Securities Regulation Daily Wrap Up, TOP STORY—7th Cir.: SEC amicus defends whistleblower interpretation, (May 9, 2017)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The SEC submitted an amicus brief backing a former founder/CEO and alleged whistleblower against his one-time company. The agency argued that the Seventh Circuit should defer to its view under the *Chevron* doctrine regarding the interplay of the Dodd-Frank Act and Sarbanes-Oxley Act whistleblower provisions. The appeals court let the SEC file an extra-long amicus brief, but has so far denied the agency's related bid to appear at oral argument in the case in support of the ex-CEO, although a recent court order suggested the SEC may be allowed to appear once oral argument has been scheduled (*Verfuerth v. Orion Energy Systems, Inc.*, May 5, 2017).

Neal Verfuerth, the ousted CEO of Orion Energy Systems, Inc., had urged the Seventh Circuit to overturn two prior district court orders that went against him. The more recent summary judgment order dismissed Verfuerth's SOX whistleblower claim. Several years earlier, the same district judge issued a partial dismissal order that ended Verfuerth's Dodd-Frank Act whistleblower claim. The SEC offered its views in the case in an effort, among other things, to persuade the Seventh Circuit not to follow the Fifth Circuit's *Asadi* decision limiting the Dodd-Frank Act whistleblower provision to its plain meaning, and by extension, imposing a narrower interpretation than the agency had given the same provision (*See also*, *Berman* from the Second Circuit).

Chevron two-step. The SEC acknowledged the "tension" that exists between Dodd-Frank Act Section 21F(h)(1)(A)(iii), which the SEC says can broadly protect certain disclosures required or protected by SOX or other laws or regulations, and Section 21(a)(6), which defines "whistleblower" as an individual who provides information about a securities violation to the Commission as required by rule. The agency said a crabbed reading of these two provisions could produce "bizarre consequences" and that its interpretation extending broader protections to whistleblowers than some courts have allowed is entitled to *Chevron* deference.

The SEC asserted that Congress could have done a better job clarifying the reach of the Dodd-Frank Act whistleblower provision in relation to its SOX counterpart. But the SEC said the law, as enacted, remained ambiguous and, thus, open to agency interpretation. According to the agency, the Second Circuit's *Berman* decision supports the reasonableness of its view of the Dodd-Frank Act. The SEC also cited several additional factors it claims show the reasonableness of its interpretation: (i) the need to effect a broad anti-retaliation provision; (ii) reaching parity between whistleblowers who first report to the SEC and those who first report internally; and (iii) further enhancement of the SEC's ability to enforce the securities laws when a person reports internally and suffers retaliation from his employer.

With respect to the Fifth Circuit's *Asadi* decision, the SEC argued that court's singular hypothetical posited to salvage Section 21F(h)(1)(A)(iii)—an employer that is unaware its employee had previously reported information about a securities violation to the SEC and nevertheless retaliates against that employee—would still not suffice to salvage the law's preventive goals. The SEC said the hypothetical would hinder an employee's private action because the employer's being unaware of the employee's disclosure to the SEC would make it hard to show retaliatory intent. The SEC also said the Fifth Circuit overlooked the reasons an employee might prefer SOX to Dodd-Frank: (i) an initial investigation by the Department of Labor and its attendant savings and efficiencies regarding litigation costs; and (ii) potential recovery for additional claims, such as emotional distress.

A footnote on Auer. While the bulk of the SEC's argument centered on application of *Chevron* deference, footnote 23 of the agency's amicus brief notes its view that its post-*Asadi* interpretation (Release No. 34-75592,

August 4, 2015) of the Dodd-Frank Act whistleblower rules clarifying things the Fifth Circuit thought ambiguous should receive *Auer* deference.

The Supreme Court had agreed to hear an appeal that challenged the *Auer* doctrine in a case that involved the rights of transgender persons. The petition for a writ of certiorari asked if *Auer* should be retained, whether *Auer* applies to an unpublished department letter, and whether the court should give effect to the department's interpretation of Title IX and a related regulation. The court granted certiorari on only questions two and three, but later vacated and remanded the case, without hearing oral arguments, to the Fourth Circuit after the Trump Administration's Departments of Education and Justice issued new guidance.

Congress has also targeted *Chevron* for legislative repeal. One example is Section 341 of the Financial CHOICE Act of 2017 (H.R. 10), which would have federal courts review agency actions de novo. The provision would apply broadly to financial regulators, including the SEC and the CFTC.

The case is No. 16-3502.

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Companies: Orion Energy Systems, Inc.

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