



February 2017

Five Employment Issues Under the New Administration That Financial Services Employers Should Monitor

Employers in the financial services industry should diligently monitor upcoming changes under the Trump administration. Although it is unlikely that President Donald J. Trump will “dismantle” the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), the new administration has suggested changes that could stir up the industry. The President has signed executive orders (“EOs”) regarding the regulation of executive compensation and immigration that significantly affect employers nationwide. Financial services employers should continue to monitor and review current policies and procedures in place and update accordingly to remain compliant as changes develop.

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This edition of Epstein Becker Green’s *Take 5* addresses these important issues and what financial services employers should know about them:

- 1. How the Trump Administration May Impact the Oversight and Enforcement of Dodd-Frank’s Whistleblower Protections**
 - 2. Looking Ahead: Executive Compensation for Financial Services in a Trump Administration**
 - 3. Recent Executive Orders Have Immediate Immigration Impacts, but Overnight Overhaul of U.S. Immigration System Is Unlikely**
 - 4. Equal Pay: The Evolving Landscape**
 - 5. SEC Continues Aggressive Oversight of Separation and Confidentiality Agreements**
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1. How the Trump Administration May Impact the Oversight and Enforcement of Dodd-Frank's Whistleblower Protections

By Jason Kaufman

On the campaign trail, President Trump vowed to “dismantle” Dodd-Frank. Dodd-Frank was enacted in the wake of the 2008 financial crisis to curtail risky investment activities and stop financial fraud through increased oversight and regulation of the banking and securities industries. Among other things, it amended the Sarbanes-Oxley Act, Securities Exchange Act, and Commodity Exchange Act to include monetary incentives for individuals to blow the whistle on suspected financial fraud and stronger protections for whistleblowers against retaliation by their employers. President Trump has criticized Dodd-Frank, arguing that it is overbroad and inhibits economic growth. Now that he is in office, President Trump has the statute squarely in his crosshairs, and he is poised to impact its whistleblower protections on the legislative, administrative, and judicial fronts.

From a legislative standpoint, President Trump has wasted no time in seeking to roll back Dodd-Frank's statutory framework. Only two weeks after his inauguration, he issued an EO titled “[Core Principles for Regulating the United States Financial System](#),” which directs the Treasury Secretary to consult with the heads of financial agencies, including the Commodity Futures Trading Commission and the Securities and Exchange Commission (“SEC”), to find ways to conform U.S. financial regulations, including Dodd-Frank, to the Trump administration's “Core Principles.” These “Core Principles” (detailed in the second article of this *Take 5*) are broad-sweeping and include, among other things, requiring “more rigorous regulatory impact analysis” for new laws and “mak[ing] regulation efficient, effective, and appropriately tailored.” While the precise scope of these principles is undefined (perhaps intentionally so), they appear to demonstrate a clear first step toward deregulation in the financial sector and may be a shot across the bow signaling the President's intent to scale back—or at least halt any expansion of—Dodd-Frank, including its whistleblower protections.

Additionally, President Trump is well positioned to substantially affect the SEC's administrative enforcement of Dodd-Frank's whistleblower laws. Dodd-Frank created the SEC Office of the Whistleblower (“OWB”) to enforce its comprehensive whistleblower program. As reported in the [2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program](#), since the OWB was established, the SEC has (i) awarded more than \$100 million in bounty awards to whistleblowers who provided information leading to successful enforcement actions, (ii) independently sued employers for retaliating against employees for reporting alleged securities violations, and (iii) made it a top priority to find and prosecute employers that use confidentiality, severance, and other agreements that impede their employees from communicating with the SEC.

The SEC's enforcement agenda could change significantly, however, under the Trump administration. Specifically, in 2017, President Trump will have the opportunity to appoint four out of the five SEC Commissioners (three seats are now vacant, and

another will become vacant in June). He has nominated Jay Clayton—a corporate attorney who has spent his career representing financial services firms in business transactions and regulatory disputes—to fill one of those vacancies and serve as SEC Chair. New SEC leadership may result in the potential replacement of the sitting OWB Chief and alter the OWB’s current enforcement strategies. Thus, through his administrative appointments, President Trump may attempt to temper the SEC’s aggressiveness and focus when it comes to enforcement of Dodd-Frank’s whistleblower protections to more closely reflect his vision for less onerous regulation of the financial sector.

