

Memorandum

Second Circuit Holds That Dodd Frank's Whistleblower Protection Provisions Extend To Allegations Reported Internally Even If Not Reported To the SEC

September 22, 2015

On September 10, 2015, the United States Court of Appeals for the Second Circuit, deferring to the interpretation of the Securities and Exchange Commission ("SEC"), held that the Dodd-Frank Act's anti-retaliation provision protects employees who reported suspected wrongdoing internally, but did not similarly report it to the SEC prior to suffering retaliation.

In *Berman v. Neo@Ogilvy LLC*, 2015 WL 5254916 (2d Cir. Sept. 10, 2015), the Second Circuit addressed the tension between two provisions of Section 21F of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which was part of the Dodd-Frank Act. Subsection 21F(a)(6) defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission."¹ Subsection 21F(h)(1)(A) prohibits, in relevant part, all forms of discrimination against "a whistleblower in the terms and conditions or employment because of any lawful act done by the whistleblower" in providing information regarding a securities law violation to the SEC or "in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."² (Section 806 of the Sarbanes-Oxley Act prohibits retaliation against employees of publicly traded companies who provide information concerning securities law violations to, among others, a federal regulatory or law enforcement agency, any member or committee of Congress, or "a person with supervisory authority over the employee.")³

¹ Exchange Act § 21F(a)(6) (emphasis added).

² Exchange Act § 21F(h)(1)(A).

³ Sarbanes-Oxley Act § 806(a) (emphasis added).

In attempting to resolve this statutory tension, the Second Circuit first consulted the legislative history of the subdivision containing the cross-reference to the Sarbanes-Oxley Act. Noting that such an inquiry “yields nothing,” the court stated that the tension between subsection 21F(a)(6) and subsection 21F(h)(1)(A) “renders section 21F as a whole sufficiently ambiguous” to warrant deference to “the reasonable interpretation of the agency charged with administering the statute,” which, in this matter, was the SEC. Accordingly, without “definitively constru[ing] the statute” itself, the Second Circuit adopted the SEC’s position that the Dodd-Frank Act’s anti-retaliation provisions extend to individuals who report suspected violations to “persons or governmental authorities other than the Commission” as well as to the SEC itself.⁴

Implications of the Decision

As the Second Circuit observed, its decision in *Berman* creates a circuit split with regard to the question of the scope of Dodd Frank’s anti-retaliation provisions. In 2013, the United States Court of Appeals for the Fifth Circuit, in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013), held that whistleblowers who face retaliation within the meaning of Dodd-Frank are covered by Dodd-Frank’s anti-retaliation provisions only if they had reported the suspected violation to the SEC. Now that the Second Circuit has reached the opposite conclusion, the issue may be ripe for Supreme Court review. In the meantime, companies should bear in mind that in some parts of the country, including within the jurisdiction of the Second Circuit (which includes the states of Connecticut, New York and Vermont), individuals who report suspected securities law violations within the company but not also to the SEC will be entitled to the anti-retaliation protection accorded by the Dodd-Frank Act.

⁴ *Berman v. Neo@Ogilvy LLC*, 2015 WL 5254916, at *3 (citing Securities and Exchange Commission, “Securities Whistleblower Incentives and Protections, Release No. 34-64545, 76 Fed. Reg. 34300-01, at *34304 (June 13, 2011)); see also “Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, Release No. 34-75592 (Aug. 4, 2015). For a discussion of the SEC’s recent interpretive release regarding the SEC’s whistleblower rules under Section 21F of the Exchange Act, see Simpson Thacher Memorandum, “[SEC Issues Interpretation Regarding Definition of ‘Whistleblower’ Under the Dodd-Frank Act’s Anti-Retaliation Provision](#)” (Aug. 27, 2015).

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