Insight

IN-DEPTH DISCUSSION

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SEC Continues its Efforts to Make Dodd-Frank Whistleblowing Easier

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The Securities and Exchange Commission (SEC) recently issued interpretative guidance intended to advance the agency's position that a whistleblower is entitled to the anti-retaliation protections of the Dodd-Frank Wall Street Reform and Consumer Protection Act after making an internal complaint regarding possible securities law violations, even if the individual does not report directly to the SEC. The SEC's interpretation comes as no surprise, as it has taken this litigation stance since issuing its first Dodd-Frank regulation in 2011. The release of an official agency interpretation on August 4, 2015 may be the SEC's attempt to convince the courts to adopt its view. If the courts do, internal whistleblowers would have the benefit of Dodd-Frank's procedural process and remedies in addition to those under the Sarbanes-Oxley Act of 2002 (SOX).

The Basis for the SEC's Interpretation

The SEC admits the scope of the employment retaliation provision in Dodd-Frank is ambiguous. The Act unambiguously 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."[1] Such whistleblowers can be awarded a "bounty" of 10% to 30% of the monetary sanction the SEC obtains using the information in a successful enforcement action if the information is "original" (as interpreted by the SEC) and the sanction exceeds $1 million.

But, as the SEC also notes, the Act later includes a "prohibition against retaliation" that the SEC refers to as a "catchall provision." The SEC argues that this prohibition protects not only whistleblowers who provide information to the Commission, but also whistleblowers who make "disclosures that are protected under the Sarbanes-Oxley Act of 2002… and any other law, rule, or regulation subject to the jurisdiction of the Commission."[2] The SEC's view is that, because SOX protects internal reporting, this "catchall" language was intended to extend Dodd-Frank's workplace retaliation protection to individuals who internally report violations of the Securities Exchange Act or the SEC's rules. Since the "catchall" anti-retaliation provision applies

1 See 15 U.S.C. § 78u-6(a)(6).

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

expressly to workplace retaliation, the SEC argues it should supplement the specific definition of "whistleblower," adding another layer of protection for employees who complain internally.

Finally, ignoring the existence of SOX, the SEC reasons that protecting employees who only report externally to the SEC, and not those who report internally, would have a chilling effect on the remedial purposes behind Dodd-Frank of uncovering, stopping and penalizing SEC violations and internal corporate fraud. Under the SEC's interpretation, employees are provided equal employment retaliation protection both for internal and external reporting. exception to Rule 41, such that court approval was required. Noting that there was conflicting district court authority within the Second Circuit, the appellate court ultimately sided with the line of authority that was concerned that "low wage employees" might be "more susceptible to coercion or more likely to accept unreasonable, discounted settlement offers quickly," which, it stated, was contrary to the purposes of the FLSA. As a result, it held that "Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect."

The Counterargument

Some courts have taken the position that the SEC's interpretation is not supported by the plain text of Dodd-Frank. For instance, the SEC's interpretation is directly at odds with a decision issued by the U.S. Court of Appeals for the Fifth Circuit and other lower court decisions, which have examined the Act and held that Dodd-Frank's whistleblower protections do not apply unless the employee has provided information directly to the SEC. Not surprisingly, the SEC views these interpretations negatively and is working hard to advance its own interpretation, which has also been embraced by some courts.

In short, courts are split on whether Dodd-Frank requires employees to report externally to the SEC in order to garner anti-retaliation workplace protection. The SEC's new interpretive guidance affirms the SEC's expansive reading of the Act to include internal whistleblowers within Dodd-Frank's anti-retaliation protections.

Will Courts Adopt the SEC's Interpretation?

Federal agency regulations, interpretations, and other pronouncements, such as litigation postures, are afforded different levels of deference by the courts. For example, an agency action that requires notice and comment, such as a rule, may have the force of law under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[3] Under the Chevron deference doctrine, the SEC's interpretation could alter how courts view Dodd-Frank's whistleblower protections. While the Securities Exchange Act and Dodd-Frank Act give the SEC rulemaking power, nothing in the Chevron deference doctrine gives the SEC the right to interpret the statute beyond its plain language. To earn Chevron deference from the courts, the SEC's interpretation must be based on a permissible reading of the Act's plain language. That means that the SEC's interpretation as formally published in the Federal Register is really just an enhancement of its litigation position.

An agency's interpretive rule is afforded a lower level of deference under Skidmore v. Swift & Co.,[4] in which a court uses a number of factors to evaluate an agency's "power to persuade." The question then becomes: what level of deference, if any, should the courts give to the SEC's interpretative guidance? Chevron, Skidmore, or one of the other types of deference the U.S. Supreme Court has developed over the years?

Looking Forward

It appears that the SEC hopes its interpretation will influence court assessments of the scope of Dodd-Frank retaliation claims. The SEC has already petitioned the U.S. District Court for the Northern District of California for permission to file an amicus brief in response to an employer's Motion to Dismiss a former employee's Dodd-Frank retaliation claim. The brief the SEC seeks to file is the same as one it previously filed. This time, however, the SEC's motion highlights its recent interpretative guidance. In support of its motion, the SEC argues that, as the federal agency charged with administering Dodd-Frank, the SEC is best positioned to assist the trial court with its interpretation of Dodd-Frank and whether the Act protects internal whistleblowing. Amicus briefs at the trial level are extremely rare, so the Northern District of California must determine whether to accept the SEC's offer of assistance.

3 467 U.S. 837 (1984).

4 323 U.S. 134 (1944).

Should the split among the federal district courts and circuit courts of appeal regarding the scope of Dodd-Frank's anti-retaliation protections continue to expand, the issue could wind up before the U.S. Supreme Court. While this plays out in the courts, publicly traded companies covered by Dodd-Frank should be aware of the SEC's clear and unmistakable insistence on an enlarged definition of "whistleblower" and continue to be vigilant with their anti-retaliation policies and practices.