

## ADVISORY | Dodd-Frank

July 12, 2012

### DODD-FRANK ANTI-RETALIATION PROVISIONS: THREE FEDERAL COURTS WEIGH IN *SIGNIFICANT UNCERTAINTIES FOR FCPA-BASED CLAIMS*

The whistleblower bounty program of the Dodd-Frank Act has received a great deal of attention, although the SEC has yet to issue a Dodd-Frank bounty award. Less attention has been paid to the broad anti-retaliation regime created by the Act,<sup>1</sup> but three District Courts have now issued decisions interpreting the Act's anti-retaliation provisions, the most recent on June 28, 2012.<sup>2</sup> Nonetheless, the extent of the Act's protection remains unsettled, particularly with respect to claims based on violations of the U.S. Foreign Corrupt Practices Act ("FCPA").

The first two District Court decisions reached inconsistent results on the Act's protection of whistleblowers whose disclosures are covered by other statutes; under one interpretation, FCPA-based retaliation claims against private issuers are categorically excluded. The third decision, without reaching the issue of disclosures covered by other statutes, rejected an FCPA-based claim on the ground that the Act does not provide "extraterritorial" anti-retaliation protection.

- **First federal court decision - expanded protection, no specific FCPA discussion.** Last year, in the *Egan* case, Judge Leonard Sand of the United States District Court for the Southern District of New York found that the anti-retaliation protection of the Act provided greatly expanded protection for whistleblowers. The court held that although the Act defines a "whistleblower" eligible for the bounty program as an individual who provides information "to the Commission," an individual can qualify for anti-retaliation protection under the Act *either* by making a report to the SEC *or* by making a disclosure in any one of four other categories listed in the statute. The four categories are disclosures "required or protected" under (i) the Sarbanes-Oxley Act; (ii) the Securities Exchange Act of 1934; (iii) 18 U.S.C. § 1513(e) (information to law enforcement about a federal offense); or (iv) any other law, rule, or regulation subject to the jurisdiction of the Commission. Judge Sand's opinion did not specifically address FCPA claims.<sup>3</sup>

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

<sup>2</sup> *See Asadi v. G.E. Energy (USA) LLC*, No. 4:12-CV-00345, 2012 WL 2522599 (S.D. Tex. June 28, 2012) ("*Asadi*"); *Nollner v. Southern Baptist Convention, Inc.*, No. 3:12-CV-00040 & 3:12-CV-00043, 2012 WL 1108923 (M.D. Tenn. April 3, 2012) ("*Nollner*"); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011) ("*Egan*"). In contrast to the very few decisions interpreting the substance of the Act's anti-retaliation provisions, a number of courts have addressed the retroactivity of the anti-retaliation provisions of the Act and the Act's amendments to the anti-retaliation provisions of other statutes, most recently this past Monday. *See, e.g., Leshinsky v. Telvent GIT, S.A.*, 10 Civ. No. 4511, 2012 WL 2686111 (S.D.N.Y. July 9, 2012) (holding that the Act's amendment to SOX protection for employees of subsidiaries applies retroactively).

<sup>3</sup> *See Egan*, 2011 WL 1672066, at \*5 (citing 15 U.S.C. § 78u-6(h)(1)(A)(iii)); *see also* "Dodd Frank Anti-Retaliation Provisions: First Federal Court Weighs In," *Covington Advisory* (May 20, 2011) found [here](#). Judge Sand also held that an individual seeking to qualify for anti-retaliation protection via a report to the SEC (as opposed to the other four categories of disclosure) need not personally report to the SEC, so long as a report is made to the SEC by someone with whom the individual is "acting jointly." *See Egan*, 2011 WL 1672066, at

- **Second federal court decision - limited protection, FCPA-based claim against non-issuer categorically rejected.** In April of this year, in the *Nollner* case, a federal district court in the Middle District of Tennessee agreed with Judge Sand that the Act's anti-retaliation protection was not limited to reports to the SEC. Judge Sand had identified *four* categories of whistleblower reports that did not need to be made to the SEC in order to be covered; the *Nollner* court held, however, that the Act's protection for disclosures not made to the SEC extended only to *three* categories. What Judge Sand considered the fourth category was instead, *Nollner* held, a limitation on the first three categories, *i.e.*, if a report was not made to the SEC, *any* anti-retaliation claim had to be based on a "federal violation [that] falls within the SEC's jurisdiction."<sup>4</sup>

The anti-retaliation claim at issue in *Nollner* was based on an alleged FCPA violation by a non-issuer. The *Nollner* court held that because the DOJ rather than the SEC had jurisdiction over FCPA enforcement against non-issuers, the anti-retaliation provisions did not apply. Although the case involved alleged reports by an India-based employee about FCPA violations on a construction project in India, the issue of extraterritorial application was not discussed.<sup>5</sup>

