Supreme Court Rules that Dodd-Frank Whistleblower Protections Do Not Extend to Internal Reporting

February 27, 2018

On February 21, 2018, in *Digital Realty Trust, Inc. v. Somers*,[1] the Supreme Court held that the Dodd-Frank Act's whistleblower anti-retaliation provisions only apply where a securities-law violation is reported to the Securities and Exchange Commission ("SEC"), and do not extend to situations in which the violation is reported only internally. In so holding, the Court resolved a circuit split that had left uncertainty over the scope of the provisions. Individuals who report to the SEC remain covered by the provisions, which allow immediate access to federal court, have a six-year statute of limitations, and allow employees to recover double backpay with interest. While the Court held that individuals who only report violations internally are not covered by Dodd Frank's anti-retaliation provisions, such individuals who are employees are nevertheless protected by the anti-retaliation provisions of the Sarbanes-Oxley Act ("SOX"), which contain an administrative exhaustion requirement, a 180-day administrative-complaint-filing deadline, and are limited to damages required to make the employee whole.

Dodd-Frank's Anti-Retaliation Provisions

When the Dodd-Frank Act was passed in 2010, it provided specific incentives and protections for "whistleblowers," which it defined as "any individual who provides . . . information relating to a violation of the securities laws to the Commission."[2] Specifically, Dodd-Frank prohibits an employer from discriminating in any way against a "whistleblower," due to "any lawful act done by the whistleblower," including—*inter alia*—"making disclosures that are required or protected under" SOX.[3] SOX, in turn, protects employees from retaliation for reporting securities-law violations and other wrongdoing to an internal supervisor.[4]

Circuit Split Regarding the Scope of the Dodd-Frank Whistleblower Provisions

In *Somers v. Digital Realty Trust Inc.*,[5] the Ninth Circuit held that a former employee was protected by the anti-retaliation provisions of Dodd-Frank after he reported to senior management that his supervisor violated provisions of SOX, even though the employee had not reported these violations to the SEC.

---

[1] 583 U.S. __ (2018).

[2] 15 U.S.C. §78u-6(a)(6).

[3] 15 U.S.C. §78u-6(h)(1)(A)(iii).

[4] 18 U.S.C. §1514A(a)(1)(C).

[5] 850 F.3d 1045 (5th Cir. 2017).

In so holding, the Ninth Circuit followed the Second's Circuit's reasoning in ***Berman v. Neo@Ogilvy LLC***[6] and found that applying the statutory definition of "whistleblower" to the anti-retaliation provisions would narrow the scope of the Dodd-Frank protections "to the point of absurdity," because it would mean that Dodd-Frank only protected employees who "reported possible securities violations both internally and to the SEC." However, the court explained that any ambiguity introduced by the unduly narrow definition was resolved by SEC regulations that do not condition "whistleblower" status on reporting violations to the SEC. As a result, the court found that the SEC's interpretation that whistleblower status extends to those who report only to their employers was entitled to *Chevron* deference.

At the same time, the Ninth Circuit rejected the Fifth Circuit's reasoning in ***Asadi v. G.E. Energy (USA), L.L.C.***, which applied the plain language of Dodd-Frank to find that its retaliation provisions only apply to a "whistleblower" who provides "information relating to a violation of the securities laws to the Commission." Accordingly, the Dodd-Frank whistleblower protections only extend to individuals who reported violations to the SEC.

The Supreme Court granted certiorari to resolve the circuit split on June 26, 2017.

Supreme Court Decision

The Supreme Court unanimously reversed the Ninth Circuit decision, siding with the Fifth Circuit and holding that the plain language of the statute makes clear that the anti-retaliation provisions of Dodd-Frank are limited by the definition of "whistleblower" and only apply to individuals who provide information regarding securities-laws violations to the SEC. Writing for the Court,[7] Justice Ginsburg dismissed concerns that this interpretation fails to adequately protect individuals seeking to report wrongdoing, noting that they are shielded by the provisions "as soon as they also provide relevant information to the Commission," and that the SEC is required to protect the identity of whistleblowers under Dodd-Frank.[8] Justice Ginsburg explained that this result is consistent with the purpose of the Dodd-Frank provisions, which was to encourage reporting to the SEC, and noted that employees who only report violations internally continue to be covered by SOX's remedial scheme.

While Justice Thomas wrote separately to express his disagreement with Justice Ginsburg's citation to legislative history, he concurred in the judgment on the basis of the plain language of the statute. Justice Sotomayor also wrote separately to affirm the legitimacy of reliance on legislative history.

Practical Considerations

Companies should be mindful that employees who only make a report internally continue to be protected by the anti-retaliation provisions of SOX, though the remedial features of such provisions are more limited than those available under Dodd-Frank. However, Dodd-Frank's increased protections, including immediate access to federal court, a six-year (or longer) statute of limitations and the potential to recover double backpay with interest, may lead whistleblowers to report potential wrongdoing directly to the SEC with more frequency and sooner than in the past.

---

[6] 801 F.3d 145 (2d Cir. 2015).

[7] Chief Justice Roberts, and Justices Kennedy, Breyer, Sotomayor and Kagan joined Justice Ginsburg's opinion. Justice Sotomayor also wrote a concurring opinion, joined by Justice Breyer, and Justice Thomas filed an opinion concurring in part and concurring in the judgment, which Justices Alito and Gorsuch joined.

[8] 15 U.S.C. §78u-6(h)(2)(A).

As discussed in a **previous alert**, in considering whistleblowers' rights and when drafting separation agreements, employment agreements, compensation plans, policies and other company documents, companies should continue to keep in mind that protecting and encouraging whistleblowers has been a priority for the enforcement division of the SEC as well as the SEC's Office of the Whistleblower. Rule 21F-17, which was promulgated under the Dodd-Frank Act as a means to prohibit employers from interfering with an employee's right to report potential securities laws violations to the SEC, reads: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." Since 2015, the SEC has brought a number of enforcement actions against companies for their use of what the SEC considered to be restrictive clauses in severance agreements and other documents that, according to the SEC, impeded whistleblowers under Rule 21F-17 of the Securities Exchange Act.

In addition to SEC enforcement, the plaintiffs' bar has been active in reviewing public filings to see if companies are in compliance with the Rule. We do not expect that such activities will be deterred by the Court's recent decision.

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

New York

Martine M. Beamon	**212 450 4262**	**martine.beamon@davispolk.com**
Angela T. Burgess	**212 450 4885**	**angela.burgess@davispolk.com**
Michael S. Flynn	**212 450 4766**	**michael.flynn@davispolk.com**
Kyoko Takahashi Lin	**212 450 4706**	**kyoko.lin@davispolk.com**
Antonio J. Perez-Marques	**212 450 4559**	**antonio.perez@davispolk.com**
Sidney J. Bashago	**212 450 4826**	**sidney.bashago@davispolk.com**

Northern California

Neal A. Potischman	**650 752 2021**	**neal.potischman@davispolk.com**

Washington DC

Linda Chatman Thomsen	**202 962 7125**	**linda.thomsen@davispolk.com**
Neil H. MacBride	**202 962 7030**	**neil.macbride@davispolk.com**
Stefani Johnson Myrick	**202 962 7165**	**stefani.myrick@davispolk.com**