

SEC Whistleblower Rule: How CCOs Can Avoid Problems

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Winston & Strawn Partner Basil Godellas, co-chair of the Financial Services Practice, co-authored the Compliance Reporter article “SEC Whistleblower Rule: How CCOs Can Avoid Problems” published on December 12, 2015. The article provides guidance to broker/dealers and investment advisers to ensure that their policies and procedures are in compliance with recent guidance by the Securities and Exchange Commission (SEC) which both encourage and protect whistleblowers.

Mr. Godellas suggests compliance teams should revise their policies and procedures to reflect the expanded reach of the anti-retaliation provisions of the whistleblower rule. This should include a requirement that information identifying internal whistleblowers be maintained in confidence, identification of steps that may be considered to be evidence of retaliation, and requiring a heightened, documented review process before implementing any adverse change or failing to grant any positive benefit to which the whistleblower might otherwise be entitled.

The article reviews the first SEC enforcement action taken against a company for allegedly using improper restrictive language in confidentiality agreements in violation of Rule 21F-17 of the Securities Exchange Act. Mr. Godellas points out that the actions taken by the SEC in this settlement raise questions regarding the scope of coverage with respect to confidentiality agreements. Specifically, “does Rule 21F-17 apply to confidentiality agreements outside the employer/employee context, and should the rule be understood to be limited to confidentiality agreements that specifically concern internal company investigations of potential securities law violations, as distinguished from general confidentiality agreements?”

In the article, Mr. Godellas offers these compliance tips to chief compliance officers (CCOs) when drafting confidentiality agreements:

- *General statement:* Include a statement that confirms an employee’s whistleblower rights in the firm’s employee handbook or generally applicable policy manual.
- *Existing problematic agreements:* Firms should also consider whether to provide notice of such rights to persons formerly associated with the firm.

- *General agreement disclaimer—new agreements:* Confirmation of whistleblower rights should be included in all new confidentially agreements that have a reasonable relationship to federal securities law violations.
- *Statement regarding attorney-client privilege:* Where appropriate, associated persons and others should be advised that communications between firm counsel and the associated or other person are privileged, that the privilege belongs to the firm, and that only the firm may waive the privilege.

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