

Securities Regulation Daily Wrap Up, WHISTLEBLOWER NEWS—6th Cir.: SEC stands up for whistleblower rule in anti-retaliation appeal, (Feb. 5, 2016)

[Click to open document in a browser](#)

By Amy Leisinger, J.D.

The SEC has filed an *amicus* brief urging the Sixth Circuit to defer to its rulemaking protecting employees from retaliation under the Dodd-Frank Act's whistleblower provision regardless of whether they reported information to the SEC. According to the agency, the Act's anti-retaliation provision is ambiguous as to whether it covers someone who did not report misconduct to the Commission and failure uphold the rule could deny Dodd-Frank protections to whistleblowers who report potential violations to other entities before reporting to the SEC (*Verble v. Morgan Stanley Smith Barney LLC*, February 4, 2016).

District court action. A former Morgan Stanley employee alleged that he was fired after his colleagues suspected he was acting as a confidential FBI source. He filed a complaint in the Eastern District of Tennessee for retaliation, but the court dismissed his Sarbanes-Oxley anti-retaliation claim and his False Claims Act allegations because the employee failed to meet prerequisite conditions. The court also dismissed the employee's Dodd-Frank anti-retaliation claim, finding the Fifth Circuit's reasoning in *Asadi v. G.E. Energy (USA), L.L.C.* persuasive and concluding in its opinion (covered in the *Securities Regulation Daily Wrap Up* for December 9, 2015) that the Dodd-Frank provision only protects whistleblowers who report misconduct to the SEC, unlike the SEC's broader rule that does not require reporting to the Commission to qualify as a whistleblower.

SEC support of its rule. The SEC argues that the Dodd-Frank Act is ambiguous in part because, although the defined term "whistleblower" means an individual who reports wrongdoing to the SEC, one of the protected categories of reporting seems to include internal reporting. Because of this ambiguity, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the agency states that the court should defer to the SEC's rule as long as it is a reasonable interpretation of the statute. The SEC contends that there is tension between the statute's broad description of protected whistleblowing activity and its narrow definition of "whistleblower." "Surely Congress could have been more explicit and more direct if it in fact intended to protect only those disclosures that involve securities law violations, and only if the employee has made a separate disclosure to the Commission," the Commission notes. To use the narrow definition of "whistleblower" renders the broader provision nearly superfluous, in the SEC's view, because it would only provide protection if the employer were unaware that the employee had already reported to the Commission and would not have any "appreciable effect" in deterring employers from taking adverse action.

The agency also argues that a failure to defer to the rule could arbitrarily deny protection to individuals who first report misconduct to the Department of Justice or to self-regulatory organizations (SROs). The SEC points out that the Dodd-Frank provision directs the Commission to pay an informant an award based on the monetary sanctions collected in a "related action," which includes a judicial or administrative action brought by the DOJ, federal banking regulators, and SROs. The anti-retaliation protections are generally coextensive with the award provision, the agency argues, and there is no basis to believe that Congress had intended for "disparate treatment based purely on the happenstance of which agency the individual reported to first." In addition, according to the agency, endorsing *Asadi* would deny recourse to an individual making a covered disclosure to an SRO who is fired before being able to make a similar report to the SEC.

Further defending its rulemaking, the agency also stresses the importance of internal company reporting in deterring, detecting, and stopping unlawful conduct that may harm investors. It argues that its rulemaking implementing Dodd-Frank's monetary award provisions was carefully calibrated not to disincentivize employees from reporting internally, and the agency likewise clarified the statute's anti-retaliation prohibition to provide support for internal reporting and protect employees regardless of reporting to the Commission.

If the rule is invalidated, authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be “substantially weakened,” and the court should defer to the SEC’s rule and interpretation, the agency concluded.

The case is No. 15-6397.

Attorneys: Richard Forlani Neely (Neely & Callaghan) for John S. Verble. Sarah E. Bouchard (Morgan, Lewis & Bockius LLP) and Keith D. Frazier (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.) for Morgan Stanley Smith Barney LLC and Morgan Stanley & Co. LLC. Stephen George Yoder for the SEC.

Companies: Morgan Stanley Smith Barney LLC; Morgan Stanley & Co. LLC

LitigationEnforcement: BrokerDealers DoddFrankAct FraudManipulation SarbanesOxleyAct WhistleblowerNews KentuckyNews MichiganNews OhioNews TennesseeNews