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michael j leech

Dodd-Frank Whistleblower Protection[1]

The Dodd-Frank Act defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u–6(a)(6). The statute provides for awards in certain limited cases, protection against employer retaliation and protection of the whistleblower's anonymity. The statute was adopted in response to the 2008 financial crisis, based on the belief that an internal whistleblower can be a powerful law enforcement tool, with the possibility of identifying fraud at a much earlier stage than other enforcement tools.

Extraterritorial Application

The prevalence of international operations among publicly traded companies promises to raise knotty issues pertaining to the scope of Dodd-Frank where such international operations are the subject of whistleblowing. The first such case to reach the Court of Appeals level is *Meng-Lin Liu v. Siemens A.G.*, 763 F.3d 175, 178-83 (2d Cir. 2014). In that case, the Second Circuit firmly held that Congress must be presumed to have intended that the statute be applied only to activities within the territorial jurisdiction of the United States.

 E-mail: mleech@talk-sense.com

In *Meng-Lin Liu*, the complaint was by a Taiwanese national employed outside the United States by a China subsidiary of a German company listed on the New York Stock Exchange. The subject of the allegations was activities of that subsidiary with respect to North Korea and China, and the whistleblowing activity occurred in China. All elements of the case except the stock listing were outside the U.S. It seems likely that cases with some elements within the United States and some outside will arise, requiring a careful analysis of which are determinative for purposes of deciding applicability of Dodd-Frank.

Whistleblower Bounty Provisions

To incentivize whistleblowing, whistleblowers may receive an award payment of 10-30% of any recovery resulting from their reports to the SEC under 15 U.S.C. §78u-6(b)(1).[2]

The disclosure must lead to "successful enforcement of the covered judicial or administrative action, or related action." 15 U.S.C. 78-u6(b)(1). The enforcement action

[2] (1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who *voluntarily* provided *original information* to the Commission that led to the successful enforcement of the *covered judicial or administrative action*, or related action, in an aggregate amount equal to--

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions. (emphasis added)

must also result in a recovery that exceeds $1,000,000, 15 U.S.C. §78u-6(a)(1).[3] A whistleblower's disclosure must be "voluntary" to qualify, which means that the disclosure is made before a request, inquiry, or demand from the SEC or other regulatory authority that relates to the subject matter of the report. 17 C.F.R. §240.21F-4(a).

Whistleblowers must provide "original information", defined in 15 U.S.C. §78u-6(a)(1) as:

> (A) is derived from the independent knowledge or analysis of a whistleblower;
>
> (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
>
> (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

Whistleblowers are required to work with the SEC staff as requested, provide all the relevant information they have, may be required to provide testimony and maintain the confidentiality of information received from the SEC. 17 C.F.R. §240.21F-8(b). A whistleblower is not eligible to receive an award if employed by or related to an employee of any applicable regulatory authority or foreign government; if convicted of a criminal violation relating to the activity; if the information provided was obtained as part of an audit process; or if the whistleblower engages in dishonest activity in connection with the report or any related activity. 15 U.S.C. §78u-6(c)(2); 17 C.F.R. §240.21F-8(c).

[3] "The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000."

The amount awarded is in the discretion of the SEC, 15 U.S.C. §78u-6(c)(1)(A). In determining the amount of an award, the SEC considers the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action; the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and such additional relevant factors as the Commission may establish by rule or regulation. 15 U.S.C. §78u-6(c)(1)(B).