The President is also uniquely situated to influence the application of Dodd-Frank in the courtroom. Indeed, President Trump has inherited more than 100 federal court vacancies that he must fill, including one on the U.S. Supreme Court, giving him the opportunity to shape how Dodd-Frank’s whistleblower laws will be interpreted and applied by federal judges across the country. One of the most critical issues that hangs in the balance is whether an employee who reports an alleged securities violation only to his or her employer, and not to the SEC, is protected by Dodd-Frank’s anti-whistleblower retaliation provision. At present, there is a circuit court split on this issue. In 2013, the U.S. Court of Appeals for the Fifth Circuit held in [Asadi v. G.E. Energy United States, LLC](#), that an employee who only reports a suspected violation internally is not a protected whistleblower for the purposes of Dodd-Frank’s anti-retaliation provision. In 2015, however, the Second Circuit Court of Appeals reached the opposite conclusion in [Berman v. Neo@Ogilvy LLC](#). The question has since come before the Sixth Circuit Court of Appeals (which declined to rule on it) and is currently pending before the Courts of Appeals for the Ninth and Third Circuits, and it will almost certainly end up before the U.S. Supreme Court for resolution. Accordingly, President Trump’s federal judicial appointments—particularly his nomination of Judge Neil Gorsuch to the U.S. Supreme Court—may play a pivotal role in establishing exactly who is protected under Dodd-Frank’s proscription against whistleblower retaliation.

Ultimately, it is unlikely that President Trump will actually be in a position to completely “dismantle” Dodd-Frank. Yet, there is no question that he has at his disposal the power to greatly impact the statute at the legislative, administrative, and judicial levels, and there is little doubt that change is on the horizon.

2. Looking Ahead: Executive Compensation for Financial Services in a Trump Administration

By Gretchen Harders

A month into the Trump presidency, there have been a number of important statements from the executive branch on the regulation of executive compensation impacting the financial services industry. On February 3, 2017, President Trump issued [a statement on the core principles for regulating the U.S. financial system](#) (“Core Principles”). The statement requires the Treasury and all heads of member agencies of the Financial Stability Oversight Council to report within 120 days (by June 3, 2017) all existing laws, treaties, guidance, regulations, etc., that promote the Core Principles, and all such laws,

etc., that inhibit the Core Principles. The Core Principles provide some insight into future regulation or repeal efforts by the Trump administration impacting executive compensation.

The Core Principles

The Core Principles include empowering Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth. This statement appears to favor a more hands-off approach to individual investment decisions. The Core Principles also require regulations that foster economic growth through more rigorous regulatory impact analysis addressing “systemic risk and market failures, such as moral hazard and information asymmetry.” This would presumably require a more extensive review of the regulatory cost of compliance favoring deregulation. However, the focus on systemic risk arising from moral hazard and information asymmetry could impact executive compensation to the extent compensation practices are seen to further individual conduct that could lead to systemic risk. The Core Principles further require regulations to enable American companies to be competitive with foreign firms in domestic and foreign markets and to advance American interests in international financial regulatory negotiations and meetings. The other Core Principles include preventing taxpayer-funded bailouts; making regulations more efficient, effective, and appropriately tailored; and restoring public accountability within federal financial regulatory agencies and rationalizing the regulatory framework, arguably all in favor of deregulation or possibly regulation by stated principles rather than by strict construction.

Potential Impact on Executive Compensation

Based on review of the Core Principles and recent regulatory statements from the Trump administration, [including the reduction of two regulations for every one regulation added](#), the re-proposed rules under Section 956 of Dodd-Frank are not likely to be approved in their final form given the scope and breadth of the regulations. Arguably, these rules would go against the Core Principles favoring deregulation and could inhibit American competitiveness with foreign firms in domestic and foreign markets as to the recruitment and retention of talent. Also, given that the re-proposed regulations were based on international executive compensation standards (particularly, regulatory guidance promulgated in Europe), adopting the re-proposed rules might not be viewed as advancing American interests in international financial regulatory negotiations.

