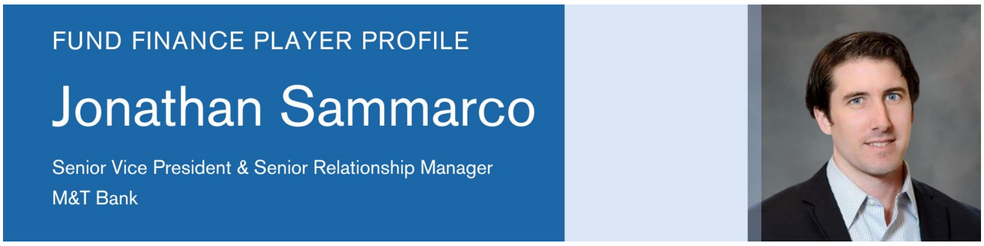
Conclusion

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.

Player Profile: Meet Jonathan Sammarco

December 6, 2024

Player Profile



This week Charlotte associates **Morgan Dennis** and **Elizabeth Oblachinski** connect with **Jonathan Sammarco**, Managing Director at M&T Bank.

Jon is based in Boston and has over eighteen years of banking experience. Previously, Jon was with People's United Bank, where he was an integral part of creating the Fund Finance team prior to the merger with M&T Bank in 2022. Starting from zero, Jon helped build his team up to a multi-billion dollar book and is still growing. Jon has an MBA from Babson College and a Bachelor's in Operations Management from UMass.

1. ***We understand you've had a successful and very busy 2024. How do you build relationships with sponsors? How do you personally look at transactions differently than other lenders?***

I have certainly been busy in 2024 – I'm are on track to close nearly 50 transactions (including both new deals and management of our existing portfolio).

I view relationships and transactions as a partnership. Educating the sponsor on options, not only at M&T Bank but across the market, is crucial to building rapport and establishing strong communication with clients. Trust and honesty go a long way and I hope my clients view me as upfront and confident, with a history of success.

My relationships are not based on individual transactions, but rather ongoing communication and availability. Even if we are not actively working through a transaction with a client, I always make myself available as a sounding board or to offer guidance. I also strive to be as relevant as possible by continuously going to events, visiting clients/prospects, and always having a pulse on the market. By consistently reminding the market of our strengths, you naturally start to see more opportunities. Being knowledgeable on this everchanging market is imperative to origination. Sponsors need to believe in your expertise and ability to close, and I believe I deliver that.

2. ***Noting M&T Bank has grown considerably in the fund finance space in recent years, what are some ways the Bank is distinguishing itself in the market?***

We've done a great job educating the market on our full suite of banking capabilities. Moving up market due to the People's United Bank/M&T Bank merger, we've been able to penetrate the larger sponsors we struggled gaining access to in prior years. While maintaining our existing relationships, the merger allowed our team to branch out and broaden our capabilities. Whether it's leverage lending, CRE, or Debt Capital Markets, having a broader suite of offerings allows the team to engage in broader banking conversations. The merger also allowed us to grow our team operationally, which has provided more bandwidth to hit the market and focus on clients. No longer siloed into only Subscription Lines has proven to be a winning formula to grow our market share.

3. ***What types of transactions is M&T Bank focused on? What are your plans for the future?***

We continue to focus on traditional sublines in the middle market with the ability to go upstream. We work on a variety of structure types, including cascades, SMAs and umbrella facilities. We're pulling efforts toward agenting more deals in the coming years with the hopes of finding solutions for the larger sponsors. As the group continues to evolve, we hope to leverage our growing Debt Capital Markets team to win more of these mandates.

4. ***Do you have any bold predictions for fund finance in 2025?***

The market of Fund Finance providers feels slightly saturated. There's been a lot of new entrants into the market over the past 18-months. We've also seen continued interest and implementation of non-bank lenders breaking into the market. I think we'll see pricing continue to tighten in 2025 with an increased appetite for risk across our peer group. This will likely slow some portfolios down and hopefully we find an equilibrium of supply and demand. We expect the

Basel III Endgame implementation to have a small impact on the general market with longer tenures and continued tug of war on pricing mechanics. The last few years have clearly seen an increase in transactions and from an origination standpoint, we expect 2025 to look similar to 2024, with smaller and fewer deals hitting the market. Though I'm starting to get a sense the
recent election results could spur additional activity as political uncertainty has been eliminated from the market.

5. ***Noting you are a top generator on your team, what do you think it takes to be successful in the fund finance industry in your experience?***

Although cliché, a strong work ethic, competitive attitude and a client-focused mentality will bring you success in this industry. If you're not committed to the client at all costs, at all hours, you'll likely slip through the cracks. Professionality and staying cognizant of your brand is also important in this market. There are a lot of talented bankers in this industry. At the onset, it takes a lot of determination and grit to build and own a portfolio. PE sponsors are particularly demanding, and you'll need to understand not only the Fund Banking market but also the PE market to gain the trust needed to be a true partner. A strong team is imperative to the success of any banker. At M&T Bank, we have an experienced group of contributors with the same client-first mindset.

