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SEC Issues Interpretive Rule Regarding Definition of Dodd-Frank "Whistleblower"

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In response to the disagreement amongst courts regarding the scope of Dodd-Frank's employment retaliation protections, on August 4, 2015, the SEC issued an "interpretive rule" clarifying that individuals who have not reported alleged misconduct to the SEC may nevertheless qualify as "whistleblowers."

Section 922 of Dodd-Frank amended the Securities Exchange Act of 1934 to (i) establish a whistleblower bounty program administered by the SEC and (ii) prohibit retaliation by employers against whistleblowers. Since Dodd-Frank's passage, courts have grappled with the scope of the definition of "whistleblower" under the anti-retaliation provision because the statute, on the one hand, prohibits retaliation against individuals who make "disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act, 18 U.S.C. Sec. 1513(e), and "any other law, rule or regulation subject to the jurisdiction of the [SEC]," but, on the other hand, defines "whistleblower" as "any individual who provides … information relating to a violation of the securities laws ***to the Commission***, in a manner established, by rule or regulation, by the Commission."

In the wake of Dodd-Frank's passage, the SEC promulgated legislative rules to implement the whistleblower bounty program. The SEC promulgated two separate definitions of "whistleblower" – one for the bounty provision and another for the anti-retaliation provision. The SEC's definition of "whistleblower" for the anti-retaliation provision states that an individual must: (i) possess a reasonable belief that the information he/she is providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in Dodd-Frank) that has occurred, is ongoing, or is about to occur; and (ii) provide that information in a manner described in the statute. The SEC's rule further provides that "[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award." The SEC also promulgated procedures to be eligible to receive a whistleblower bounty award (Rule 21 F-9). These procedures state that to be a "whistleblower," individuals must submit information about a possible securities violation to the SEC.

On July 17, 2013, the Fifth Circuit Court of Appeals in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013) held that the text of the statute requires that a "whistleblower" report an alleged violation to the SEC to be covered by Dodd-Frank's anti-retaliation provision. Some district courts have followed *Asadi* while others (including a recent decision by the Northern District of California) have rejected *Asadi* and held that an internal complaint of an alleged securities law violation is sufficient to invoke Dodd-Frank’s anti-retaliation protection.

In response to the growing disagreement amongst courts in the wake of the *Asadi* decision, the SEC issued an interpretive rule clarifying that for purposes of Dodd-Frank's employment retaliation protections, "an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Rule 21F-9(a)." In issuing its clarification, the SEC states that the definition of "whistleblower" for purposes of Dodd-Frank's employment retaliation provision is "ambiguous" but that the SEC's interpretation "best comports with our overall goals in implementing the whistleblower program." The SEC further states 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, our interpretive rule avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally in appropriate circumstances and, thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting."

It remains to be seen whether courts (including those within the Fifth Circuit) will rely on the SEC's interpretive guidance in construing the scope of Dodd-Frank's anti-retaliation provision or whether they will continue to follow *Asadi*. We may learn more soon as this issue is currently before the Second Circuit. Regardless, the SEC's guidance increases the risk that internal complaints may be protected activity under Dodd-Frank, which underscores the importance of implementing internal reporting processes and conducting prompt and thorough investigations.

Authors of this alert: *Lloyd B. Chinn and Harris M. Mufson.*

Related Professionals

- **Lloyd B. Chinn**
  Partner
- **Steven J. Pearlman**
  Partner