Presumably in furtherance of these Core Principles, on February 6, 2017, the Acting Chairman of the SEC, Michael S. Piwowar, issued [a statement](#) requesting comments from the public within the next 45 days (by March 23, 2017) on the challenges that issuers are facing with compliance with the CEO pay ratio disclosure rule under Dodd-Frank. The CEO pay ratio disclosure rule requires public companies to disclose the ratio of the median of the annual total compensation of all employees to the annual total compensation of the CEO. Gathering data to prepare the calculation has been challenging for large employers with a diverse domestic and global workforce, and the ratio itself has been criticized as not providing meaningful information. Based on

comments, the SEC Acting Chairman stated that SEC staff will be directed to determine whether additional relief is appropriate. As to the review of other executive compensation provisions under Dodd-Frank that are currently in effect, such as say-on-pay and clawback requirements, they likely will be subject to the overall regulatory review, but their repeal might not be first on the agenda.

The final area of interest is President Trump's pre-election criticisms of the treatment of carried interests, which generally are tax-favored partnership interests that, when sold, frequently generate profits that are paid to private equity fund managers as compensation. However, that compensation may be taxed at a long-term capital gains rate of 20 percent or less, rather than as ordinary income. Thus far under the new presidency, there have been no official statements in this area, but the discussion of carried interests could become part of the broader tax reform agenda expected from the Trump administration.

This year, financial services organizations can expect a new direction on executive compensation to take shape.

3. Recent Executive Orders Have Immediate Immigration Impacts, but Overnight Overhaul of U.S. Immigration System Is Unlikely

By Jennifer L. Taler

It is no secret that the new administration under President Trump brings with it a fundamental shift in executive attitude with respect to both legal and illegal immigration. The transitional period leading up to January's inauguration left employers and their foreign national employee populations mired in uncertainty regarding the future of former President Barack Obama's largely immigration-friendly reforms. Shortly after entering the White House, President Trump made headlines by signing a series of controversial EOs that created a travel ban on nationals "from" seven primarily Muslim countries, eliminated visa interview waiver programs, suspended refugee programs, expanded removal grounds, eliminated federal funding for "sanctuary" cities, and directed the design and build-out of a wall at the United States/Mexico border. These EOs created discord among the government agencies that are charged with executing the EOs but were largely kept out of the drafting process. In addition, the EOs left employers scrambling to identify and support their impacted employee populations and cemented notions that the Trump administration has initiated a new immigration dialogue that will focus on enforcement and the impact of immigration on U.S. workers.

On January 27, 2017, a draft EO leaked. In this currently unsigned EO titled "[Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs](#)," President Trump presupposes a broken immigration system that violates immigration laws and injures U.S. workers. The draft EO would therefore direct an investigation into, and a revamping of, our nation's existing immigration framework. Among other things, the draft EO would mandate Department of Homeland Security ("DHS") review of all regulations that allow foreign nationals to work

in the United States, and it would call for the rescission of all such regulations that are not in the (undefined) “national interest.” This draft EO, if signed, would also restrict the use of parole admissions, change how H-1B visas and immigrant numbers are allocated, expand employer site visit programs, and reform student practical training and J-1 summer work programs.

Many of the provisions of the draft EO seem directed at unraveling immigration reforms created under the Obama administration, including employment authorization for spouses of certain H-1B visa holders and recipients of benefits under Deferred Action for Childhood Arrivals (more commonly known as “DACA”). However, the draft EO could also have far-reaching impacts on financial services employers. For example, a merit-based reallocation of H-1B visa numbers based on compensation may prove beneficial to financial services companies because it would likely favor the types of highly paid professional that financial services organizations typically hire. On the other hand, a merit-based system that favors degrees in Science, Technology, Engineering, and Mathematics, the so-called “STEM” degrees, might adversely impact those financial services firms that do not have large back and middle offices of employees with this academic background. Also, proposed restrictions in F-1 practical training programs may make it more difficult for financial services employers to recruit top talent out of U.S. universities, especially MBA programs that do not qualify for STEM benefits. Finally, the draft EO’s apparent crackdown on IT consultancies, which transfer relatively large numbers of foreign workers to the United States under the L-1 visa program, is also likely to have a trickle-down effect on financial services companies that rely on consultancies for project-based IT support.

Despite the sweeping rhetoric of the draft EO, employers should not expect many changes for 2017. Most of the changes delineated in the draft EO implicate existing laws and regulations that cannot be modified by an EO, and would require an expansive overhaul of our U.S. immigration system. Major programmatic changes would require congressional action that is unlikely in a fractured Congress. Any proposed regulatory changes would also require significant lead time, as they would be subject to notice and comment requirements under the Administrative Procedure Act and would likely be impacted by President Trump’s January 30, 2017, EO requiring rescission of two federal regulations each time a new one is established.