- **Third federal court decision - "extraterritorial" FCPA-based claim rejected.** At the end of June, in the *Asadi* case, a federal district court in the Southern District of Texas considered a motion to dismiss an anti-retaliation claim based on an internal report of alleged FCPA violations. The claimant, a dual United States - Iraqi citizen, was employed in Jordan as the GE-Iraq Country Executive by GE Energy (USA), LLC, a wholly owned, direct subsidiary of General Electric Company.<sup>6</sup>

The *Asadi* court held that it need not decide whether the Act's protections extended to individuals whose disclosures were not made to the SEC.<sup>7</sup> Instead, the *Asadi* court first considered whether the Act's anti-retaliation provision applied extraterritorially. Relying on the presumption against extraterritoriality recently applied by the Supreme Court in *Morrison*, and the Act's explicit grant of extraterritorial jurisdiction for certain enforcement actions other than the anti-retaliation provisions, the *Asadi* court held that the anti-retaliation protection of the Act did not apply extraterritorially.<sup>8</sup>

The *Asadi* plaintiff argued that even if the Act's anti-retaliation protection did not apply extraterritorially, he was eligible for protection, apparently based in large part on an e-mail from GE Energy which terminated his employment "as an at-will employee, as allowed under U.S. law" and stated that "[a]s a U.S. based employee you will be terminated in the U.S."<sup>9</sup> In contrast to its extended discussion of extraterritorial application, the court dismissed this factual argument in a single paragraph, noting that the plaintiff admitted that "the majority of events giving rise to the

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<sup>\*</sup>7-9 (construing 15 U.S.C. § 78u-6(a)(6)). The court also accepted, without discussion, that the Act's anti-retaliation protections are applicable to private as well as public companies. See *Egan*; see also *Nollner*, 2012 WL 1108923, at \*7 (commenting on *Egan*'s implicit recognition that protection may apply to privately held companies).

<sup>4</sup> *Nollner*, 2012 WL 1108923, at \*6. The *Nollner* court also held that when a report is not made to the SEC, the Act's anti-retaliation provision protects only disclosures that are "required or protected" by laws, rules or regulations within the SEC's jurisdiction. *Id.* at \*7 (citing *Egan*, 2011WL 1672066, at \*6). This holding raises a host of questions, particularly with regard to reports of FCPA violations that are made to agencies other than the SEC. Indeed, given that the FCPA does not "require or protect" individual disclosures, reports of FCPA violations not made to the SEC would appear under *Nollner* to fall outside the scope of the Act's anti-retaliation protections.

<sup>5</sup> *Id.* at \*1-2, \*8-9.

<sup>6</sup> *Asadi*, 2012 WL 2522599, at \*1 & n.4.

<sup>7</sup> *Id.* at \*3.

<sup>8</sup> *Id.* at \*4 (relying on, *inter alia*, *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010), and Dodd-Frank Act § 929P(b), 124 Stat. 1376 (2010) (amending three statutory sections)).

<sup>9</sup> *Id.* at \*5 & n.46.

suit occurred in a foreign country,” the e-mail was sent to plaintiff in Jordan, related to his employment in Jordan, and noted that a letter would be sent to his home in Jordan.<sup>10</sup>

After the decisions in *Egan*, *Nollner* and *Asadi*, there is still significant uncertainty about what conduct is protected under the Act. If protection extends broadly to four categories of non-SEC reports, as in *Egan*, a Sarbanes-Oxley internal whistleblower report of mail fraud or wire fraud would appear to be eligible for the Act’s anti-retaliation protection. If protection extends only to law, rules and regulations within the jurisdiction of the SEC, as in *Nollner*, the same claim apparently would not be eligible for the Act’s protection.

For FCPA-based claims, the *Asadi* view that the anti-retaliation provision has no extraterritorial application may be dispositive. Even if the *Asadi* view is widely accepted, however, there may still be considerable uncertainty about how extraterritoriality is to be determined. If courts follow *Asadi* to determine extraterritoriality issues, they might consider where the majority of events giving rise to the suit occurred, where the plaintiff was employed, and where the adverse employment action was communicated. If so, companies may be able to demonstrate that many FCPA-based claims are outside the protection of the Act’s anti-retaliation provisions.

Given the divergent interpretations of the Act’s anti-retaliation provisions thus far, it may be quite some time before many of these issues are resolved.

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<sup>10</sup> *Id.* at \*5. The court also declined to reach plaintiff’s contention that the territorial reach of the Act’s anti-retaliation provision was effectively extended by either Sarbanes-Oxley or the FCPA. *Id.* at \*5-6.