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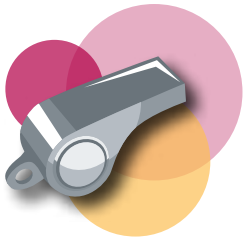

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

FINRA Gives Whistleblowers an Assist

By Robert S. Whitman and Cameron A. Smith

Concerned that whistleblowers may not find their way to its door, FINRA *recently advised member firms* that they may be disciplined for using arbitration settlement agreements that do not expressly authorize an individual to inform FINRA or other regulators about potential securities law violations.

FINRA issued similar *guidance ten years ago*, warning firms not to enter into settlement agreements with customers or former employees that bar them from disclosing to FINRA or other regulators the settlement terms or underlying facts of the dispute. The new notice "reminds" firms that they may not restrict a customer or former employee from initiating communications directly with FINRA or other regulators regardless of whether the individual has received an inquiry from a regulator. In fact, any confidentiality provision in a settlement agreement must "expressly authorize" the individual to initiate direct communication with FINRA or any federal or state regulatory authority regarding a potential securities violation. The guidance provides the following example of an acceptable confidentiality provision in a settlement agreement:

> Any non-disclosure provision in this agreement does not prohibit or restrict you (or your attorney) from initiating communications directly with, or responding to any inquiry from, or providing testimony before, the SEC, FINRA, any other self-regulatory organization or any other state or federal regulatory authority, regarding this settlement or its underlying facts or circumstances.

Any confidentiality provision between a firm and a customer or former employee that does not expressly and unconditionally authorize an individual to contact FINRA or other regulators, or to respond to their inquiries, may subject the firm to disciplinary proceedings for violation of FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade).

The notice also cautions against confidentiality provisions in a discovery stipulation or confidentiality order issued by an arbitrator as part of the discovery process that prohibit or restrict a customer or former employee from communicating directly or sharing documents with FINRA. However, FINRA's guidance does not state that such confidentiality provisions, unlike those contained in settlement agreements, must "expressly authorize" a customer or former employee to initiate direct communication with a regulator. Firms simply cannot bar individuals from communicating or sharing documents with regulators about a securities violation or responding to an investigation via a confidentiality provision in a discovery stipulation or confidentiality order. FINRA has warned that such restrictions may invite discipline for violation of FINRA Rule 2010.

FINRA issued the notice one day after the *SEC approved a rule change* that permits arbitrators to make mid-hearing referrals of suspected securities violations to FINRA's enforcement office. Previously, arbitrators were required to wait until the hearing concluded before referring any suspicions of fraud or wrongdoing to FINRA for further investigation.

FINRA's warning is similar to the requirement, now standard in settlement agreements, that an employee is permitted to speak with regulators and even file an EEOC charge notwithstanding a release of claims or confidentiality clause. The new notice should prompt firms to review the confidentiality provisions in their settlement agreements to ensure that they *expressly authorize* an individual to communicate directly with regulatory authorities regarding a potential securities violation, terms of the settlement, or the underlying facts of the dispute. Similarly, firms should review the confidentiality provisions in their discovery stipulations to ensure that they do not restrict the disclosure of documents to the SEC, FINRA or other regulator or prohibit a customer or former employee from communicating directly with or in response to an inquiry from a regulator.

Robert S. Whitman is a partner in Seyfarth Shaw LLP's New York office and *Cameron A. Smith* is an associate in the firm's New York office. If you would like further information, please contact a member of the *Whistleblower Team*, your Seyfarth Shaw attorney, Robert S. Whitman at *rwhitman@seyfarth.com* or Cameron A. Smith at *casmith@seyfarth.com*.