Although it made many fewer headlines, it is important to note in this context that many longstanding DHS policies and practices were recently codified in an expansive set of new regulations published by U.S. Citizenship and Immigration Services (“USCIS”) in November 2016, which by no coincidence took effect on January 17, 2017. These new rules, [“Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,”](#) were intended to modernize and improve aspects of certain visa programs and clarify and codify longstanding DHS policies and practices with respect to the American Competitiveness in the Twenty-First Century Act (“AC21”), which focuses, in large part, on H-1B and green card portability. Of particular note, the new rules:

- clarify the use and establishment of priority dates;
- expound H-1B portability and successive portability benefits;
- confirm H-1B recapture and cap-exempt status eligibility requirements;
- establish grace periods for certain job seekers;
- describe eligibility for post sixth-year H-1B extensions under AC21;
- clarify green card portability requirements and explain the purpose and use of new USCIS Form I-485 Supplement J; and
- provide automatic employment authorization document (“EAD”) extensions for certain EAD holders, while eliminating USCIS’s obligation to adjudicate EAD applications within 90 days.

In the coming months and years, shifts in the nation’s approach to immigration policy are inevitable due to the change in administrations. Like the recent EOs, some may happen quickly and with very little notice. More substantial programmatic changes, however, will occur over time through the normal legislative and regulatory channels. In the immediate term, employers should advise their foreign national populations to take caution in all international travel and to expect delays in visa application processing and heightened screening across all inspection facilities. Employers should direct specific questions about the EOs, and questions about the impacts of the new USCIS rules and their interplay with the EOs, to their immigration counsel. In the longer term, financial services firms should expect an ongoing dialogue about the future of U.S. immigration law and, if they want the law to develop in a more positive direction, get engaged in the legislative and regulatory processes. Regardless of sentiments about how the conversation starts, these employers should recognize that opportunities exist to make the system better and more efficient. The time is therefore ripe for stakeholder advocacy.

4. Equal Pay: The Evolving Landscape

By Lauri F. Rasnick

Equal pay for equal work has been required for many years, but, as of late, this rather static requirement has become the focal point of regulators, state and local governments, and activists. In order to achieve equality in compensation, the efforts are becoming increasingly creative with new pushes for transparency, privacy, and/or disclosures. Financial services firms are often the target and should not only be aware of these innovative measures and requirements but also consider what proactive actions to put in place.

Eliminating Pay Secrecy

The National Labor Relations Board made it clear years ago that “employees” (as defined under the National Labor Relations Act) could not be restricted from discussing the terms and conditions, including compensation, of their employment, based on their rights to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Yet, many employers continue to have policies or agreements, or informal rules, which restrict employees from doing so. Recently, there has been a concentrated effort to prevent employers from designating employee compensation as “confidential” and/or restricting discussion of it. For example, in connection with the former administration’s determination to eradicate equal pay impediments in the workplace, in a 2014 executive order, then-President Barack Obama prohibited federal contractors from retaliating against employees who talk about their salaries or other compensation information.

A number of states and localities that have been passing their own equal pay laws have been addressing pay secrecy as well. Such states include the following:

- **California:** The California Fair Pay Act, which became effective as of January 1, 2016, takes pay secrecy head on. It not only restricts policies that prevent employees from discussing their own compensation but also prevents them from prohibiting an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under the law.
- **Connecticut:** Connecticut’s Act Concerning Pay Equity and Fairness (“Connecticut Act”) prohibits an employer from (i) barring employees from disclosing or discussing the amount of his or her wages or the wages of another employee of such employer that have been disclosed voluntarily by such other employee, (ii) inquiring about the wages of another employee of such employer, or (iii) requiring employees to sign documents waiving their rights under the Connecticut Act or taking actions against employees. The Connecticut Act does note, however, that it will not be construed to require any employer or employee to disclose the amount of wages paid to any employee.
- **New York:** New York State recently enacted the Achieve Pay Equity Act (“APEA”), which modified the existing equal pay law in a number of respects. One particular change bars an employer from prohibiting an employee from “inquiring about, discussing, or disclosing” the employee’s wages or the wages of another employee. However, the APEA specifically provides for limitations. The APEA states that employers may maintain, *in a written policy*, reasonable workplace and workday limitations on the time, place, and manner for inquiries about, discussion of, or the disclosure of wages. Also, the APEA provides that no employee is required to discuss his or her wages with another employee, and employees who have access to other employees’ wage information as a result of

their job duties (e.g., human resources staff) may be limited in the disclosure of such information by their employer.