Anti-Retaliation Provisions

The main Dodd-Frank anti-retaliation provision protects individuals from discharge, demotion, suspension, threats, harassment and discrimination for providing information to the SEC, and for initiating, testifying or assisting in any SEC investigation or proceeding based on that information, 15 U.S.C. §78u-6(h)(1). It also protects disclosures required or protected by Sarbanes-Oxley or any other provision of the securities laws enforced by the SEC, 15 U.S.C. §78u-6(h)(1)(A).[4] The statute creates a

[4] (1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

civil cause of action in U.S. District Court to remedy violations of the prohibition, 15 U.S.C. §78u-6(h)(1(B).[5]

The statute of limitations on such a claim is six years from the date of the violation or three years from the date on which the employee asserting the claim knew or should have known of the claim. 15 U.S.C. §78u-6(h)(1)(B)(iii). The Dodd-Frank six year statute of limitations applies as well to Sarbanes-Oxley violations enforced under Dodd-Frank, *Banko v. Apple Inc.*, 20 F.Supp.3d 749, 754 (N.D. Cal.2013).

The relief under Dodd-Frank in a retaliation case includes reinstatement, double back pay, plus attorneys' fees and other litigation costs, 15 U.S.C. § 78u–6(h)(1)(C). The court in *Rosenblum v. Thomson Reuters (Markets) LLC*, S.D.N.Y.2013, 984 F.Supp.2d 141, 149 (S.D.N.Y. 2013) concluded that punitive damages are not recoverable, finding that the remedy provided by Dodd-Frank allows only for limited relief and cannot be interpreted to authorize punitive damages.

Limited to Whistleblowing About Securities Law Violations

The scope of Dodd-Frank extends only to claims about violations of the securities laws, and thus, the court in *Zillges v. Kenney Bank & Trust*, 24 F.Supp.3d 795, 801 (E.D.

> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

[5] (i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

Wis.2014) concluded that blowing the whistle on alleged violations of banking regulations did not come within Dodd-Frank's protection.

The problem is more complex where the whistleblowing concerns claimed violations of the Foreign Corrupt Practices Act. The court in *Nollner v. Southern Baptist Convention, Inc.*, 852 F.Supp.2d 986, 995-96 (M.D. Tenn. 2012) decided that because the SEC's jurisdiction over FCPA is limited to civil enforcement against issuers of publicly traded securities, Dodd-Frank protection was similarly limited. *Accord, Meng-Lin Liu v. Siemens A.G.*, 978 F.Supp.2d 325 (S.D.N.Y. 2013)(holding that since Sarbanes-Oxley does not apply to FCPA violations, Dodd-Frank's enforcement of Sarbanes-Oxley could not extend to FCPA whistleblowing) *aff'd on other gnds* 763 F.3d 175 (2d Cir. 2014).

By contrast, the court in *Bussing v. COR Clearing, LLC*, 20 F.Supp.3d 719, 734-35 (D. Neb. 2014) found that the "securities laws" encompassed disclosures required by FINRA because as a national securities association, it is subject to substantial SEC oversight. In that case, the employee, an accountant, gathered information that was required to be disclosed to a FINRA investigation of the employer.

Showing of Violation Requires Only Reasonable Belief

The Dodd-Frank definition of "whistleblower," 15 U.S.C. § § 78u–6(a)(6) is "any individual who provides…information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." While this language might be read to require a retaliation plaintiff to show an actual (as opposed to suspected) violation of the securities laws to be covered, the prohibition on retaliation itself extends to disclosures that are "required *or* protected" by the securities laws, specifically including Sarbanes-Oxley, 15 U.S.C. §78u-6(h)(1)(A)(iii). Sarbanes-Oxley, in turn, protects disclosures based on the whistleblower's "reasonable belief" that there is a violation. This position is reflected in the SEC regulations, 17 C.F.R. § 240.21F–2(b)(1)(i) and was accepted by the court in *Kramer v. Trans–Lux Corp.*, 2012 WL 4444820, at *6-7 (D. Conn. 2012) and *Yang v. Navigators Group, Inc*., 18 F.Supp.3d 519, 528-29 (S.D.N.Y. 2014).

SEC Report Required or Are Internal Reports Protected?

