Dodd-Frank Whistleblower Protection *Post-Digital Realty*

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Prior to this year, there was a split of authority as to whether the anti-retaliation provision of the Dodd-Frank Act, 5 U. S. C. §78u– 6(h), protects internal whistleblowing. In February 2018, the Supreme Court resolved the split when it held in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018) that the definition of "whistleblower" in Section 21F(a)(6) of the Exchange Act requires that an individual report a possible securities law violation to the Securities and Exchange Commission ("SEC") to qualify for protection against retaliation.

Although *Digital Realty* narrows corporate whistleblower protection, a whistleblower disclosing a potential violation of federal securities law to their employer or the SEC has various remedies available to remedy retaliation, including Section 806 of SOX, 18 U.S.C. §1514A. And indeed Dodd-Frank's anti-retaliation provision protects internal whistleblowing where the whistleblower also made a disclosure to the SEC at the time of the adverse action.

This FAQ provides an overview of protections available to SEC whistleblowers and offers suggestions to maximize damages. It should not be relied upon as legal advice.

Does the Dodd-Frank Act protect whistleblowers that disclose potential violations of securities law to the SEC?

Yes. To qualify for protection under the anti-retaliation provision of the Dodd-Frank Act, a whistleblower must demonstrate that they reported a potential securities law violation to the SEC.

In particular, the Dodd-Frank Act protects three types of whistleblowing:

1. providing information to the SEC in accordance with the whistleblower incentive section;
2. initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC based upon or related to such information; or
3. making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, and any other law, rule, or regulation subject to the jurisdiction of the SEC.

Does the Dodd-Frank Act's whistleblower protection provision protect internal disclosures (disclosures made to a supervisor, company management, or a corporate compliance program)?

Yes, but only if the whistleblower also disclosed the potential violation to the SEC at the time that the whistleblower suffers retaliation. There is, however, some ambiguity as to whether an internal disclosure is protected if it does not relate to the same subject matter as the disclosure to the SEC, and whether an internal disclosure is protected prior to the whistleblower making a disclosure to the SEC. These issues are addressed in the SEC's proposed amendments to its rules implementing the Dodd-Frank whistleblower reward provisions, and NELA

weighed in on these issues in comments posted at https://www.sec.gov/comments/s7-16-18/s71618-4370865-175229.pdf.

Does the Sarbanes-Oxley Act also protect corporate whistleblowers that suffer retaliation for reporting fraud or other potential violations of securities law to the SEC or to an employer?

Section 806 of SOX protects both internal whistleblowing (e.g., reporting securities fraud to a supervisor) and whistleblowing to the SEC. In particular, the whistleblower protection provision of SOX prohibits employers from retaliating against whistleblowers for reporting to law enforcement, regulatory authorities, Congress, or the employee's supervisor suspected mail fraud, wire fraud, bank fraud, securities fraud, a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. Unlike the Dodd-Frank Act, the whistleblower protection provision of SOX does not require the whistleblower to have disclosed the potential violation to the SEC. It protects an individual who disclosed a possible violation only to their employer.

For more information about SOX whistleblower protection, download our guide **Sarbanes-Oxley Whistleblower Protection: Robust Protection for Corporate Whistleblowers.**

This table identifies some of the major differences between the anti-retaliation provisions of SOX and Dodd-Frank. To maximize the potential recovery, a whistleblower could initially bring a SOX claim at OSHA and subsequently remove it to federal court and also bring a Dodd-Frank claim. Doing so could enable the whistleblower to recover double back pay and uncapped special damages.

	SOX	**Dodd-Frank**
Scope of coverage	Any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization, or any officer, employee, contractor, subcontractor, or agent of such company.	Any employer
Protection for internal whistleblowing	Yes	Internal whistleblowing protected only if individual has also reported a possible securities violation to the SEC
Protection for whistleblowing to SEC	Yes	Yes
Statute of Limitations	180 days	6 years

	SOX	Dodd-Frank
Administrative exhaustion	Must file initially with OSHA	None
Arbitration	Exempt from mandatory arbitration	Not exempt
Back pay	Ordinary back pay	Double back pay
Special damages for emotional distress and reputational harm	Available	Not available

What acts of retaliation are prohibited under the Dodd-Frank anti-retaliation law?