Prior Compensation: Don't Ask, Don't Tell

Another focus of equal pay activists has been on employers' asking employees for their current pay information to be used in determining their pay rates. Opponents to this practice claim that it perpetuates wage gaps for women that may "follow" women from job to job. Massachusetts is the first state to take the issue head on and prohibit employers from seeking information about applicants' compensation history in the hiring process. The Massachusetts equal pay law, which becomes effective in 2018, bars employers from asking about an applicant's salary history on an application or during interviews for employment. Pursuant to the law, after an offer of employment with compensation terms has been negotiated and made, a prospective employer may seek or confirm a prospective employee's wage or salary history.

Activist Investors Turn Their Sights to Wall Street

In an effort to push for pay equality, activist investors have begun to exert pressure on large financial institutions to disclose compensation information. Such investors have already filed proposals with a number of large financial services institutions, such as Citigroup, Bank of America Corp., and Wells Fargo & Co. The investors are demanding that these institutions publish statistics about the race and gender of employees, as well as compensation information. Last year, activist investors took similar initiatives with respect to large technology firms, the majority of which complied with making public pay gap information and taking steps to close any gaps.

What Employers Should Do Now

In light of this increased focus on pay information, policies, and procedures, employers should do the following:

- Undertake pay audits to determine any disparities and the genesis of such disparities. Pay audits should be conducted with legal counsel to maintain the information in a privileged manner as much as possible.
- Thoroughly review their pay-setting policies and procedures. If you are a Massachusetts employer, take specific steps to ensure that pay information is not improperly requested through the hiring process. While most states and localities do not prohibit an employer from asking employees for their pay histories, relying solely on such information for setting starting pay may lead to pay inequities.
- Determine appropriate compensation ranges based on factors other than pay history—such as market conditions, job requirements, experience, and skills, among other things.

- When providing raises or determining bonuses, consider and document an employer’s rationale for compensation decisions in order to defend against any claims of inequity based on gender or another improper reason.
- Consider training managers not to restrict (or appear to restrict) employees from discussing wages in compliance with applicable local laws. Managers may be unfamiliar with the new focus on prohibiting pay secrecy and could be improperly handling such matters.
- Review their policies and agreements as they relate to sharing pay information to make sure that they are compliant with applicable laws, contain non-retaliation provisions, and direct employees to avenues for complaints.

5. SEC Continues Aggressive Oversight of Separation and Confidentiality Agreements

By John F. Fullerton III

Last August, we reported on two significant cease-and-desist orders issued by the SEC that, for the first time, found certain language in the confidentiality and release provisions of separation agreements to violate the SEC’s Rule 21F-17(a), which precludes anyone from impeding any individual (i.e., a whistleblower) from communicating directly with the agency.¹ Since then, the SEC has continued its aggressive oversight of separation and confidentiality agreements, with substantial repercussions for some employers. These orders, a select number of which we summarize here, have companies engaging in a serious review and rethinking of their confidentiality restrictions and other relevant provisions in their agreements and handbooks, and considering whether and what remedial steps to take proactively to cure any issues with the language in these key documents.

In [Anheuser-Busch InBev SA/NV \(Sept. 28, 2016\)](#), the company entered into a separation agreement in late 2012 with a specific employee after his termination and subsequent mediation of various alleged employment law claims. The separation agreement contained provisions (i) prohibiting the employee from disclosing confidential or proprietary company information, with no carve-out for reporting to government agencies; (ii) prohibiting the employee from disclosing the substance of the separation agreement; and (iii) imposing a \$250,000 liquidated damages provision in the event that the employee breached the confidentiality provisions. After signing the agreement, the employee, who had been voluntarily communicating with SEC in connection with an ongoing investigation, ceased doing so.

¹ See the Epstein Becker Green *Act Now* Advisory titled “[SEC Finds Certain Separation Agreement Provisions Unlawful Under Dodd-Frank Whistleblower Rule](#)” (Aug. 18, 2016).

The cease-and-desist order—which is a negotiated resolution of the matter once the SEC determines that a company has violated its rules or regulations—did not require the company to make any additional changes to its separation agreements because, in September 2015, the company had amended separation agreements to state:

I understand and acknowledge that notwithstanding any other provision of this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency of entity, and I am not required to inform the Company if I make such reports.

