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Memorandum

SEC Issues Interpretation Regarding Definition of "Whistleblower" Under the Dodd-Frank Act's Anti-Retaliation Provision

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On August 4, 2015, the Securities and Exchange Commission ("SEC") issued an interpretive release to clarify its reading of the whistleblower rules it promulgated in 2011 under Section 21F of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The release expressed the SEC's view that the employment retaliation protection accorded by the Dodd-Frank Act and codified in Section 21F is available to individuals who report the suspected securities law violation internally, rather than to the SEC.[1]

The Ambiguity in Section 21F

The question of whether the Dodd-Frank Act's employment retaliation protection covers employees who report the suspected violation internally, rather than to the SEC, originates with the ambiguity of Section 21F. Section 21F defines a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[2] The statute's provision protecting whistleblowers from retaliation, however, prohibits, in relevant part, all types of discrimination against "a whistleblower in the terms and conditions or employment because of any lawful act done by the whistleblower . . . in providing information to the Commission in accordance with this section" or "in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."[3] Section 806 of the Sarbanes-Oxley Act, in turn, prohibits retaliation against employees of publicly traded companies who provide information or otherwise assist in an investigation relating to fraud, "when the information or assistance is provided to or

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

[2] Exchange Act § 21F(a)(6) (emphasis added).

[3] Exchange Act § 21F(h)(1)(A).

the investigation is conducted by" a federal regulatory or law enforcement agency, any member or committee of Congress, or "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[4]

The SEC's Interpretation

In its interpretive release, the SEC explains that when it promulgated its rules to implement the Dodd-Frank Act's whistleblower program, it recognized Section 21F's ambiguity regarding the scope of the statute's protection against retaliation. The SEC indicates that in an effort to resolve this ambiguity, it provided "two separate definitions of 'whistleblower'" that "apply in different circumstances," each requiring its own set of "reporting procedures that must be satisfied in order for an individual to qualify under the particular definition."

1. The Definition of "Whistleblower" in Rule 21F-2(a). Rule 21F-2(a) defines "whistleblower" as one who, "alone or jointly with others" furnishes the SEC with information pursuant to Rule 21F-9(a). Rule 21F-9(a), in turn, provides that in order to be considered a whistleblower under Section 21F, an individual must submit information regarding a possible securities law violation "[o]nline, through the Commission's Web site . . . or [b]y mailing or faxing a Form TCR (Tip, Complaint or Referral) . . . to the SEC Office of the Whistleblower . . . ."
2. The Definition of "Whistleblower" in Rule 21F-2(b). Section 21F-2(b), titled "Prohibition against retaliation," indicates that "[f]or purposes of the anti-retaliation protections afforded by" Section 21F, a whistleblower is one who provides information relating to a possible securities law violation "in a manner described in" the employment retaliation provision of Section 21F, Section 21F(h)(1)(A).

The SEC's interpretive release clarifies that the definition of "whistleblower" in Rule 21F-2(a), which "mirrors the statutory definition of whistleblower," "applies only to the . . . provisions of Section 21F" that allow for monetary awards for supplying information about the violation and provide heightened confidentiality assurances. On the other hand, the second definition of "whistleblower," set forth in Rule 21F-2(b), applies for purposes of Section 21F's anti-retaliation protections and "does not require reporting in accordance with Rule 21F-9(a)'s procedures." Thus, the procedures outlined in Rule 21F-9(a) apply "only to help determine an individual's status as a whistleblower for purposes of Section 21F's award and confidentiality provisions"; Rule 21F-2(b) "alone controls the reporting methods that will qualify an individual as a whistleblower for the retaliation protections."

Noting that the Court of Appeals for the Fifth Circuit recently held that an employee who only reported the violation internally was not covered under the Dodd-Frank Act's anti-retaliation provision, the SEC observes that such an interpretation of Section 21F "is not consistent with Rule 21F-2 and would undermine our

[4] Sarbanes-Oxley Act §806(a) (emphasis added).

overall goals in implementing the whistleblower program." The SEC believes that "by providing employment retaliation protections for individuals who report internally first to a supervisor, compliance official, or other person working for the company that has authority to investigate, discover, or terminate misconduct," the SEC's interpretive rule "removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances." According to the SEC, a contrary reading of the statutory protection would undermine other incentives in the SEC's whistleblower rules designed to encourage internal reporting.

Implications of the SEC's Interpretive Release

While the SEC's position on the issue is not new, the recent interpretive release clarifies and emphasizes that, in the SEC's view, an employee who reports the violation internally and suffers subsequent employment retaliation is protected under the Dodd-Frank Act to the same extent as an employee who reports the violation immediately to the SEC. The interpretive release does not settle the issue, however, as the judiciary – not the SEC – is the final arbiter of statutory construction. The issue continues to be litigated, and while courts addressing the issue are likely to consider the SEC's interpretation, they are not obligated to follow it.

The issue of whether the Dodd-Frank Act's employment retaliation provision protects employees who reported the violation internally rather than to the SEC is currently before the Second Circuit.[5] It remains to be seen whether the court will adopt the SEC's interpretation and, if so, whether the resulting circuit split will compel the Supreme Court to address and resolve the issue.

[5] *See Berman* v. *NEO@Ogilvy LLC*, Case No. 14-4626 (2d Cir.).

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