# Client Update

# Second Circuit Creates Circuit Split on the Question Of Whether Internal Reporting Triggers Whistleblower Anti-Retaliation Protection under Dodd-Frank

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In a much-anticipated decision, a divided panel of the Second Circuit Court of Appeals yesterday held in *Berman v. Neo@Ogilvy LLC*[1] that internal reporting of alleged wrongdoing to an employer is sufficient to trigger protection under Dodd-Frank's anti-retaliation provision and that whistleblowers need not report externally to the U.S. Securities and Exchange Commission ("SEC") in order to be afforded such protection. In so holding, the Second Circuit created a circuit split with the Fifth Circuit, whose 2013 decision in *Asadi v. G.E. Energy (USA), LLC*[2] held that, under the plain language of the statute, the anti-retaliation provision covers only those who blow the whistle externally by providing information to the SEC. With this circuit split, it seems likely that the question will ultimately be addressed by the U.S. Supreme Court.

## BACKGROUND

The *Berman v. Neo@Ogilvy LLC* case involved the former finance director of Neo@Ogilvy LLC ("Neo"), who was terminated in April 2013 after he reported a number of alleged violations of GAAP, Sarbanes-Oxley and Dodd-Frank internally at Neo. Following his termination, he reported his allegations to the Audit Committee of Neo's parent company, WPP Group USA, Inc., in August 2013, and to the SEC in October 2013. In January 2014, Berman sued Neo and

1 No. 14-4626, slip. op. (Sept. 10, 2015) ("Second Circuit Decision").

2 720 F.3d 620 (5th Cir. 2013).

WPP alleging retaliation in violation of Dodd-Frank. Dodd-Frank provides a private cause of action to an individual who is retaliated against for engaging in whistleblowing activity, allowing the whistleblower to seek reinstatement, double back pay, and litigation costs and attorneys' fees.[3] The District Court, agreeing with defendants, dismissed Berman's complaint, reasoning that Berman did not meet the Dodd-Frank statutory definition of a whistleblower because he had not reported externally to the SEC before the alleged retaliation occurred.[4]

## THE SECOND CIRCUIT OPINION

The issue on appeal to the Second Circuit in *Berman v. Neo@Ogilvy LLC* was whether an individual must report wrongdoing to the SEC, or whether internal reporting is sufficient to meet the statutory definition of "whistleblower" for the purposes of triggering the protections of the anti-retaliation provision of Dodd-Frank.

The legal uncertainty arises from what the Second Circuit found to be ambiguous Dodd-Frank statutory language on the definition of a "whistleblower" for purposes of the anti-retaliation provisions of the Act. Specifically, Dodd-Frank Section 21F(a)(6)'s definition of "whistleblower" appears to require "voluntarily provid[ing] original information to the Commission," but Section 21F(h)(1)(A)—the anti-retaliation provision—states that an employer may not retaliate against a whistleblower who makes disclosures required or protected by Sarbanes-Oxley, the Exchange Act, 18 U.S.C. §1513(e) and other laws and rules subject to SEC jurisdiction.[5] Since Sarbanes-Oxley contains several provisions requiring internal reporting of securities law violations or improper practices, the SEC and plaintiffs have argued that the two sections appear to be in tension, creating ambiguity in the definition. Importantly, the SEC's rules implementing the whistleblower provisions, issued in 2011, take a broad view of who qualifies as a "whistleblower" for purposes of the anti-retaliation provision, and they do not require reporting externally to the SEC.[6]

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3 15 U.S.C § 78u–6(h)(1)(C).

4 *Berman v. Neo@Ogilvy LLC*, No. 1:14-cv-523, 2014 WL 6860583 (S.D.N.Y. Dec. 4, 2014).

5 *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii).

6 Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34304 (June 13, 2011).

The Fifth Circuit was the first circuit court to consider the issues in *Asadi v. G.E. Energy (USA), LLC*.[7] The Fifth Circuit in that case expressly "reject[ed] the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision" and held that the plain language of the statute provides protection only to whistleblowers who provide information to the SEC.[8] The Fifth Circuit reasoned that an individual who simultaneously reported internally and to the SEC would satisfy both the definitional provision 21F and the anti-retaliation provision, so the two provisions were not necessarily in conflict.[9]

The Second Circuit rejected the Fifth Circuit's reading of the statute, finding that requiring reporting to the SEC would significantly limit the scope of the anti-retaliation provision for two reasons. First, few whistleblowers are likely to report wrongdoing to the government simultaneously with reporting internally because "reporting to a government agency creates a substantial risk of retaliation," but "reporting only to their employer offers the prospect of having the wrongdoing ended."[10] Second, several Sarbanes-Oxley provisions prohibit auditors and attorneys from reporting wrongdoing to the SEC until after they have reported the wrongdoing to their employer, so requiring simultaneous reporting would prevent them from obtaining the protections of the anti-retaliation provision.[11]

Citing its view of the ambiguity presented by the two Dodd-Frank sections and the lack of legislative history to provide guidance, the Second Circuit concluded—after a lengthy analysis of the statutory language—that it was obliged "to give Chevron deference to the reasonable interpretation of the agency charged with administering the statute."[12] Under the SEC's broad interpretation, as articulated in its interpretive rule, whistleblower Berman would be allowed to pursue Dodd-Frank remedies for alleged retaliation even though he did not report to the SEC before the alleged retaliation occurred. In reversing and remanding the case for further proceedings, the Second Circuit

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7 720 F.3d 620 (5th Cir. 2013).

8 *Id.* at 630.

9 *Id.* at 627-28.

10 Second Circuit Decision, at 17.

11 *Id.* at 18-19 (citing 15 U.S.C. §§ 78j-1; 7245) (also noting that the SEC's Standards of Professional Conduct Rule 3 would prohibit simultaneous reporting).

12 *Id.* at 28.

noted that its analysis was consistent with the majority of district courts which have considered the question.

## CONCLUSION

The Second Circuit's decision is a strong reminder to companies of the perils of potential retaliation against employees who report alleged wrongdoing. Companies should take care to monitor and test the effectiveness of their policies and procedures around internal reporting of alleged misconduct. It is imperative to evaluate carefully and thoughtfully internal whistleblower complaints before taking any action that could be perceived as retaliatory against the employee raising the complaints. SEC Chair Mary Jo White has advised companies to "embrace [whistleblowers] as a constructive part of the process to expose the wrongdoing that can harm a company and its reputation."[13] Companies should take note that the SEC continues to devote significant attention to whistleblower retaliation and protection issues, a trend we do not anticipate will slow any time soon.

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Please do not hesitate to contact us with any questions.

[13] *See* Mary Jo White, Chair, SEC, Address at Ray Garrett, Jr. Corporate & Securities Law Institute- Northwestern University School of Law: The SEC as the Whistleblower's Advocate (Apr. 30, 2015).