# CLIENT UPDATE

# SECOND CIRCUIT HOLDS WHISTLEBLOWER ANTI-RETALIATION PROVISION DOES NOT APPLY EXTRATERRITORIALLY

**WASHINGTON, DC**
Jonathan R. Tuttle
jrtuttle@debevoise.com

Ada Fernandez Johnson
afjohnson@debevoise.com

Renee M. Cipro
rmcipro@debevoise.com

**NEW YORK**
Mary Beth Hogan
mbhoganl@debevoise.com

Jyotin Hamid
jhamid@debevoise.com

In a closely-watched decision interpreting the Dodd-Frank Act's whistleblower provision, the Second Circuit Court of Appeals last week affirmed the Southern District of New York's decision in *Liu v. Siemens A.G.* and became the first federal court of appeals to hold that the Dodd-Frank Act whistleblower anti-retaliation provision does not apply extraterritorially.[1] The Southern District of Texas, the only other district court to consider the issue, reached the same conclusion in *Asadi v. G.E. Energy (USA), LLC.*[2] For companies with global operations, the *Liu* decision should provide at least some level of comfort that allegations by foreign employees regarding conduct exclusively outside the United States are outside the reach of Dodd-Frank's anti-retaliation provision.

## BACKGROUND

Plaintiff Liu Meng-Lin had been employed as a compliance officer for the healthcare division of Siemens China, Ltd., a wholly-owned subsidiary of Siemens AG. The complaint alleged that Siemens progressively reduced Liu's responsibilities as compliance officer and eventually fired him after he reported evidence of suspicious payments related to the sale of medical equipment in North Korea and China.

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1 *Liu v. Siemens A.G.*, No. 13-4385-cv (2d Cir. decided August 14, 2014), *aff'g Liu v. Siemens A.G.*, 978 F.Supp.3d 325 (S.D.N.Y. 2013).

2 *Asadi v. G.E. Energy (USA), LLC*, 2012 WL 2522599 (S.D.Tex June 28, 2013), *aff'd on other grounds*, 720 F.3d 620 (5th Cir. 2013).

After leaving the company, Liu reported the alleged misconduct to the U.S. Securities and Exchange Commission ("SEC"). He then filed an action alleging that Siemens violated the anti-retaliation provision of the Dodd Frank Act, which prohibits an employer from, among other things, firing or demoting a "whistleblower" for providing information to the SEC; assisting the SEC in an investigation, judicial, or administrative action; or making disclosures that are "required or protected" under the laws specified in the provision. [3] The district court dismissed Liu's complaint finding that the anti-retaliation provision does not apply to conduct outside of the United States.

## SECOND CIRCUIT OPINION

On appeal, the Second Circuit affirmed the district court's dismissal of Liu's complaint because there was no evidence that Congress intended the anti-retaliation provision to apply extraterritorially and the complaint alleged no facts to suggest a domestic application of the anti-retaliation provision would be proper in this instance.

In reaching its decision, the Second Circuit relied on Supreme Court precedent in *Morrison v. Nat'l Austl. Bank Ltd*, which establishes a presumption against extraterritoriality absent a "clear" and "affirmative indication" that the statute was intended to apply to conduct outside of the United States.[4] Liu advanced several arguments supporting an extraterritorial intent within the text of the provision, but the court summarily dismissed these arguments as too generic, indirect, or circumstantial to rebut the presumption. Liu also pointed to two sections of The Dodd-Frank Act specifically providing for extraterritorial jurisdiction, § 929P(b) and the whistleblower bounty provisions, as instructive of Congress' intent *vis-à-vis* the reach of the anti-retaliation provision. In addition to noting that such an argument is counter to the canons of statutory interpretation, the court found that Liu was unable to demonstrate a relation between these sections and the anti-retaliation provision.

First, § 929P(b) grants district courts limited extraterritorial jurisdiction over actions brought by governmental entities pursuant to the antifraud provisions of the Securities and Exchange Act. Because the anti-retaliation provisions are not antifraud provisions and because Liu is not a governmental actor, the court found no colorable relationship between the two provisions.

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3 15 U.S.C. § 78u-6(h)(1)(A) (2012).

4 561 U.S. 247, 255 (2010).

Second, the bounty provision permits the SEC to pay a monetary award to a whistleblower who voluntarily provides information to the SEC that led to a successful enforcement action.[5] Liu argued that SEC regulations defining eligibility for an award suggested an extraterritorial application because the regulations exclude employees of foreign governments or agencies[6] and because the final release included a discussion of tax filing procedures for awards to foreign nationals and left open the possibility of an award to a whistleblower despite potential violations of foreign law.[7] Having already found that the question of congressional intent can be resolved using the devices of statutory construction, the court declined to apply *Chevron* deference to an interpretation of the SEC's regulations. Even assuming deference to the SEC's interpretation, the court stated it does not necessarily follow that Congress intended the anti-retaliation provisions to apply similarly. As an initial matter, the bounty regulations do not mention the anti-retaliation provision and other SEC regulations suggest that the two provisions are to be considered separately. Furthermore, the court noted that an extraterritorial application of the anti-retaliation provisions would be much more intrusive to the sovereignty of the foreign nation than applying the bounty award provision internationally.

## IMPACT OF *LIU* DECISION

Importantly, the facts alleged in the complaint filed by Liu provided no reasonable connection to the United States. Liu was a resident and citizen of Taiwan who was employed by a foreign company and all of the events giving rise to the liability occurred abroad: the alleged misconduct occurred in China, North Korea and Hong Kong; Liu reported the alleged misconduct to supervisors in China and Germany; and the decision to terminate Liu's employment was made by his employers in those countries. Because the facts of the Liu case were so clearly extraterritorial, the Second Circuit did not provide insight into what combination of facts – regarding either the wrongdoing or retaliatory acts – might provide sufficient contact with the United States to render application of the statute domestic rather than extraterritorial. That question remains open and will likely be one that the court will continue to grapple with as the contours of the anti-retaliation provision are further defined.

It is also worth noting that the Second Circuit declined to address, even in dicta, Siemens' alternative argument that Liu's complaint should be dismissed because the anti-retaliation provision does not apply to employees who report improper conduct internally. The SEC

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5 15 U.S.C. § 78u-6(b).

6 17 C.F.R. § 240.21F-8(c)(2).

7 76 Fed. Reg. 34300-01 (June 13, 2011).

submitted an amicus brief in Liu arguing in support of its position that the same protections apply to employees that report internally as those who report to the Commission. Most district courts have decided the issue consistent with the SEC's interpretation.[8] However, the only appellate court to consider the issue took the opposite position in *Asadi v. G.E. Energy (USA), LLC* and held that the definition of a whistleblower includes only individuals who have provided information to the SEC.[9] Now that the Second Circuit has deferred its opportunity to weigh in, the Fifth Circuit decision continues to stand out against what appears to be a growing consensus around a more expansive interpretation of Dodd-Frank's whistleblower-protection provisions that is developing in the district courts.

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Please do not hesitate to contact us with any questions.

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8 *See Genberg v. Porter*, 935 F. *orp*., 2012 WL 4444820 (D.Conn. Sep. 25, 2012); *Egan v. TradingScreen, Inc.*, 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

9 720 F.3d 620, 629 (5th Cir. 2013).