6. ***Could you tell us a bit about your career in banking and how you started in fund finance? What made you interested in fund finance originally?***

I've been working in a finance role for the better part of my 18-year career with a gap for Grad School, working mostly at commercial banks during this time. Admittedly, I knew little about Fund Finance prior to starting a role in this market about 9 years ago but I haven't looked back. The opportunity to work alongside some of the largest, most successful sponsors in the market continues to motivate my growth in this industry. Creating and maintaining a brand required to perform for an extended period is a driving factor to my Fund Banking career.

7. ***What do you like to do when you're not closing credit facilities?***

I spend the majority of my spare time with friends and family. My wife and I have two sons, Brooks (3) and Cooper (7 months) who take up most of our time these days, but I stay active through hockey, skiing and golf. We recently moved to a suburb south of Boston and have enjoyed immersing ourselves in the community. I participate in a men's hockey league that has a game once a week and have joined a paddle ball league that also meets weekly. Along with our ski weekends, these leagues have helped to make the winters feel shorter. During the summers, we spend a lot of time at the beach and exploring our new community. My three year old is also at the age where he can start participating in sports, so bringing him to soccer and a learn to skate program on the weekends has been a new, fun way to spend my time not working.

Fund Fanatics Features Alyssa Briggs

December 6, 2024

Join Scott Aleali, Head of Private Equity Finance at Citizens Bank, and Jeff Maier, Senior Managing Director - Private Equity Finance at Citizens Bank, with special guest Alyssa Briggs, Managing Director and ESG Commercial Lead from **ACA Group.**

- This issue of Fund Fanatics provides an update on the SEC, private funds & marketing rule, and the latest trends in ESG.
- Private Funds Rule struck down in June. Where do we go from here and what actions will ILPA take next?
- Anti Greenwashing and Demystifying the Marketing Rule when integrating ESG.
- Importance of ESG marketing & disclosures for Private Equity managers raising capital overseas.
- Self-Reflection, Sabbaticals, and a taste of NOLA.

See the episode **HERE.**

Nominate Someone for the 2025 Fund Finance Industry Awards!

December 6, 2024

Nominations for the annual Fund Finance Industry Awards are now open!

Do you know someone who has made remarkable contributions to the fund finance industry? A leader who exemplifies strength and commitment? Someone advancing diversity, equity, and inclusion in our field? Or a rising star in your team demonstrating a passion for shaping the future of fund finance?

Now is the time to recognize them! We are currently accepting nominations for our prestigious Industry Awards, with submissions open until December 30, 2024.

Winners will be announced at our 14th Annual Global Fund Finance Symposium, which is scheduled for February 24-27, 2025.

Nominate someone **here**.

Fund Finance Hiring

December 6, 2024

Fund Finance Hiring

Here is who's hiring in Fund Finance:

Goldman Sachs is seeking a Vice President for an origination role. This individual will play a key role in sourcing and managing new business opportunities, fostering client relationships, and driving strategic initiatives within the team. Learn more **here**.

Goldman Sachs is hiring Analysts and Associates for underwriting roles. These individuals will focus on evaluating, structuring, and managing credit transactions, collaborating with cross-functional teams to deliver tailored financing solutions. Learn more **here**.

East West Bank is currently seeking a SVP - Relationship Manager for our Private Equity business in the Eastern U.S. This individual will work with the Managing Director and other relationship team members in sourcing new business, structuring and underwriting loans, and managing relationships with a variety of private capital firms. Learn more **here**.

Cadwalader, Wickersham & Taft LLP is seeking a Private Fund/Debt Financing Associate Attorney with at least three years of experience working on transactions that provide debt financing solutions for fund sponsors and fund investors, including collateralized fund obligations, rated note feeders and NAV facilities. This position will work across all three of Cadwalader's US offices, and candidates can sit in Charlotte, NC, New York, NY, or Washington, DC. Learn more **here**.

Cadwalader, Wickersham & Taft LLP is seeking a Securitization/Structured Finance Associate with a minimum of three years of substantial experience in securitization, structured finance, structured products, corporate and/or real estate. CLO, CMBS, Repo and other ABL finance experience is also a plus, but not required. Candidates must have excellent academic credentials and solid law firm work experience. Learn more **here**.

MUFG Bank is seeking an Vice President to join its EMEA Fund Financing Credit team in London, United Kingdom. The VP will play a crucial role in managing credit risk across a diverse portfolio of fund finance transactions, including Subscription Finance, NAV Finance, Hybrid facilities, and Fund FX. Learn more **here**.

East West Bank is seeking an SVP - Relationship Manager. This individual will work with the Managing Director and other relationship team members in sourcing new business, structuring and underwriting loans, and managing relationships with a variety of private capital firms. Learn more and apply **here**.