



2nd Circuit Splits, Holds Reporting to SEC Not Necessary for Dodd-Frank Protection

Sep 21, 2015

Reading Time : 3 min

By: M. Scott Barnard, Matthew Vernon Lloyd

The Conflict: Ambiguous or Unambiguous?

The conflicting decisions turn on disagreement regarding whether the anti-retaliation provision of Dodd-Frank is sufficiently ambiguous to warrant deference to the SEC's interpretive rule on the subject. The anti-retaliation provision, codified at 15 U.S.C. § 78u-6, provides, in relevant part, that "[n]o employer may discharge, demote, suspend, threaten, harass . . . or in any other manner discriminate against, a whistleblower . . . because of any lawful act done by the whistleblower . . . (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."

Although the 2nd Circuit did not have difficulty interpreting the explicit terms of this provision, the court nonetheless found an ambiguity because of "the arguable tension" between the statutory definition of "whistleblower" and the application of the Sarbanes-Oxley Act in subsection (iii). Specifically, the *Berman* majority noted that Sarbanes-Oxley protects employees at publicly traded companies who report securities law violations internally. In contrast, the Dodd-Frank definition of "whistleblower" is limited to an individual "who provides . . . information relating to a violation of the securities laws *to the Commission*."

The Test: Tension and Extreme Limitation

The 2nd Circuit viewed this tension in the statute as problematic, because applying the Dodd-Frank definition of "whistleblower" appeared to severely undercut the Sarbanes-Oxley protections otherwise incorporated. While the 2nd Circuit acknowledged that such tension would not necessarily result in a contradiction or render the provision superfluous, the

Berman majority was nonetheless concerned that strict application of the text would lead to an “extremely limited scope” and fail to protect two major groups: (1) employees who report only internally; and (2) whistleblowers, such as auditors and attorneys, who cannot report to the SEC without first reporting to the employer.

Such “extreme limitation” of the statute was enough for the *Berman* majority to declare the subsection at issue ambiguous. Relying on the recent Supreme Court case of *Burwell v. King*, 135 S. Ct. 2480 (2015), the 2nd Circuit held that the ambiguity warranted “*Chevron* deference to the reasonable interpretation [of the statute, by] the agency charged with administering the statute.” The *Berman* majority thus relied on the SEC’s guidance, which permitted anti-retaliation protection under Dodd-Frank for individuals who only internally report securities violations.

The Dissent: Plain Text Governs

The 2nd Circuit’s decision in *Berman* is in line with a number of district court opinions. However, in addition to being in conflict with the 5th Circuit, the *Berman* decision was strongly criticized by the dissenting judge, Dennis Jacobs. Judge Jacobs was especially critical of the majority’s apparent disregard for the plain text of Dodd-Frank, noting that, in forming its opinion, “the majority looks here, there and everywhere—except to the statutory text.”

Regarding the definition of “whistleblower” in particular, Judge Jacobs noted the Supreme Court’s language in *King* (a case relied upon by the majority), in which the Supreme Court suggested, “[h]ad Congress meant to limit [applicability of the statute], it likely would have done so in the definition . . . or in some other prominent manner.” This, Judge Jacobs argued, is precisely what Congress did in limiting applicability of Sarbanes-Oxley to “whistleblowers”—a prominently defined term in the statute. Judge Jacobs also took issue with the majority’s “extremely limited” analysis, noting that the U.S. Code is full of statutory provisions with extremely limited effect, and such limitation in applicability is neither evidence of ambiguity nor proof that the statute as applied fails to satisfy the intent of Congress.

The Significance: Circuit Split and Potential Supreme Court Review

The *Berman* case creates a circuit split and cements an ongoing conflict among lower courts in determining whether Dodd-Frank anti-retaliation protections apply to “internal whistleblowers.” Given the present conflict in the circuit courts, the widespread conflict among lower courts and even the conflict within the 2nd Circuit itself, this issue appears destined for the U.S. Supreme Court—assuming Congress does not step in first.

Categories

Capital Markets

White Collar

Compliance

© 2025 Akin Gump Strauss Hauer & Feld LLP. All rights reserved. Attorney advertising. This document is distributed for informational use only; it does not constitute legal advice and should not be used as such. Prior results do not guarantee a similar outcome. Akin is the practicing name of Akin Gump LLP, a New York limited liability partnership authorized and regulated by the Solicitors Regulation Authority under number 267321. A list of the partners is available for inspection at Eighth Floor, Ten Bishops Square, London E1 6EG. For more information about Akin Gump LLP, Akin Gump Strauss Hauer & Feld LLP and other associated entities under which the Akin Gump network operates worldwide, please see our Legal Notices page.