The definition of a whistleblower appears to contemplate limitation of whistleblower status to persons who provide "information relating to a violation of the securities laws to the Commission." 15 U.S.C. § 78u–6(a)(6). However, the anti-retaliation itself suggests that persons who have not reported to the SEC might be protected by the statute, because the third category of protected activity covers "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e)

of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." Not all such activity requires a communication with the SEC. This provision of the statute appears to extend protection to an employee who makes an internal complaint about conduct that violates the securities laws and who is fired before (or without) contacting the SEC.

The SEC adopted a regulation seeking to reconcile these seemingly contradictory provisions of Dodd-Frank, providing that:

> For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. § 78u–6(h)(1)), you are a whistleblower if:
>
> > (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. § 1514A(a)) that has occurred, is ongoing, or is about to occur, and;
> >
> > (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. § 78u–6(h)(1)(A)).
> >
> > (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.
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> 17 C.F.R. § 240.21F–2(b)(1).

But the language of the Dodd-Frank anti-retaliation provision itself extends its protection only to a "whistleblower." Focusing on this language, the court in *Asadi v. G.E. Energy (USA), L.L.C*, 720 F.3d 620, 625-28 (5th Cir. 2013) found no conflict between the definition of whistleblower and the description of protected activity. The court concluded that the "protected activity" is only actionable if the person who engaged in that activity was a "whistleblower" as defined in the statute. Thus, the court held, there

could be no protected activity without a report to the SEC and thus no retaliation remedy under Dodd-Frank.

The Fifth Circuit rejected the applicability of the regulation, concluding that it "redefines 'whistleblower' more broadly than does the statute" and pointing out that the regulation defines "whistleblower" more broadly for purposes of the prohibition against retaliation than it does for purposes of eligibility for an award. *Asadi,* 720 F.3d at 629-30.

Lutzeier v. Citigroup Inc., 305 F.R.D. 107, 109-10 (E.D. Mo. 2015); *Wagner v. Bank of Am. Corp.*, 2013 WL 3786643, at *4–6 (D. Colo. 2013) and *Banko v. Apple Inc.*, 20 F.Supp.3d 749, 755-57 (N.D. Cal. 2013) followed *Asadi,* although the *Banko* court permitted an action under California law for retaliatory discharge violating public policy based on Dodd-Frank.

Both before and after *Asadi,* however, most District Courts found the statute to be ambiguous and deferred to the interpretation in the SEC regulation under the *Chevron* doctrine, as well as emphasizing the need for broad protection as called for by Dodd-Frank's purpose*:* *Rosenblum v. Thomson Reuters (Markets) LLC*, S.D.N.Y.2013, 984 F.Supp.2d 141, 146-48 (S.D.N.Y. 2013)(finding the statute ambiguous about whether whistleblowing could only be to the SEC and applying *Chevron* analysis to apply the SEC Rule); *Ellington v. Giacoumakis*, 977 F.Supp.2d 42, 44-46 (D. Mass.2013); *Kramer v. Trans–Lux Corp.,* 2012 WL 4444820, at *3-5 (D. Conn. 2012); *Yang v. Navigators Group, Inc.*, 18 F.Supp.3d 519, 531-34 (S.D.N.Y. 2014); *Murray v. UBS Sec., LLC*, 2013 WL 2190084, at *3-6 (S.D.N.Y. 2013); *Egan v. TradingScreen, Inc.*, 2011 WL 1672066, at *3-7

(S.D.N.Y. 2011)(predating SEC rule but citing it in proposed form); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 993-94 (M.D. Tenn. 2012); *Bussing v. COR Clearing, LLC*, 20 F.Supp.3d 719, 727-33 (D. Neb.2014); *Genberg v. Porter*, 935 F.Supp.2d 1094, 1106 (D. Colo. 2013); *Dressler v. Lime Energy*, 2015 WL 4773326 (D. N.J. 2015). A comprehensive explanation of the basis for upholding the SEC regulation's provisions may be found in *Somers v. Digital Realty Trust,* --- F.Supp.3d ---, 2015 WL 4483955, at *5-13 (N.D. Cal. 2015).

