

# Client Update

## Ninth Circuit Widens Split Over Application of Dodd-Frank's Whistleblower Protections

### NEW YORK

Andrew J. Ceresney  
aceresney@debevoise.com

Jyotin Hamid  
jhamid@debevoise.com

Mary Beth Hogan  
mbhogan@debevoise.com

### WASHINGTON, D.C.

Julie M. Riewe  
jriewe@debevoise.com

Jonathan R. Tuttle  
jrtuttle@debevoise.com

Ada Fernandez Johnson  
afjohnson@debevoise.com

Arian M. June  
ajune@debevoise.com

Mark D. Flinn  
mflinn@debevoise.com

Ryan M. Kusmin  
rmkusmin@debevoise.com

The U.S. Court of Appeals for the Ninth Circuit ruled on March 8 in *Somers v. Digital Realty Trust Inc.*<sup>1</sup> that an employee's internal reporting of alleged wrongdoing to his or her employer entitles the employee to protection under Dodd-Frank's whistleblower anti-retaliation provisions. In so holding, the Ninth Circuit sided with the Second Circuit and rejected the Fifth Circuit's 2013 opinion that the anti-retaliation provisions only cover whistleblowers who provide information to the U.S. Securities and Exchange Commission (the "SEC"). As we noted in a previous client update,<sup>2</sup> two federal district courts adopted the Fifth Circuit's view in December 2015, but the majority of district courts that have considered the issue agree with the SEC's broader reading of the statute, which has now been adopted by both the Second and Ninth Circuits.

### BACKGROUND

In *Somers v. Digital Realty Trust Inc.*, Paul Somers, a former Vice President at Digital Realty Trust Inc. ("Digital Realty"), was fired after making several reports of potential securities law violations to the company's senior management. Somers did not report his concerns to the SEC before he was terminated. After he was fired, Somers sued Digital Realty, alleging that his termination violated various state and federal laws, including Dodd-Frank's anti-retaliation provisions. Digital Realty moved to dismiss the complaint, arguing that Somers was not entitled to protection under the anti-retaliation provisions because, while he had reported his concerns internally, he did not report them to the SEC and therefore did not meet the statute's definition of a "whistleblower." The district

<sup>1</sup> No. 15-17352, slip op. (9th Cir. Mar. 8, 2017) ("Ninth Circuit Decision").

<sup>2</sup> Debevoise & Plimpton LLP, Client Update: Recent Decisions Create Further Uncertainty on Question of Whether Internal Reporting Triggers Dodd-Frank Whistleblower Anti-Retaliation Protection (Jan. 20, 2016), available at <http://www.debevoise.com/insights/publications/2016/01/recent-decisions-create-further-uncertainty>.

court denied Digital Realty's motion and deferred to the SEC's broader interpretation of the anti-retaliation provisions, holding that the SEC was entitled to such deference because the statute's application is ambiguous.

### THE NINTH CIRCUIT OPINION

The issue on appeal to the Ninth Circuit in *Somers v. Digital Realty Trust Inc.* was whether a whistleblower's internal reporting of suspected wrongdoing qualifies for protection under Dodd-Frank's anti-retaliation provisions, or whether the protections are only triggered when an employee reports wrongdoing to the SEC.

This legal uncertainty arose from the ambiguous use of the term "whistleblower" in Dodd-Frank. Specifically, Dodd-Frank Section 21F(a)(6) defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission."<sup>3</sup> However, a later subsection – Section 21F(h)(1)(A) – prohibits retaliation against a whistleblower who makes disclosures that are required or protected by Sarbanes-Oxley and the Exchange Act.<sup>4</sup> Sarbanes-Oxley protects from retaliation employees who report securities law violations to "a person with supervisory authority over the employee."<sup>5</sup>

In the SEC's view, the apparent tension between Section 21F(a)(6) and Section 21F(h)(1)(A) creates an ambiguity in the statute's application. When the SEC issued rules implementing Dodd-Frank's whistleblower provisions in 2011, it sought to resolve that ambiguity and adopted a broad view of who qualifies as a "whistleblower" under the statute. In doing so, the SEC specifically included within the "whistleblower" definition employees who report internally under Sarbanes-Oxley.<sup>6</sup> The SEC filed an amicus brief in *Somers v. Digital Realty Trust Inc.*, as it did in other cases addressing the issue, urging the court to adopt this broader reading of the statute.<sup>7</sup>

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<sup>3</sup> 15 U.S.C. § 78u-6(a)(6) (emphasis added).

