

SEC Enforcement Case Summary Investment Adviser Whistleblower Protection Enforcement

On September 26, 2024, the SEC charged GQG Partners LLC, a registered investment adviser, for entering into agreements with candidates for employment and a former employee that made it more difficult for them to report potential securities law violations to the SEC. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, amended the Securities Exchange Act by adding Section 21F-17, "Whistleblower Incentives and Protection." The purpose of these provisions was to encourage whistleblowers to report possible securities law violations by providing, among other things, financial incentives and confidentiality protections. To fulfill this Congressional purpose, the SEC adopted Rule 21F-17, which provides in relevant part that "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications. Rule 21F-17 became effective on August 12, 2011. Since that date, the SEC has instituted over twenty additional enforcement actions charging violations of Rule 21F-17.

According to the SEC's order, from November 2020 through September 2023, GQG entered into non-disclosure agreements ("NDAs") with 12 candidates for employment that prohibited them from disclosing confidential information about GQG, including to government agencies. While the agreements permitted the candidates to respond to requests for information from the SEC, they required notification to GQG of any such request and prohibited responding to requests arising from a candidate's voluntary disclosure.

If GQG made a candidate an offer of employment that was accepted, the candidate subsequently signed a separate confidentiality agreement ("Employee Confidentiality Agreement," or "ECA") that specifically carved out from its confidentiality provisions the reporting of possible securities law violations to SEC. In addition, in March 2021, GQG added a Whistleblower Policy to its compliance manual. The Whistleblower Policy, which mainly addressed the requirement that employees report issues internally to GQG, also contained a carveout stating that employees "have the right to report directly to GQG's primary regulator, the Commission, pursuant to section 21F of the Securities Exchange Act of 1934, as amended and may do so anonymously without fear of retaliation by GQG." However, the SEC alleged that nondisclosure provisions in the NDA conflicted with the ECA and the Whistleblower Policy and created confusion that raised an impediment to whistleblowing.

The SEC noted in its order that it was not aware of any instances in which GQG took action to enforce an NDA or otherwise affirmatively prevent a candidate from communicating with the SEC. Nevertheless, they expressed concern that a candidate could reasonably have interpreted the NDA's confidentiality provisions as more stringent than or not comparable to those of the ECA and concluded that the carveout in the ECA would not be applicable to the terms of the NDA.

GQG further terminated a former employee and later entered into mediation regarding the individual's termination and severance from the firm. Apparently, the former employee's counsel had told GQG that the individual intended to report alleged securities law violations to the SEC. According to the SEC order, the settlement agreement with the former employee permitted reporting possible securities law violations to government agencies, including the SEC; however, it also required the former employee to affirm that he or she had not done so; was not aware of facts that would support an investigation; and would withdraw any statements already made that might support an investigation. The SEC noted that these provisions violated the whistleblower protection rule.

GQG agreed to a \$500,000 civil penalty in its settlement with the SEC. This case serves as a reminder for advisers to not only review NDAs and confidentiality agreements in employment agreements with current employees but also be mindful of agreements with potential candidates for employment and avoid restrictions that run afoul of the SEC's whistleblower protections. In addition, Advisers may wish to consider reviewing employment agreements with former employees to look for similarly problematic language and to determine what action steps, if any, to now take. Advisers should work closely with legal counsel that is familiar with Section 21F of the Exchange Act and SEC enforcement cases in this area when negotiating and drafting separation agreements with former employees.

See Summary - <https://www.sec.gov/newsroom/press-releases/2024-150>