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New SEC Guidance: Dodd-Frank Protects Internal Whistleblowers



Shortly after the July 2010 adoption of the [Dodd-Frank](#) Act's whistleblower program, disputes began arising over whether its anti-retaliation protections apply to employees who report misconduct *internally* to the company, but not externally to the SEC.

On August 4, 2015, the SEC issued new guidance through an [interpretive rule](#), maintaining that the Act's whistleblower protections are not limited only to those who choose to report externally to the SEC. [Section 21F\(h\)\(1\)\(A\) of the Exchange Act](#) provides that employers may not take an adverse action against an employee "because of any lawful act done by the whistleblower—in making disclosures" under any "law, rule, or regulation subject to the jurisdiction of the Commission." Because this subsection does not, by its terms, limit its application to those who report misconduct directly to the SEC, some [courts](#) have adopted the view that these protections extend to employees who only report misconduct internally. Courts adopting this view have previously deferred to the SEC's [rule](#), which itself does not hinge on a whistleblower reporting directly to the agency. But Section 21F(h)(1)(A), by its terms, only applies to conduct undertaken by a "whistleblower." And Section 21F(a)(6) defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." Therefore, some courts, including the [Fifth Circuit](#), have held that Dodd-Frank's whistleblower protections require a "whistleblower," as defined by the statute, to provide information "to the Commission" itself. In its new guidance, the SEC now [weighs in](#) on this dispute. Speaking directly to the Fifth Circuit's interpretation of the statute, the SEC states that it "would undermine our overall goals in implementing the whistleblower program" to require a whistleblower to report to the SEC in order to avail him or herself of the law's protections. The guidance states that, "an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission." The SEC reasoned that a contrary interpretation would "undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting" and that "providing equivalent employment retaliation protection for both [internal and external reporting] removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances." Importantly, the SEC's interpretive rule is not binding on courts, which will ultimately determine whether Dodd-Frank's

whistleblower protections extend to employees who only report misconduct internally. Nonetheless, several courts have already held that the statute is ambiguous, suggesting that it is likely that the SEC's interpretation will continue to be given significant deference.

Authors

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