<sup>4</sup> 15 U.S.C. § 78u-6(H)(1)(A).

<sup>5</sup> 18 U.S.C. § 1514A(a).

<sup>6</sup> See Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2.

<sup>7</sup> Brief of the Securities and Exchange Commission, *Amicus Curiae* in Support of the Appellee, *Somers v. Digital Realty Trust Inc.*, No. 15-17352, slip op. (9th Cir. Mar. 8, 2017). See also Brief of the Securities and Exchange Commission, *Amicus Curiae* in Support of the Appellant, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151-52 (2d Cir. 2015) (No. 14-4626).

The Fifth Circuit was the first appellate court to consider this issue in *Asadi v. G.E. Energy (USA), LLC*.<sup>8</sup> In that case, the court 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.<sup>9</sup> The Fifth Circuit reasoned that an employee who simultaneously reported internally and to the SEC would satisfy both Section 21F(a)(6) and Section 21F(h)(1)(A), so the two provisions are not necessary in conflict.

The Second and Ninth Circuits rejected this narrow reading of the statute, finding that the scope of the anti-retaliation provisions would be significantly limited if external reporting to the SEC were required. In particular, the Ninth Circuit echoed the Second Circuit’s finding that internal auditors and in-house attorneys would be left with virtually no Dodd-Frank anti-retaliation protection under this reading because Sarbanes-Oxley requires them to report internally before reporting to the SEC, and any retaliation would typically precede external reporting. Referring to the Second Circuit’s analysis in *Berman v. Neo@Ogilvy LLC*<sup>10</sup>, the Ninth Circuit emphasized that under the narrow reading of the statute, Section 21F(h)(1)(A)’s anti-retaliation provision would be “narrowed to the point of absurdity” because it would only protect employees who reported both internally and externally, meaning that a company would not be subject to potential anti-retaliation liability under Dodd-Frank were it to fire an employee who reported internally before he or she could report to the SEC.<sup>11</sup>

## CONCLUSION

The Ninth Circuit’s decision widens an already existing circuit split on the question of whether internal whistleblowers can avail themselves of the anti-retaliation provisions of Dodd-Frank. While this issue will not likely be resolved unless and until the Supreme Court takes it up, the Ninth Circuit’s decision is a stark reminder to companies of the perils of retaliation against employees who report alleged wrongdoing, whether internally or externally. 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 any internal whistleblower complaints before taking

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<sup>8</sup> 720 F.3d 620 (5th Cir. 2013).

<sup>9</sup> *Id.* at 630.

<sup>10</sup> 801 F.3d 145, 151-52 (2d Cir. 2015).

<sup>11</sup> Ninth Circuit Decision, at 10.

any action that could be perceived as retaliatory against the employee raising the complaints.

Companies should note that the SEC continues to devote significant attention to whistleblower retaliation and protection issues, a trend we do not anticipate slowing any time soon. As we have discussed in other client updates,<sup>12</sup> the SEC has recently focused on agreements with current and former employees that could be read to interfere with potential whistleblowers. Accordingly, companies should review all such agreements, including severance and confidentiality agreements, to ensure they do not contain provisions that can be read as prohibiting, discouraging or interfering with protected whistleblowing activities.

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Please do not hesitate to contact us with any questions.

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<sup>12</sup> See Debevoise & Plimpton LLP, Client Update: SEC Brings Two Enforcement Actions Against Employers for Taking Steps to Impede Whistleblower Activity (Jan. 20, 2017), available at <http://www.debevoise.com/insights/publications/2017/01/sec-brings-two-enforcement-actions>. See also Debevoise & Plimpton LLP, Client Update: SEC Exams Focus on Whistleblower Compliance by Investment Advisers and Brokers (Oct. 26, 2016), available at <http://www.debevoise.com/insights/publications/2016/10/sec-exams-focus-on-whistleblower-compliance>.