

SEC Warns Against Agreements Restricting Whistleblowers and Continues to Discuss Reforms Focused Proxy Advisers and Disclosure Requirements

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Sean McKessy, the Chief of the SEC's whistleblower office, recently [warned](#) companies not to be "creative" in trying "get people out of our programs." He was referring to concerns regarding confidentiality, separation or employee agreements that require employees to agree that they will not report issues to a regulator in order to obtain the benefits under the contracts. His admonishment went so far as to indicate that the Commission will examine not only the companies that may have these types of agreements but will also "go after" the lawyers who prepared them, reminding people that the SEC has the power to revoke attorneys' ability to appear before the Commission and indicating that the SEC is actively looking for these types of situations. The whistleblower office continues to receive 9 to 10 tips a day.

In addition, [Reuters](#) reports that Chair White remains focused on possible regulations of proxy advisory firms, the subject of a recent SEC roundtable. While she did not provide specific details, it appears that the SEC may examine opportunities for improving disclosure regarding conflicts of interests and also the impact that reliance by investment advisers on proxy advisory firms have on the advisers' fiduciary obligations. Chair White expects staff recommendations in the "very near term" on the topic.

Another SEC agenda item where we could expect some action soon may be disclosure reform, or at least some incremental steps toward improving disclosure overload, as Keith Higgins recently [discussed](#). He addressed the current practice of companies repeating critical accounting estimates disclosure in both MD&A and in the financial statement footnotes, and encouraged companies to instead use cross-references to the footnotes. The use of cross-references should also be applied to risk factors, litigation and contingences. Another problem that leads to increased volume of disclosure, which he dubbed the "follow the leader" approach, arises when a company includes specific disclosure in response to SEC staff comments, and other companies begin adopting that same disclosure, or companies start including disclosure based on law firm or accounting firms' memos on frequent staff comments as a preemptive measure.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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