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OCIE Staff to Examine Registered Advisers' Policies and Agreements for Whistleblower Rule Compliance

October 31, 2016

On October 24, 2016, OCIE published a risk alert noting that the SEC exam staff intends to examine registrants' compliance with the Dodd-Frank Act's whistleblower provisions. The alert noted recent enforcement actions charging violations of Rule 21F-17 as a result of confidentiality or severance agreements that allegedly impeded individuals from communicating with the SEC. In light of those actions, the national exam program intends to review registered investment advisers' policies and agreements for whistleblower compliance. Advisers should expect OCIE staff to include in their exams a review relating to Dodd-Frank whistleblowers.

What documents will examiners request? The alert specifically notes the following:

- compliance manuals;
- codes of ethics;
- employment agreements; and
- severance agreements.

We previously noted in August that advisers should review these policies for compliance.

What will examiners look for? Specifically, the alert notes that examiners will look for agreements that the SEC has previously found to violate the whistleblower laws, and other provisions that may impede employees or former employees from communicating with the SEC. Examples are agreements that:

- Limit the types of information that an employee may convey to the SEC or other authorities;
- Require departing employees to waive their right to any monetary recovery in connection with reporting information to the government;
- Require representations that an employee has not assisted in any investigation involving the registrant; or

- Require an employee to notify or obtain consent prior to disclosure, allow disclosure "only as required by law," or prohibit any and all disclosure of confidential information, without an exception for voluntary communications with the SEC concerning possible securities law violations.

What remedial actions might be taken? As each situation is likely to be analyzed on a case-by-case basis, it is hard to predict. However, the alert noted the following remedial actions imposed in recent SEC enforcement cases:

- Requiring documents to be revised on a going-forward basis to clarify that nothing therein will prohibit employees from voluntarily communicating with the SEC concerning potential violations or from recovering a related whistleblower award;
- Requiring general notices to employees of their right to contact the SEC or other authorities; and
- Contacting former employees who signed severance agreements to inform them that they are not prohibited from communicating with the SEC or seeking a whistleblower award.

For more information, please see our previous guidance:

- Summarizing recent SEC whistleblower actions and reminding fund sponsors to review their policies and procedures; and
- Identifying seven mistakes to avoid when addressing whistleblower concerns.

Related Professionals

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