

## Securities Litigation and Enforcement

# Ninth Circuit Weighs In On Scope Of Dodd-Frank Whistleblower Protection

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Earlier this month, the US Court of Appeals for the Ninth Circuit widened a growing split among federal courts over whether Dodd-Frank's anti-retaliation protections extend to whistleblowers who voice concerns about potential securities law violations internally, but do not report those violations to the SEC. In a divided panel decision, the Ninth Circuit answered that question in the affirmative, holding that internal reporting alone is sufficient to qualify an employee for whistleblower status under Dodd-Frank. The court thus affirmed the district court's ruling allowing the plaintiff to proceed with a Dodd-Frank retaliation claim against his former employer. The case is *Somers v. Digital Realty Trust*, 15-17352 (9th Cir. Mar. 8, 2017).

*Somers* has potentially far-reaching implications not only with respect to the future of private whistleblower claims brought under Dodd-Frank, but also the SEC's enforcement activities in this area. The SEC has indicated for some time now that anti-retaliation enforcement is a critical focus of its whistleblower program. In 2015, the SEC issued formal guidance reflecting an expansive interpretation of Dodd-Frank's retaliation protections. The SEC's guidance makes clear that the SEC views Dodd-Frank as protecting internal reporting to the same extent that it protects reporting to the SEC. Consistent with that interpretation, the SEC has taken enforcement action in circumstances where an internal whistleblower makes no corresponding disclosure to the SEC, and even in circumstances where the whistleblower's internal complaint discloses conduct that does not amount to a chargeable securities law violation. See *In re International Game Technology*, Order Instituting Cease-And-Desist Proceedings, File No. 3-17596 (Sept. 29, 2016). With *Somers'* approval of the SEC's interpretation, companies may see a bolstering of the SEC's anti-retaliation enforcement efforts and increased potential for liability in private whistleblower actions. Thus, companies should be especially mindful about how they address issues with employees who report potential misconduct internally, even if it is determined that no securities violation has occurred.

*Somers* is the first appellate decision to address the scope of Dodd-Frank whistleblower status following conflicting rulings on the issue from the Fifth and Second Circuits. The Sixth Circuit recently acknowledged this split in authority but declined to weigh in on the question. *Verble v. Morgan Stanley Smith Barney, LLC*, 15-6397 (6th Cir. Jan. 13, 2017).

Disagreement over the reach of Dodd-Frank's anti-retaliation protections arises from an internal statutory inconsistency caused by Dodd-Frank's addition of certain whistleblower-related provisions to the Securities Exchange Act of 1934. Among other things, those provisions, found in Section 21F of the Act, offer incentives for employees who report potential violations of the securities laws and prohibit retaliation against employees for disclosing such violations. 15 U.S.C. § 78u-6. There is a tension between Section 21F's stated definition of the term "whistleblower," however, and Section 21F's anti-retaliation provision, which outlines the bounds of what constitutes protected activity. While the statutory definition of the term "whistleblower" applies only to individuals who provide information relating to a violation of the securities laws to the SEC, Section 21F's anti-retaliation provision appears to cover a broader category of whistleblowers, including those who report violations solely on an internal basis. 15 U.S.C. § 78u-6(h)(1)(A)(iii). The result is an arguable ambiguity over the kind of conduct that qualifies as whistleblower activity for purposes of Dodd-Frank.

The Fifth Circuit, in *Asadi v. G.E. Energy, LLC*, was the first appeals court to consider the availability of a Dodd-Frank claim for retaliation in response to internal reporting only. 720 F.3d 620 (5th Cir. 2013). Emphasizing the specific meaning accorded to the term "whistleblower" in the statute's definitional section, the *Asadi* court held that the "plain language of the Dodd-Frank whistle-blower protection provision" applies only to "individuals who provide information relating to a securities law violation to the

SEC.” (emphasis added). The court held that a contrary reading would render superfluous the Sarbanes-Oxley enforcement scheme, which indisputably confers protection on internal whistleblowers, but imposes different administrative requirements on claimants and provides for a shorter limitations period and generally less extensive damages than may be available under Dodd-Frank.

In August 2015, in response to *Asadi*, the SEC issued interpretative guidance that takes the opposite position. That guidance rejects the Fifth Circuit’s reasoning and interprets Section 21F as containing two entirely separate whistleblower definitions—the first of which concerns the statute’s award and confidentiality provisions and applies only to reporting made to the SEC, while the second, which is relevant for anti-retaliation purposes, encompasses a broader category of whistleblowers, including those who report violations internally.

Examining the SEC’s interpretative guidance, the Second Circuit in *Berman v. Neo@Ogilvy LLC* agreed that Section 21F does not limit Dodd-Frank whistleblower protection only to those who disclose violations to the SEC. 801 F.3d 145 (2d Cir. 2015). Rather, the Second Circuit determined that Section 21F was sufficiently ambiguous to warrant deference to the SEC’s interpretation that the anti-retaliation provision “expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley, and those provisions, which contemplate an employee reporting violations internally, do not require reporting violations to the [SEC].” The court noted that, despite *Asadi*, a majority of lower court decisions had arrived at a similar conclusion.

In *Somers*, the Ninth Circuit considered whether a plaintiff who was fired after reporting concerns about potential securities law violations to senior company management could proceed with a Dodd-Frank retaliation claim even though he did not disclose those violations to the SEC. Recognizing the inter-circuit disagreement on the issue, the Ninth Circuit sided with the Second Circuit’s approach, finding that the SEC’s guidance “correctly reflects congressional intent to provide protection for those who make internal disclosures as well as those who make disclosures to the SEC.” Addressing *Asadi*’s counterarguments head on, the court concluded that *Asadi*’s interpretation of the term “whistleblower” would “all but read [the portion of the anti-retaliation provision describing internal reporting] out of the statute.” The court further rejected *Asadi*’s position that a broader reading of Dodd-Frank whistleblower protections would render Sarbanes-Oxley moot. Rather, the court noted that Dodd-Frank and Sarbanes-Oxley provide different relief and separate recovery procedures, and therefore offer aggrieved employees “alternative enforcement mechanisms.”

With a growing split among the circuits, the scope of whistleblower protection under Dodd-Frank remains uncertain. The balance of lower court decisions appears to have tipped in favor of the SEC’s interpretation—for now. With a narrow circuit split, the issue may be ripe for Supreme Court review, and a crucial vote against the SEC could come from nominee Neil Gorsuch, who has expressed skepticism about the principle of deferring to agency interpretations. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring). Whatever the future holds, the issue presents some important takeaways:

- As articulated in its interpretative guidance, the SEC views internal reporting as clearly within the ambit of Dodd-Frank’s anti-retaliation protections. Many federal courts, including two circuit courts, have now deferred to the SEC’s guidance on this issue.
- The SEC has signaled that it is very focused on whistleblower issues and has indicated a willingness to bring anti-retaliation enforcement proceedings even where the whistleblower reports only internally. Given growing judicial approval for the SEC’s interpretation of Section 21F, increased enforcement action with respect to internal whistleblowers can be expected in the future.
- The SEC has brought anti-retaliation enforcement proceedings where the underlying conduct complained of does not amount to a chargeable violation. Companies should therefore be aware that Dodd-Frank whistleblower issues may arise even when it has been determined that no violation occurred.

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