

## ADVISORY | Dodd-Frank Act

May 20, 2011

### DODD-FRANK ANTI-RETALIATION PROVISIONS: FIRST FEDERAL COURT WEIGHS IN

Much attention has been given to the whistleblower bounty provisions of the Dodd-Frank Act. After the SEC issued proposed implementing rules last November, a period of intense commentary followed, and the SEC is now preparing to issue its final rules on or about May 25, 2011. With all the debate surrounding the bounty provisions, less attention has been paid to the new anti-retaliation regime created by the Act – a regime that significantly expands the protections afforded to whistleblowers.<sup>1</sup> The SEC has not proposed any rules in connection with the anti-retaliation provisions, and it is not clear that the SEC ever will. The interpretation of the anti-retaliation provisions thus falls – at least for now – in the hands of the federal courts.

Earlier this month, Judge Leonard Sand of the United States District Court for the Southern District of New York issued the first decision interpreting the Act's anti-retaliation provisions. Judge Sand, in dismissing the plaintiff's retaliation claim (with leave to amend), made a number of significant findings:<sup>2</sup>

- *A report to the SEC is not necessarily a prerequisite for protection under Dodd-Frank's anti-retaliation provisions.* The Act defines "whistleblower" as a person who provides information "to the Commission," and Judge Sand confirmed that the Act prohibits retaliation against such persons when they have provided information or testimony to the SEC.<sup>3</sup> Judge Sand also noted, however, that the Act prohibits retaliation against a whistleblower who makes disclosures that are required or protected under: (i) the Sarbanes-Oxley Act; (ii) the Securities Exchange Act of 1934, including section 10A(m) (accounting and auditing matters); (iii) 18 U.S.C. § 1513(e) (information to law enforcement about a federal offense); and (iv) "any other law, rule, or regulation subject to the jurisdiction of the Commission."<sup>4</sup> Because reports under these other four categories do not need to be made to the SEC, Judge Sand rejected defendants' argument that anti-retaliation protection under the Act is limited to only those whistleblowers who report information to the SEC. The Court held instead that any whistleblower who makes a disclosure (whether to the SEC or elsewhere) under any of the four categories listed above is also entitled to protection from retaliation.<sup>5</sup>
- *An individual does not need to personally report to the SEC in order to qualify for anti-retaliation protection, provided that a report is made to the SEC by someone with whom the individual is "acting jointly."* The Act defines "whistleblower" as "any individual who provides, or 2 or more

---

<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6 (2006) (the "Act"); "Dodd-Frank Act: Enhanced Protection for Whistleblowers Against Employer Retaliation," *Covington Advisory* (7/29/2010) found [here](#).

<sup>2</sup> *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

<sup>3</sup> 15 U.S.C. §§ 78u-6(a)(6), -6(h)(1)(A)(i)-(ii).

<sup>4</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>5</sup> See *Egan*, 2011 WL 1672066, at \*3-5. The Court found that, because the plaintiff's alleged disclosures did not fall within any of the four categories, the plaintiff would need to allege that his information was, in fact, reported to the SEC. See *id.* at \*5, \*7.

individuals acting jointly who provide” information to the SEC.<sup>6</sup> The plaintiff in *Egan* claimed that because he initiated and participated in an investigation by outside counsel retained by the independent directors of the company as a result of his allegations, he “act[ed] jointly” with outside counsel in providing information to the SEC. The Court accepted that this allegation could, if true, satisfy the “acting jointly” prong of the statute, but also made clear that, in order to have a claim for retaliation, the plaintiff would need to sufficiently allege that outside counsel had, in fact, reported the information to the SEC.<sup>7</sup>

- *The Act’s anti-retaliation provisions are applicable to private as well as public companies.* Unlike the Sarbanes-Oxley whistleblower provisions, which apply only to publicly traded companies, the Court accepted without discussion that the Dodd-Frank anti-retaliation provisions apply to private companies as well.<sup>8</sup>

It remains to be seen whether other courts will follow Judge Sand’s interpretation of the Act’s anti-retaliation provisions. And there are many other issues concerning the Act’s anti-retaliation provisions that have yet to be addressed. But for now, the *Egan* decision provides important and timely guideposts for evaluating who can and cannot come within the ambit of those provisions.

---

If you have any questions concerning the material discussed in this client advisory, please contact the following members of our firm:

|                         |              |  |
|-------------------------|--------------|--|
| <b>Steven Fagell</b>    | 202.662.5293 | <a href="mailto:sfagell@cov.com">sfagell@cov.com</a>         |
| <b>Barbara Hoffman</b>  | 212.841.1143 | <a href="mailto:bhoffman@cov.com">bhoffman@cov.com</a>       |
| <b>Nancy Kestenbaum</b> | 212.841.1125 | <a href="mailto:nkastenbaum@cov.com">nkastenbaum@cov.com</a> |
| <b>David Martin</b>     | 202.662.5128 | <a href="mailto:dmartin@cov.com">dmartin@cov.com</a>         |

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic advisories.

© 2011 Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, NY 10018-1405. All rights reserved.

---

<sup>6</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>7</sup> See *Egan*, 2011 WL 1672066, at \*7-9. The Court found that the plaintiff insufficiently alleged knowledge that outside counsel actually disclosed misconduct to the SEC, and dismissed with leave to amend on that ground. See *id.* at \*9-10.

<sup>8</sup> See *id.* at \*5-7.