Most recently, the Second Circuit Court of Appeals also disagreed with *Asadi,* finding the ambiguity sufficient to justify application of the *Chevron* doctrine. *Berman v. Neo@Olgivy LLC,* --- F.3d ---, 2015 WL 5254916 (2d Cir.). *Asadi* had observed that *strict* application of the definition of whistleblower under Dodd-Frank was not did not give rise to an absolute contraction between the protection of SOX whistleblowers and Dodd-Frank's definition of whistleblower because an employee would be protected if s/he either reported to the SEC or to both their employer and the SEC.

In response, the Second Circuit said that this would extend very limited protection to SOX whistleblowers both because few whistleblowers would report both to the employer and the SEC and because some whistleblowers, such as auditors and attorneys, could not make an external report until an internal report had been made. Following the *Asadi* strict interpretation would open the door to retaliation before the SOC whistleblower would have the right to make a report to the SEC.

Finding no clarification in the legislative history, the court noted that the Supreme Court in the Obamacare decision of *Burwell v. King*, –––U.S. –––, 135 S.Ct. 2480,

192 L.Ed.2d 483 (2015)(finding that the term "exchange established by a State' included one established by the federal government when the State failed to establish one) focused on the adverse impact one interpretation might have on the overall statutory scheme in accepting a broad interpretation.

Unlike *Burwell,* where the Supreme Court refused to apply *Chevron* deference because the issue was so central to the statute and the agency lacked expertise in the statutory subject matter, the Second Circuit saw the SEC as uniquely qualified to deal with this interpretative problem and accepted the agency's interpretation of the statute. But a dissenting opinion urged acceptance of the *Asadi* result, commenting that the SEC and the majority had effectively removed the words "to the commission" from the statute failed to follow the plain language of the statute.

The issue may ultimately be one that must be decided by the Supreme Court.

Anonymity Provision

An additional form of employee protection included in the statute is a qualified protection of the identity of whistleblowers by the SEC, contained in 15 U.S.C. §78u-6(h)(2).[6] Under this provision, the SEC is not to disclose either the identity of a

[6] (2) Confidentiality

> (A) In general
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> Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of Title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). . . .
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> . . .

whistleblower or information that could reasonably be expected to reveal a whistleblower's identity. The SEC is otherwise required to protect anonymity of whistleblowers unless disclosure is ordered in an enforcement action, although it may disclose the identity of the whistleblower to other law enforcement authorities, with identity protection at the discretion of the SEC, 17 C.F.R. §240.21F-7(a).

A whistleblower may even submit information anonymously to the SEC if it is done through counsel, 17 C.F.R. §240.21F-7(b). In order to remain anonymous, a Dodd-Frank whistleblower must communicate through counsel and in order to obtain an award, must disclose his or her identity to the SEC and provide whatever other information the agency requests, 15 U.S.C. §78u-6(d)(2). In such cases, the attorney must certify that s/he has verified the whistleblower's identity and, to the extent possible, the completeness and accuracy of the information submitted, along with a signed version of the form for the information that the SEC may obtain if it has concerns that the report is knowingly false or fraudulent. 17 C.F.R. §240.21F-9(b).

Dodd-Frank Remedies

The remedies provided to employees by Dodd-Frank are generally more limited than those provided for under Sarbanes Oxley. Under 15 U.S.C. §78u-6(H)(i)(C),[7] an

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(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

[7] Relief for an individual prevailing in an action brought under subparagraph (B) shall include--
(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;
(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and
(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

employee may obtain reinstatement and recover double back pay, plus litigation costs including both attorneys' fees, expert witness fees and other litigation costs. In *Kshetrapal v. Dish Network, LLC*, — F.Supp.3d —, 2015 WL 857911 at *4-5 (S.D.N.Y. 2015), the court declined to permit injunctive relief against post-employment blacklisting of the employee, noting that the statute did not authorize individual applications for injunctive relief beyond reinstatement orders.