SECOND CIRCUIT FILING RE-IGNITES DEBATE OVER THE SCOPE OF THE DODD-FRANK WHISTLEBLOWER PROTECTION PROVISIONS

Date: 30 November 2015

Government Enforcement Alert; Appearing also in The Harvard Law School Forum on Corporate Governance and Financial Regulation (20 December 2015)

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On November 10, 2015, the employer in a high-profile whistleblower-retaliation case[1] advised the United States Court of Appeals for the Second Circuit that it "will not be pursuing a petition for writ of certiorari with the Supreme Court of the United States" with respect to the appellate court's recent pro-whistleblower decision concerning the scope of the anti-retaliation provisions contained in Section 21F of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act").[2] In so doing, the employer re-invigorated the debate over whether Dodd-Frank's anti-retaliation protections cover individuals who report to their employers, as opposed to contacting the Securities and Exchange Commission ("SEC").

BACKGROUND

In *Berman v. Neo@Ogilvy LLC*, the former finance director of Neo@Ogilvy ("Neo") sued Neo and its parent, alleging that he had been discharged in violation of the whistleblower protection provisions of Section 21F of Dodd-Frank, and in breach of his employment contract. According to the complaint, Berman internally reported various practices that constituted accounting fraud under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), Dodd-Frank, and generally accepted accounting principles. Berman alleged that his employment was terminated after a senior officer at Neo "became angry with him" for reporting the suspected violations. Berman did not report any allegedly unlawful conduct to the SEC during his employment or for about six months after his termination.

Relying on the "whistleblower" definition contained in Section 21F(a)(6) of Dodd-Frank, the United States District Court for the Southern District of New York held that the Act provides whistleblower protection only to those who are discharged after reporting alleged violations to the SEC.[3] The District Court dismissed Berman's Dodd-Frank claim (as well as his contract claims) because his employment was terminated before he reported the alleged violations to the SEC. Berman appealed the dismissal of his Dodd-Frank claim.

THE SECOND CIRCUIT OPINION

On appeal, the Second Circuit considered whether Dodd-Frank's anti-retaliation provisions protect whistleblowers who report suspected wrongdoing to their employers, rather than the SEC. The appellate court noted that Section 21F(a)(6) narrowly defines "whistleblower" as an individual who reports "to the Commission," whereas subdivision

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(iii) of Section 21F(h)(1)(A) more broadly extends protection to whistleblowers who report under statutes that provide for internal reporting of securities violations, such as Sarbanes-Oxley.

Predictably, the SEC filed an *amicus* brief in *Berman*, arguing that the statute does not unambiguously demonstrate congressional intent to limit whistleblower protection to those who report suspected wrongdoing to the SEC. The SEC asserted that, under the circumstances, the court should defer to its reasonable interpretation of the anti-retaliation provisions,[4] as articulated in Rule 21F-2(b)(1). That is, "[u]nder [the SEC's] interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission."[5]

The Second Circuit found that, if restricted to the definition of "whistleblower" contained in Section 21F(a)(6), subdivision (iii) would protect only those employees who notify the SEC at the same time, or just before, they report internally under Sarbanes-Oxley. According to the court, the subset of whistleblowers that elects to report suspected wrongdoing to the SEC is "few in number," because many whistleblowers believe that reporting to the government will increase the chances of retaliation by their employers. Moreover, some categories of whistleblowers, including attorneys and auditors, cannot legally report to the SEC until they have first reported apparent wrongdoing to their employer. If subdivision (iii) applied only to those whistleblowers who report directly to the Commission, attorneys and auditors may not be entitled to Dodd-Frank protection. For these reasons, the court explained, reading subdivision (iii) within the context of the "whistleblower" definition leaves it with minimal practical applications.

The 2-1 majority of the Second Circuit panel concluded that the "arguable tension" between Dodd-Frank's definition of "whistleblower" and subdivision (iii) of its anti-retaliation provisions renders Section 21F "ambiguous." The *Berman* court further determined that the legislative history of Dodd-Frank did not clarify the matter; therefore, the court was obligated to give *Chevron* deference to the SEC's reasonable interpretation of the relevant provisions.

THE FIFTH CIRCUIT'S POSITION

In deferring to the SEC's reasonable interpretation of Rule 21F-2(b)(1), the Second Circuit diverged from the position of the only other appellate court to consider this issue.[6] In *Asadi v. G.E. Energy (USA), L.L.C.*,[7] the Fifth Circuit held that the whistleblower-protection provisions of Dodd-Frank exclusively apply to individuals who report misconduct directly to the SEC. The *Asadi* court found that, "under the plain language and structure of Dodd-Frank, there are not conflicting definitions of 'whistleblower,' and [Section 21F(h)(1)(A)(iii)] is not superfluous." Section 21F(h)(1)(A) of the Act identifies three categories of protected activity; subdivision (iii) protects whistleblowers from retaliation "based not on the individual's disclosure of information to the SEC but, instead, on that individual's other possible required or protected disclosures." The Fifth Circuit noted that, if it construed Dodd-Frank to extend beyond the statutory definition of "whistleblower," that may interfere with the anti-retaliation provision of Sarbanes-Oxley. In doing so, the *Asadi* court declined to give weight to the SEC's interpretive rule, finding that the plain language of the statute clearly expresses Congress's intent to require would-be whistleblowers to report information to the SEC.

CONCLUSION

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Now that the employer in *Berman* has declined to pursue Supreme Court review of the Second Circuit's decision, companies and employees will have to analyze and address the resulting circuit split. The Supreme Court may be asked to consider this question of statutory interpretation in the near future.[8] However, in the meantime, employers should bear in mind that whistleblowers who report internally may be covered by the anti-retaliation provisions of Dodd-Frank — at least within the Second Circuit — and they maybe held liable for any actions that could be perceived as retaliatory. As a result, employers should promptly evaluate, and thoroughly document their investigation of, any purported whistleblower reports.

NOTES:

[1] *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

[2] 15 U.S.C. § 78u-6(h).

[3] *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404 (S.D.N.Y. 2014).

[4] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

[5] *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, Release No. 34-75592 (Aug. 4, 2015).

[6] The Second Circuit noted that "although our decision creates a circuit split, it does so against a landscape of existing disagreement among a large number of district courts." *See e.g., Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013); *Wagner v. Bank of America Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643 (D. Colo. July 19, 2013). *Compare with Somers v. Digital Realty Trust, Inc.*, No. C-14-5180 EMC, 2015 WL 2354807 (N.D. Cal. May 15, 2015); *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519 (S.D.N.Y. 2014).

[7] *Asadi v. G.E. Energy (USA), L.L.C.*, 20 F.3d 620 (5th Cir. 2013).

[8] *See Somers v. Digital Realty Trust, Inc.*, __ F. Supp. 3d __, at *14 (N.D. Cal. 2015) (certifying the issue for interlocutory appeal to the Ninth Circuit).

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