The order required the company to contact only *certain* former employees identified by the SEC to inform them that they were not prohibited from providing information to the SEC, rather than all employees who had signed separation agreements since the rule was implemented in August 2011, as has been required in other cases. In addition, unlike other cases, it appears that there was no separate monetary penalty against the company for violating Rule 21F-17(a).

In [NeuStar, Inc. \(Dec. 19, 2016\)](#), the company's severance agreements included a non-disparagement clause with the following language:

Except as specifically authorized in writing by NeuStar or as may be required by law or legal process, I agree not to engage in any communication that disparages, denigrates, maligns or impugns NeuStar . . . *including but not limited to communication with . . . regulators (including but not limited to the Securities and Exchange Commission . . .)* [emphasis added].

Any breach of this clause by the employee resulted in the required forfeiture of all but \$100 of the severance paid under the agreement. The SEC found that “at least one” former employee was impeded by this clause from communicating with the agency—although the SEC does not hesitate to find violations of Rule 21F-17(a) even where there is no evidence that anyone has actually been impeded.

To settle the matter, the company agreed to pay a civil penalty of \$180,000 and to contact 246 former employees to inform them that the severance agreements they signed between August 12, 2011, and May 21, 2015, did not prevent them from communicating concerns about potential violations of law or regulation to the SEC. No remedial revisions to the company's template severance agreement were required because the company had voluntarily, after commencement of the investigation, removed the reference to “regulators” from the non-disparagement clause and included a more common provision that stated, “In addition, nothing herein prohibits me from communicating, without notice to or approval by NeuStar, with any federal government agency about a potential violation of a federal law or regulation.”

Most recently, in [HomeStreet, Inc. \(Jan. 19, 2017\)](#), certain severance agreements used by the company had contained common waiver language used, in form and substance, by many employers:

This release shall not prohibit Employee from filing a charge with the Equal Employment Opportunity Commission or discussing any matter relevant to Employee's employment with any government agency with jurisdiction over the Company *but shall be considered a waiver of any damages or monetary recovery therefrom* [emphasis added].

The SEC previously found that employees might interpret such waivers as applying to the agency's whistleblower monetary incentive award program and, therefore, would unlawfully impede employees from coming forward to the SEC or reporting potential violations of the securities laws. The SEC reached the same conclusion in this case.

Prior to the investigation, however, the company had voluntarily revised its standard severance agreement to substitute the following:

Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with any federal, state or local government agency or commission ("Government Agencies"). Employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be commenced by any Government Agency including providing documents or other information without notice to the Company. *This Agreement does not limit the Employee's right to receive an award for information provided to any Government Agencies* [emphasis added].

Thus, the cease-and-desist order did not require further revisions to the severance agreement because the foregoing language largely tracks revised language that the SEC had required in one of the previous orders issued last summer. Notwithstanding its proactive revisions to its agreements, the company still had to agree to a \$500,000 civil penalty and to contact certain former employees who had signed the agreement to provide a link to the order and inform them that severance agreements did not prevent them from reporting information to the SEC or seeking and obtaining a whistleblower award from the SEC.

The *NeuStar* and *HomeStreet* orders serve to highlight that, even when a company has revised its agreements voluntarily to comply with Rule 21F-17(a), the SEC may still impose monetary penalties and potentially burdensome and undesirable obligations to contact former employees who have signed problematic separation agreements to inform them that, notwithstanding the money they were paid in conjunction with their

separation agreements, they remain free to report any company wrongdoing—real or perceived—to the SEC.

What Employers Should Do Now

Companies wishing to avoid SEC scrutiny should do the following:

- Review current separation and severance agreement templates to determine whether they are in compliance with Rule 21F-17, which would include a review of provisions such as, among others,
 - future monetary waivers,
 - non-disclosure of confidential information, and
 - non-disparagement clauses.
- If necessary, work with legal counsel to determine appropriate revisions or “carve-outs” to bring those agreement templates into compliance.
- Discuss with legal counsel whether to take affirmative steps to remedy past uses of confidentiality or waiver provisions that would be unlawful under the SEC orders.
- Review other types of confidentiality and waiver agreements with employees, in whatever form they are used, to ensure that those agreements do not similarly violate Rule 21F-17.

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For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters or any of the authors of this *Take 5*:

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