CLIENT ALERT

Court Finds Disclosure to SEC Required for Anti-Retaliation Protection

Dodd-Frank Whistleblower Protection Requires More than Just Internal Disclosure

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On February 21, 2018, the United States Supreme Court—reversing the Ninth Circuit—held in *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (Feb. 21, 2018), that the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") only protect individuals who provide "information relating to a violation of the securities laws" directly to the Securities and Exchange Commission (the "SEC" or the "Commission"). In so holding, the Court concluded that the Dodd-Frank anti-retaliation provisions do not protect those who only report internally to a company rather than to the SEC.

The unanimous decision, authored by Justice Ginsberg, relied on the statutory definition of "whistleblower" and on "Dodd Frank's core objective: to prompt reporting to the SEC." The decision rejected the SEC's interpretation, reflected in its Rule 21F-2[1]—and the government's argument in both its brief and at oral argument—that Dodd-Frank whistleblower protection could be triggered by an internal disclosure of an alleged securities law violation, as contrary to the plain

[1] The SEC had drawn a line between whistleblower protection and award eligibility under Dodd-Frank. Under Rule 21F-2, to be eligible for an award, the individual must have submitted the information directly to the Commission. In contrast, whistleblower anti-retaliation protection merely required conformance with Sarbanes-Oxley requirements and the rule specifically rejected that the same requirements and procedures for award eligibility were necessary. 17 C.F.R. 240.21F-2.

language of the statute. While the decision significantly curtails whistleblower protections under Dodd-Frank, it is important to keep in mind that the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") prohibits retaliation against internal whistleblowers in certain circumstances (albeit under a less plaintiff-friendly remedial scheme than Dodd-Frank), as do the laws of certain states.

The suit originated in the Northern District of California when a former employee brought a Dodd-Frank whistleblower action claiming retaliation after reporting alleged securities law violations to senior management. The district court granted *Chevron* deference to the SEC's interpretation, reflected in Rule 21F-2, finding that internal reporting, in compliance with the requirements of Sarbanes-Oxley, was sufficient to trigger Dodd-Frank anti-retaliation protection and that it was not necessary for a plaintiff to report the alleged securities law violations directly to the SEC. The district court agreed with the SEC that the statute distinguished between the requirements for award eligibility, which required disclosure to the SEC, and eligibility for whistleblower protection, which did not. The Ninth Circuit agreed with the district court. This aligned the Ninth Circuit with a divided Second Circuit, but was in conflict with a Fifth Circuit opinion that required disclosure to the SEC before affording Dodd-Frank anti-retaliation protections.[2]

The Supreme Court rejected the SEC's interpretation. Rule 21F-2 created a dichotomous regime, creating separate definitions of "whistleblower" for different protections. For purposes of the award program, an individual had to "provide the Commission with information . . . relat[ing] to a possible violation of the Federal securities laws."[3] In contrast, the anti-retaliation provisions of the Rule extended protections regardless of whether the "whistleblower" provided the information to the Commission, so long as the whistleblower provided information reasonably believed to be a securities violation and provided it in the manner prescribed by Sarbanes-Oxley. The Court concluded that Dodd-Frank's definition of "whistleblower" is clear and conclusive, and therefore it would not accord deference to the contrary view advanced in Rule 21F-2. "The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term."[4] In addition to relying on the statutory language, the majority opinion relied on the core objective of Dodd-Frank's whistleblower program, namely "to motivate people who know of securities law violations to tell the SEC."[5]

Importantly, while this decision does limit liability under Dodd-Frank, the majority highlighted the differences in language with Sarbanes-Oxley. While the language of Dodd-Frank imposes a requirement of communication with the Commission itself, Sarbanes-Oxley protects individuals making disclosures to "a federal regulatory or law enforcement agency; any Member of Congress . . . ; or a person with supervisory authority over the employee."[6] The majority opinion acknowledged this difference and the concurrent regime providing an alternative vehicle for protection for individuals who disclose information to their employers.

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2 *See Berman v. NEO@OGILVY LLC*, 801 F.3d 145, 155 (2d Cir. 2013); *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 630 (5th Cir. 2013).

3 In order to be eligible for the award, the information provided had to lead to a successful enforcement action by the SEC.

4 *Digital Realty*, at 19 (citing *Burgess v. United States*, 553 U.S. 124, 130 (2008)).

5 *Id.* at 4 (citing S. Rep. No. 111-176, 38 (2010)).

6 18 U.S.C. § 1514A(a)(1)(A)-(C).

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This decision limits the ability of former employees to invoke Dodd-Frank's broad anti-retaliation protections without first reporting alleged violations to the government. However, former employees still have the ability to file an administrative complaint under Sarbanes-Oxley invoking anti-retaliation protections for up to 180 days after termination. Additionally, state anti-retaliation regimes are not impacted by *Digital Trust*. In sum, this decision limits only one avenue of potential liability under the various anti-retaliation regimes.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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