The anti-retaliation provision of the Dodd-Frank Act prohibits an employer from:

- Discharging;
- Demoting;
- Suspending;
- Threatening;
- Harassing; or
- Directly or indirectly, or in any other manner discriminating against, a whistleblower in the terms and conditions of employment.

Does the Dodd-Frank whistleblower protection law require a whistleblower to demonstrate that the employer knew about the whistleblower's disclosure to the SEC?

No. In *Digital Realty*, the Supreme Court held where an employee blows the whistle to the SEC and subsequently reports the misconduct to the employer and then suffers retaliation because of the internal disclosure (not because of the disclosure to the SEC, which the retaliating employer is unaware of), the internal disclosure is protected under Dodd-Frank even where the employer does not know that the employee reported a possible securities law violation to the SEC:

> [Dodd-Frank] protects a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC. In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee "because of" the SEC reporting. §78u–6(h)(1)(A). Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

Somers, 138 S. Ct. at 779.

What damages can a SEC whistleblower recover in a retaliation case?

A prevailing whistleblower can recover:

- double back pay (lost wages) with interest;
- reinstatement or front pay in lieu thereof; and
- reasonable attorneys' fees, litigation costs, and expert witness fees.

If the whistleblower also brings a SOX retaliation claim, the whistleblower can recover uncapped "special damages" for emotional distress and reputational harm.

What is the statute of limitations for a Dodd-Frank Act whistleblower retaliation claim?

The statute of limitations for a Dodd-Frank retaliation claim is 6 years after the date on which the violation occurred, which is tolled (the time period is suspended) by three years after the date "when facts material to the right of action are known or reasonably should have been known" by the whistleblower. This extends the time period for a Dodd-Frank retaliation claim beyond the 6 year statute of limitations, but a retaliation claim may not in any circumstance be brought more than 10 years after the date on which the violation occurred.

Are auditors and compliance personnel protected from retaliation under the Dodd-Frank Act?

Yes, but individuals who are integral to a company's compliance will not be protected under Dodd-Frank when they initially make a mandatory internal disclosure, *i.e.*, they will be protected only when they make a disclosure to the SEC.

Employees whose principal duties involve compliance or internal-audit responsibilities, employees of public accounting firms, and officers and directors are eligible for a SEC whistleblower award only if they meet one of the following requirements:

1. They reasonably believe the disclosure is necessary to prevent conduct that is likely to cause "substantial injury" to the financial interest or property of the entity or investors;
2. They reasonably believe the entity is engaging in "conduct that will impede an investigation of the misconduct"; or
3. At least 120 days have passed either since they properly disclosed the information internally, or since they obtained the information under circumstances indicating that the entity's officers already knew of the information.

Under the third requirement, the whistleblower will not be protected when they make the required internal disclosure. Therefore, if the employer retaliates against the whistleblower before the whistleblower reports the violation to the SEC, Dodd-Frank would not protect the whistleblower. But the whistleblower could likely bring a SOX retaliation claim.

Should a corporate whistleblower suffering retaliation bring a claim under Dodd-Frank, Sarbanes-Oxley, or both laws?

We recommend bringing claims under SOX and Dodd-Frank to maximize the potential recovery, although the claims cannot be brought simultaneously in federal court (the SOX claim must be filed initially at OSHA). The statute of limitations for a SOX whistleblower claim is just 180 days and this short statute of limitation applies to each discrete adverse employment action, with the exception of hostile work environment

claims. Accordingly, if you have suffered retaliation for whistleblowing, it is critical to promptly identify each actionable adverse action and determine the deadline for filing a claim.

There are four advantages to bringing a SOX claim in addition to a Dodd-Frank claim:

- Uncapped special damages: The Dodd-Frank Act authorizes economic damages and equitable relief but does not authorize non-economic damages. In contrast, SOX authorizes *uncapped* "special damages" for emotional distress and reputational harm.
- Exemption from mandatory arbitration: SOX provides an unequivocal exemption from mandatory arbitration, but Dodd-Frank claims are subject to arbitration.
- Preliminary reinstatement: If an OSHA investigation concludes that an employer violated the whistleblower protection provision of SOX, OSHA can order the employer to reinstate the whistleblower.
- Favorable causation standard: A far more generous burden of proof ("contributing factor" causation under SOX, rather than "but for" causation under Dodd-Frank).

