Second Circuit Applies *Chevron* Deference to Broaden Protections of Dodd-Frank's Anti-Retaliation Provisions; Creates Circuit Split

On September 10, 2015, the United States Court of Appeals for the Second Circuit held that Section 21F of the Securities Exchange Act of 1934 ("Exchange Act")[1] was sufficiently ambiguous to warrant *Chevron* deference[2] to the Securities and Exchange Commission's ("SEC" or "Commission") interpretation that Dodd-Frank's[3] "whistleblower" protections are available to persons who report wrongdoing internally whether or not they also report to the Commission.[4]

I. Factual Background and Procedural Posture[5]

Plaintiff-Appellant Daniel Berman was employed as finance director of Neo@Ogilvy LLC. He alleged in his complaint that he discovered various practices at Neo@Ogilvy that he believed amounted to accounting fraud. He further alleged the practices that he discovered violated GAAP, Sarbanes-Oxley and Dodd-Frank. Berman reported these violations internally.

According to Berman, this internal reporting resulted in his termination in April 2013. It was not until October 2013—approximately six months after his employment was terminated—that Berman reported the allegedly unlawful conduct to the SEC.

In January 2014, Berman commenced suit against Neo@Ogilvy and its corporate parent, WPP Group USA, Inc., alleging he was discharged in violation of Dodd-Frank's whistleblower protection provisions.[6] The defendants moved to dismiss Berman's complaint. Magistrate Judge Sarah Netburn recommended that Berman was entitled to Dodd-Frank's whistleblower protections even though he was terminated before reporting to the Commission, but that the retaliation claims be dismissed as legally insufficient with leave to amend.

The District Court disagreed and held that the definition of "whistleblower" in subsection 21F(a)(6)[7] of the Exchange Act included only those persons who reported alleged violations "to the Commission." The District Court further concluded that subsection 21F(a)(6)'s definition of "whistleblower" applied to the anti-retaliation provisions of Dodd-Frank[8] and, therefore, persons who are discharged for reporting alleged violations only internally are not protected. Accordingly, the District Court dismissed Berman's entire complaint.

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[1] *See* 15 U.S.C. § 78u-6.

[2] *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[4] *See Berman* v. *Neo@Ogilvy LLC, et al.*, --- F.3d ----, 2015 WL 5254916 (2d Cir. Sept. 10, 2015) (the "Opinion").

[5] The factual background has been summarized from the facts set forth in the Opinion.

[6] Berman also alleged that he was terminated in breach of his employment contract.

[7] Subsection 21F(a)(6) of the Exchange Act defines "whistleblower" to mean "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." (emphasis added).

[8] Subsection 21F(h)(1)(A) of the Exchange Act sets forth three types of activity against which an employer may not retaliate. The only activity relevant to the *Berman* decision is subdivision (iii): "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter [*i.e.*, the Exchange Act], including section 78j-1(m) of this title [*i.e.*, Section 10A(m) of the Exchange Act], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." *Berman*, 2015 WL 5254916, at *2 (quoting 78u-6(h)(1)(A)).

II. The Circuit Court Decision

On September 10, 2015, the Second Circuit reversed the district court decision, deferring to the SEC's interpretation of the scope of Dodd-Frank's protection against retaliation.[9] Writing for the majority, Judge Jon O. Newman held that sufficient ambiguity existed regarding whether the Commission notification requirement in the statutory definition of "whistleblower" applied to the portions of Dodd-Frank that referenced Sarbanes-Oxley reporting requirements. Accordingly, the Court deferred to the Commission's determination that employees need not report wrongdoing to the SEC to receive the protections provided under subdivision (iii).

While recognizing that there is no "absolute conflict" between the term "whistleblower" as used in the definitional subsection of Dodd-Frank and its anti-retaliation provisions, the Court found that "a significant tension . . . nevertheless remains."[10] Specifically, applying the definition of "whistleblower" set forth at subsection 21F(a)(6) to subsection 21F(h)(1)(A)(iii) would severely narrow its scope, effectively limiting Dodd-Frank's anti-retaliation protections to instances of simultaneous (or near simultaneous) reporting to both employers and the SEC.[11]

Based on the "sharply limiting effect" of requiring Commission notification, the Court examined whether Congress could have contemplated such a result. Finding no support in the legislative history, the Court voiced skepticism that the last-minute insertion of subdivision (iii) in committee was intended to have such a narrowing effect. The Court concluded that "at a minimum, the tension between the definition . . . and the limited protection provided by subdivision (iii) . . . renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute."[12]

Judge Dennis Jacobs dissented, expressly disagreeing that there was any ambiguity that would permit the Court to go beyond the plain statutory definition of "whistleblower." He viewed the majority as altering the protections provided by the statute, claiming that "the SEC and the majority perceive a hole in coverage, or an insufficiency of remedy, and are patching."[13] The dissent argued that the statutory text clearly defined "whistleblower" to require notification "to the Commission," and that the statute adopted this definition for all subsequent provisions, including subdivision (iii). While the dissent observed that such an interpretation does disadvantage those who do not report allegations of wrongdoing to the SEC, it suggested other protections—such as those contained in Sarbanes-Oxley—still protect "the (generic) employee" that does not report allegations of wrongdoing to the SEC.

III. Significance of the Decision

As a practical matter, the Second Circuit's *Berman* decision broadens the protections afforded by Dodd-Frank's anti-retaliation provisions to cover employees who report wrongdoing, but do so only internally. Care now must be taken by employers dealing with internal "whistleblowers" to ensure that the provisions of Dodd-Frank are not violated.

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[9] The SEC articulated its interpretation of subsection (iii) as not requiring Commission notification in its release accompanying Exchange Rule 21F-2. *See* Securities Whistleblower Incentives and Protections, Release No. 34-64545, 76 Fed. Reg. 34300-01, at *34304, 2011 WL 2293084 (F.R.) (June 13, 2011).

[10] Opinion at *5.

[11] The opinion focused significantly on auditors and attorneys, two categories of whistleblowers that Sarbanes-Oxley requires first report suspected wrongdoing internally before contacting the Commission. Opinion at *6.

[12] Opinion at *9.

[13] Opinion at *10 (Jacobs, J. dissenting).

The Second Circuit's decision also increases the likelihood of Supreme Court review of this issue since *Berman* creates a direct circuit split regarding the proper scope of Dodd-Frank's protections. Both the majority and the dissent invoked the Supreme Court's recent decision concerning the Affordable Care Act in *Burwell* v. *King*[14] as supporting their competing interpretations, and a recent decision by the United States Court of Appeals for the Fifth Circuit, *Asadi* v. *G.E. Energy (USA), LLC*,[15] held that Dodd-Frank protected only whistleblowers who notify the Commission of wrongdoing. Three district courts have followed *Asadi*, but as the Opinion observes,[16] more district courts have deferred to the SEC's rule.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; Wesley Lewis at 212.701.3648 or wlewis@cahill.com; or Peter Linken at 212.701.3715 or plinken@cahill.com.

[14] 135 S. Ct. 2480 (2015).

[15] 720 F.3d 620 (5th Cir. 2013).

[16] Opinion at *8.