

ADVISORY | Dodd-Frank

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DODD-FRANK ANTI-RETALIATION PROVISIONS: *FIFTH CIRCUIT NARROWS SCOPE, REJECTS SEC AND DISTRICT COURT INTERPRETATIONS*

In the first appellate decision to interpret the Dodd-Frank Act's anti-retaliation provisions,¹ the Fifth Circuit's opinion in *Asadi v. G.E. Energy (USA) LLC* strictly limited the scope of such provisions to individuals who provide information to the Securities and Exchange Commission.² The Court explicitly rejected the contrary, more expansive reading given to the statute by the SEC and by five previous district courts, which extended protection to certain non-SEC reporting as well. The Fifth Circuit decision thus creates substantial uncertainty about who qualifies for protection from retaliation as a "whistleblower" under the Act and potentially sets the stage for Supreme Court review. An intra-district split has already been created: two days after the Fifth Circuit's *Asadi* decision, a district court in Colorado agreed with *Asadi*'s reasoning and bluntly rejected prior district court decisions, including a decision in the same district.³

Statutory whistleblower definition vs. statutory anti-retaliation provisions. The Act defines a "whistleblower" as a person who provides information to the SEC.⁴ The Act's anti-retaliation provisions, however, also protect a "whistleblower" against retaliation for making disclosures that are required or protected under: (1) the Sarbanes-Oxley Act ("SOX"); (2) the Securities Exchange Act of 1934; (3) 18 U.S.C. § 1513(e) (information to law enforcement about a federal offense); and (4) "any other law, rule, or regulation subject to the jurisdiction of the Commission."⁵

SEC and prior district court interpretations. The SEC regulations implementing the Act provide that an individual who makes non-SEC disclosures required or protected by the laws enumerated in the Act's anti-retaliation provisions can qualify as a "whistleblower" entitled to protection from retaliation regardless of whether the individual has provided information to the SEC itself. Prior to the *Asadi* decision, five district courts also held that the Act's anti-retaliation provisions either conflict with the Act's definition of "whistleblower" or are ambiguous, and resolved the perceived conflict or ambiguity by holding that the Act can protect certain individuals from retaliation even if they did not provide information to the SEC.⁶

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), 15 U.S.C. § 78u-6; see also "[Enhanced Protection for Whistleblowers Against Employer Retaliation](#)," *Covington Advisory* (7/29/2010).

² See *Asadi v. G.E. Energy (USA) LLC*, No. 12-20522, 2013 WL 3742492 (5th Cir. July 17, 2013).

³ *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at*5-6 (D. Colo. July 19, 2013) (citing *Asadi*, 2013 WL 3742492).

⁴ 15 U.S.C. § 78u-6(a)(6).

⁵ 15 U.S.C. § 78u-6(h)(1)(A)(iii).

⁶ See 17 C.F.R. § 240.21F-2(b)(1); *Murray v. UBS*, No. 12 Civ. 5914, 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, No. 11-CV-02434, 2013 WL 1222056, *10 (D. Colo. Mar. 25, 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11-cv-1424, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp.2d 986, 993-94 & n.9 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). See also "[Dodd-Frank Anti-Retaliation Provisions: Three Federal Courts Weigh In: Significant Uncertainties for FCPA-Based Claims](#)," *Covington*

Fifth Circuit decision. Relying on the Act’s plain language,⁷ the Fifth Circuit disagreed.⁸ The Court held that the statutory definition of “whistleblower” and the anti-retaliation provisions are not in conflict: the definitional section identifies *who* is entitled to protection—those who provide information “to the Commission”—and the anti-retaliation provisions identify *what conduct* is entitled to protection—conduct that includes certain additional disclosures.⁹ Thus, only an individual who provides information to the SEC is entitled to protection as a “whistleblower.”¹⁰

The Court offered other grounds in support of its decision. *First*, the Court emphasized that the anti-retaliation provisions referred to “whistleblower” not “individual” or “employee,” which indicates that only a “whistleblower” as defined in the Act is entitled to protection.¹¹ *Second*, it stated that the contrary view of the SEC and earlier district court decisions improperly reads the words “to the Commission” out of the Act’s definition of “whistleblower.”¹² *Third*, the Court noted that the SEC’s and district courts’ interpretations also would render the SOX anti-retaliation provision and its administrative scheme moot because the Act provides for greater monetary damages, allows suits to be filed in federal court without a preliminary Department of Labor proceeding, and provides for a much longer statute of limitations.¹³ *Finally*, given the Court’s determination that the plain language of the Act is clear, the Court had no basis to defer to the SEC’s interpretation of the term “whistleblower.”¹⁴

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The Fifth Circuit’s interpretation of the Act’s anti-retaliation provisions is a clear departure from those of the SEC and the previous federal district courts. One district court outside of the Fifth Circuit already has considered the reasoning persuasive; others may follow suit. If the next federal appeals court disagrees, the resulting circuit split would pave the way for potential Supreme Court review. The scope of the Dodd-Frank anti-retaliation provisions, an issue that appeared to be on a path toward consensus, now seems far from resolution.

Advisory (7/12/2012); “[Dodd-Frank Anti-Retaliation Provisions: First Federal Court Weighs In](#),” *Covington Advisory* (5/20/2011).

⁷ The court disclaimed reliance on the Act’s legislative history. *Asadi*, 2013 WL 3742492, at *5 n.9.

⁸ The decision appealed from was based on the district court’s determination that the Act’s anti-retaliation provisions do not apply extraterritorially. See *Asadi v. G.E. Energy (USA) LLC*, Civil Action No. 4:12-345, 2012 WL 2522599, at *4-5 (S.D. Tex. June 28, 2012). The Fifth Circuit declined to address this issue because it was unnecessary to the disposition of the case. *Asadi*, 2013 WL 3742492, at *8 n.13.

⁹ *Asadi*, 2013 WL 3742492, at *4-6. The court noted, for example, that a manager who reports a securities law violation to both the SEC (to qualify as a “whistleblower”) and to his CEO (conduct protected by SOX), but is fired before the CEO becomes aware of the SEC disclosure, is protected by the Act’s anti-retaliation provision. *Id.* at *6.

¹⁰ *Id.* at *4-6.

¹¹ *Id.* at *5.

¹² *Id.* at *6.

¹³ *Id.* at *6-7.

¹⁴ *Id.* at *7-8 (“Because Congress has directly addressed the precise question at issue, we must reject the SEC’s expansive interpretation of the term ‘whistleblower’ for purposes of the whistleblower-protection provision.”).

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