CLIENT UPDATE

SDNY HOLDS ANTI-RETALIATION PROVISION OF DODD-FRANK DOES NOT APPLY EXTRATERRITORIALLY

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On October 21, 2013, the Southern District of New York weighed in on the scope and applicability of the anti-retaliation provision of the whistleblower protections of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), holding that the provision does not apply to protect whistleblower conduct outside the United States. In *Liu v. Siemens A.G.*, No. 13-317, 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013), Judge William Pauley applied the presumption against extraterritoriality articulated by the Supreme Court in *Morrison v. Nat'l Austl. Bank Ltd.*, to hold that nothing in the plain language of Dodd-Frank's anti-retaliation provision suggests that it should apply extraterritorially and, accordingly, the provision does not extend to protect "overseas whistleblowers."

THE *LIU V. SIEMENS* DECISION

In *Liu*, the court considered whether the anti-retaliation provision of Dodd-Frank applied extraterritorially to cover a Taiwanese resident bringing a claim against a German corporation for its Chinese subsidiary's allegedly corrupt actions in China and North Korea. The plaintiff alleged that he was terminated in retaliation for reporting a potential violation of the Foreign Corrupt Practices Act ("FCPA") to the SEC.

In addressing the extraterritorial reach of the anti-retaliation provision, Judge Pauley noted that absent a clearly expressed congressional intent to give a statute extraterritorial effect, a court must presume it is primarily a domestic concern. Because the language of Dodd-Frank's anti-retaliation provision is silent on whether it applies extraterritorially, that silence "invokes a strong presumption against extraterritoriality." Judge Pauley also noted that other provisions of Dodd-Frank explicitly provide for extraterritorial application, such as Section 929P(b), which allows the SEC to bring enforcement actions outside the U.S. This fact "reinforces" the court's conclusion that the anti-retaliation provision was "purely a domestic concern." Ultimately, the court found "simply no indication that Congress intended the Anti-Retaliation Provision to apply extraterritorially" and rejected the plaintiff's attempt to expand the provision's protections to foreign whistleblowers.

Judge Pauley also rejected the plaintiff's argument that he should be afforded protection under the anti-retaliation provision of Dodd-Frank because his disclosures were "required or protected" by Section 806 of the Sarbanes-Oxley Act ("SOX"). The court found—and plaintiff had already conceded—that Section 806 of SOX did not apply extraterritorially. Therefore, the plaintiff's disclosures were not protected disclosures and Dodd-Frank would not protect the plaintiff from retaliation for making those disclosures. The court further held that, regardless of the extraterritorial application of Section 806 of SOX, disclosure of potential FCPA violations—such as plaintiff's disclosure—was not a "required or protected" disclosure under Dodd-Frank.

Finally, the court turned to whether the plaintiff qualified as a "whistleblower" for purposes of the anti-retaliation provision of Dodd-Frank. The court acknowledged an "apparent incongruity" between the definition of "whistleblower" under certain provisions of Dodd-Frank—which explicitly require disclosure to the SEC—and the anti-retaliation provision—which does not explicitly require disclosure to the SEC. Judge Pauley noted that the majority of courts to address the "incongruity" have harmonized the provisions to include within the definition of "whistleblower" those who may not have reported to the SEC. Judge Pauley acknowledged the appeal of the Fifths Circuit's interpretation of the conflicting language as articulated in the recent decision *Asadi v. G.E. Energy, LLC (USA),* [1] where that court held that that the plain language of Dodd-Frank's whistleblower protection provision applied *only* to individuals who report information relating to a violation of the securities laws to the SEC. Although the definition of "whistleblower" in *Asadi* was "appealing in that it avoids rewriting the statute," Judge Pauley expressed concern about the Fifth Circuit's interpretation because "it rejects the

[1] 720 F.3d 620 (5th Cir. 2013). *See also* Debevoise & Plimpton LLP Client Update, *Circuit Court Adopts Narrow Interpretation of Anti-Retaliation Provision of Dodd-Frank Whistleblower Rules*, July, 19, 2013.

SEC's interpretation of a statute it is charged with enforcing." Judge Pauley ultimately declined to weigh in on the question of whether the plaintiff qualified as a whistleblower under Dodd-Frank, finding "no need for this Court to wade into this debate," as the plaintiff's complaint failed for other reasons.

POTENTIAL IMPACT OF *LIU* DECISION

With the decision in *Liu*, the Southern District of New York became the second district court to hold that the anti-retaliation provision of Dodd-Frank does not apply to conduct outside the United States. By adding its voice to the extraterritoriality question, the *Liu* decision is significant in that it appears to signal a growing consensus around at least one open issue with respect to Dodd-Frank's whistleblower provisions. The decision is also noteworthy for Judge Pauley's dicta implicitly criticizing the Fifth Circuit's narrow interpretation of the scope of the statutory definition of "whistleblower" under Dodd-Frank. It remains to be seen whether other judges in the Southern District of New York will concur with Judge Pauley's critical view of the strict statutory construction advocated by the Fifth Circuit.

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Please do not hesitate to contact us with any questions.

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