There are four advantages to bringing a Dodd-Frank claim in addition to a SOX claim:

- Double back pay: Dodd-Frank authorizes an award of double back pay (double lost wages) plus interest, whereas SOX authorizes ordinary back pay with interest along with other damages. Both statutes authorize reinstatement and attorney fees.
- Longer statute of limitations: Whereas the statute of limitations for a SOX retaliation claim is just 180 days, the statute of limitations for a Dodd-Frank retaliation claim is six to ten years.
- Broader scope of coverage: SOX whistleblower protection applies primarily to employees of public companies and contractors of public companies. The Dodd-Frank prohibition against whistleblower retaliation applies to "any employer," not just public companies.
- No administrative exhaustion: In contrast to SOX, Dodd-Frank permits a whistleblower to sue a current or former employer directly in federal district court without first exhausting administrative remedies at DOL.

Can a whistleblower obtain a reward for reporting a securities law violation to the SEC?

Yes, under the SEC's Dodd-Frank whistleblower reward program, a whistleblower who voluntarily provides original information to the SEC that leads to a successful enforcement action that recover more than $1 million is disgorgement or penalties is eligible for an award ranging from 10% to 30% of the monetary sanctions collected in the enforcement action. To learn more about the SEC whistleblower awards, download our guide ***SEC Whistleblower Program: Tips from SEC Whistleblower Attorneys to Maximize an SEC Whistleblower Award*.**

Can a whistleblower settle a retaliation lawsuit without waiving their ability to recover a potential Dodd-Frank whistleblower award?

Although no court has ruled on this issue, the SEC has taken a firm position that an employer cannot require a whistleblower to waive the right to obtain a potential whistleblower award. And indeed, the SEC has taken several enforcement actions against companies for violating Rule 21F-17(a), which provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement…with respect to

such communications." *See, e.g., In the Matter of Homestreet, Inc. and Darrell Van Amen*, File No. 3-17801 (January 19, 2017); *In the Matter of Blackrock, Inc*., File No. 3-17786 (January 17, 2017); *In the Matter of SandRidge Energy, Inc*., File No. 3-17739 (December 20, 2016); *In the Matter of NeuStar, Inc*., File No. 3-17736 (December 19, 2016)*; In the Matter of Anheuser-Busch InBev SA/NV*, File No. 3-17586 (September 28, 2016); *In the Matter of Health Net, Inc.*, File No. 3-17396 (August 16, 2016)*; In the Matter of BlueLinx Holdings Inc.*, File No. 3-17371 (August 10, 2016).

Is an employee protected against retaliation for providing testimony in an SEC investigation or at a hearing in an administrative or judicial enforcement action?

The whistleblower protection provision of SOX protects such testimony. The plain meaning of the anti-retaliation provision of Dodd-Frank should also protect the witness, but the SEC has proposed limiting Dodd-Frank protection to written disclosures to the SEC.

A criminal prohibition against retaliation in Section 1107 of SOX, 18 U.S.C. § 1513(e), could also provide a remedy in that Section 1107 of SOX is a predicate offense under RICO. Section 1107 of SOX provides:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1513(e).

The Seventh Circuit's decision in *DeGuelle v. Camilli*, 664 F.3d 192 (7th Cir. 2011) illustrates how a whistleblower suffering retaliation can pursue a RICO action relying on Section 1107 as a predicate offense. To plead a RICO case, the whistleblower must aver (state or assert to be the case) a second predicate act that is related to the Section 1107 violation, e.g., securities fraud. RICO is a potent remedy because it authorizes treble damages (financial compensation that is triple the amount of the actual or compensatory damages).

Another potential remedy for a whistleblower that suffers retaliation for participating in a federal court proceeding is 42 U.S.C. § 1985(2). This civil rights statute prohibits conspiracies to intimidate or retaliate against parties, witnesses or jurors testifying or participating in federal court proceedings. Under 42 U.S.C. § 1985(2), a victim of intimidation or retaliation who suffers injury to "his person or property" can recover damages against the perpetrators of the conspiracy. The Supreme Court held in *Haddle v. Garrison*, 525 U.S. 121 (1998) that a conspiracy to terminate an employee's at-will employment constitutes injury to person or property and is therefore actionable under 42 U.S.C. § 1985(2).

