SEC Enforcement Case Summary
Whistleblower Protection Rule Violation Case Highlights Problematic Confidentiality Agreement Provisions

On September 4, 2024, the SEC charged broker-dealer Nationwide Planning Associate, Inc., as well as an affiliated SEC-registered investment adviser, NPA Asset Management, LLC, and state-registered adviser Blue Point Strategic Wealth Management, LLC for impeding brokerage customers and advisory clients from reporting securities law violations to the SEC in violation of Rule 21F-17 under the Securities Exchange Act of 1934 ("Exchange Act"). The Whistleblower Provisions of Section 21F were enacted in a 2010 amendment to the Exchange Act pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act added.

Over a nearly three-year period, the firm asked clients to sign a total of 11 confidentiality agreements in connection with compensatory payments authorized to be made to client investment accounts on behalf of one or more of Respondents. These payments were authorized to compensate for investment account losses arising from alleged breaches of federal or state securities laws. The SEC order noted that the agreements included provisions that impeded clients from reporting potential securities law violations to the Commission or another federal, state, or self-regulatory securities commission or authority.

The agreements purportedly prohibited clients from disclosing any details of the agreement or the underlying dispute, or any information about the client's investments accounts or relationship with the firm. The agreements included a paragraph that stated: "The confidentiality and non-disclosure provision does not prohibit the Recipient from responding to any unsolicited inquiry (i.e., an inquiry not resulting from or attributable to any actions taken by Recipient or by any third party at Recipient's direction) about the Agreement or its underlying facts and circumstances initiated by any state, federal or self-regulatory commission or authority that regulates the business or activities of registered investment advisers or their representatives." However, the SEC argued that this limited-carve out for responding to unsolicited inquiries expressly limited a client's ability to voluntarily report potential securities law violations to the SEC.

Moreover, the agreement further required clients to attest to a representation that "…Releasors have not, directly or indirectly through any third party, reported this matter to any state, federal or self-regulatory securities commission or authority … regarding the subject matter of this Agreement, and shall forever refrain from doing so…" The SEC noted that by requiring clients to affirmatively certify that they had not previously, nor would they ever voluntarily report the matter to the SEC, the firms raised additional impediments to whistleblowing.

This case is instructive to firms in highlighting specific language that SEC staff have objected to under Ruel 21F-17 and the shortcoming in relying on carve-out clauses that are too limiting. The firms in this case agreed to pay combined civil penalties of $240,000 to settle the SEC's charges.

See Summary - https://www.sec.gov/newsroom/press-releases/2024-115