Does the SEC enforce the anti-retaliation provision of the Dodd-Frank Act?

Yes, the SEC enforces the anti-retaliation provision of the Dodd-Frank Act, but it does not provide relief for the whistleblower, e.g., the SEC does not obtain lost wages or order reinstatement. Instead, it can take an enforcement action against the registrant for violating the anti-retaliation provision of the Dodd-Frank Act.

In a June 28, 2018 public statement at an open meeting announcing proposed amendments to

the rules governing the SEC Whistleblower Program, Chair Clayton stated: "Many have asked whether the SEC will continue to enforce the anti-retaliation provisions of Dodd-Frank. Let me be clear: retaliation protections are a key component of the whistleblower program, and we will bring charges against companies or individuals who violate the anti-retaliation protections when appropriate." Statement at Open Meeting on Amendments to the Commission's Whistleblower Program Rules, *available at* https://www.sec.gov/news/public-statement/statement-open-meeting-amendments-commissions-whistleblower-program-rules.

The SEC has taken enforcement actions for whistleblower retaliation, and such an enforcement action can increase an SEC whistleblower award. In September 2016, the SEC ordered International Game Technology ("IGT") to pay a $500,000 penalty for terminating the employment of a whistleblower because he reported to senior management and to the SEC that the company's financial statements might be distorted. *See* Exchange Act Release No. 78991 (Sept. 29, 2016). During an internal investigation into the whistleblower's allegations, IGT removed him from opportunities that were integral to his ability to perform his job successfully. IGT then fired the whistleblower the same day as the internal investigation concluded that IGT's cost-accounting model was appropriate and did not cause its financial statements to be distorted. The whistleblower was protected under the SEC whistleblower program, despite being mistaken, because he reasonably believed that IGT's cost-accounting model constituted a violation of federal securities laws.

On June 16, 2014, the SEC announced that it was taking enforcement action against Paradigm Capital Management, Inc. ("Paradigm"), a hedge fund advisory firm, for engaging in prohibited principal transactions and for retaliating against the whistleblower who disclosed the unlawful trading activity to the SEC. *See* Exchange Act Release No. 72393 (June 16, 2014). This was the first case in which the SEC exercised its authority under Dodd-Frank to bring enforcement actions based on retaliation against whistleblowers.

According to the order, Paradigm retaliated against its head trader for disclosing, internally and to the SEC, prohibited principal transactions with an affiliated broker-dealer while trading on behalf of a hedge fund client. The transactions were a tax-avoidance strategy under which realized losses were used to offset the hedge fund's realized gains.

When Paradigm learned that the head trader had disclosed the unlawful principal transactions to the SEC, it retaliated against him by removing him from his position as head trader, changing his job duties, placing him on administrative leave, and permitting him to return from administrative leave only in a compliance capacity, not as head trader. The whistleblower ultimately resigned his position.

Paradigm settled the SEC charges by consenting to the entry of an order finding that it violated the anti-retaliation provision of Dodd-Frank and committed other securities law violations; agreeing to pay more than $1 million to shareholders and to hire a compliance consultant to overhaul their internal procedures; and entering into a cease-and-desist order.

The SEC's press release accompanying the order includes the following statement by Enforcement Director Andrew Ceresney: "Those who might consider punishing whistleblowers should realize that such retaliation, in any form, is unacceptable." The Paradigm enforcement action suggests that

retaliation can invite or heighten SEC scrutiny.

In addition to SOX, do other whistleblower protection laws protect corporate whistleblowers?

Yes, some state whistleblower protection laws protect disclosures about corporate fraud, and some states recognize a common law tort action for wrongful discharge in violation of public policy. Adding a state law

claim can potentially enable the whistleblower to recover punitive damages.

Should a whistleblower report internally before disclosing a violation to the SEC?

Prior to deciding whether to report internally, the whistleblower should carefully weigh several factors, including the risk of retaliation, the employer's potential inclination to destroy evidence or otherwise cover-up a violation, the extent to which senior management is profiting from the violation, and the adequacy of the company's compliance program. There is a significant incentive to report internally in that a whistleblower who initially reports internally, and reports the same information to the SEC within 120 days, will receive credit for any information the company subsequently self-reports to the SEC