Securities Regulation Daily Wrap Up, TOP STORY—2d Cir.: SEC asks appeals court to defer to its rulemaking on whistleblower retaliation, (Feb. 20, 2014)

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By Anne Sherry, J.D.

The SEC has filed an *amicus* brief urging the Second Circuit to hold that employees are protected from retaliation under Dodd-Frank's whistleblower provision whether or not they reported information to the SEC. The district court below discussed but did not rule on this question, ultimately dismissing the whistleblower suit on other grounds (*Liu v. Siemens AG*, February 20, 2014).

Dismissal of complaint. Meng-Lin Liu, a compliance officer with Siemens China Ltd. (Siemens), was instructed not to work the remaining three months of his contract after he continually raised concerns that a kickback scheme conducted by the healthcare division violated the Foreign Corrupt Practices Act (FCPA). After the contract expired, he reported possible FCPA violations to the SEC. He also sued Siemens in the Southern District of New York for violating Dodd-Frank's anti-retaliation provision, embodied in Exchange Act Sec. 21F. The court dismissed the action on the bases that the anti-retaliation provision does not apply extraterritorially and that Liu's disclosures were not "required or protected."

Controversy. A key issue in Dodd-Frank whistleblower litigation is whether an employee who reported activity internally, but did not report to the SEC, is protected against retaliation. Section 21F prohibits employers from discriminating against "a whistleblower" because of a lawful act in providing information to the SEC; in being involved in an investigation or action based on the information; *or in making disclosures required or protected under the securities laws*. That third category of protected activity ("clause (iii)") encompasses internal reporting and other disclosures that are not necessarily made to the SEC. But "whistleblower" is defined elsewhere in Sec. 21F as "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."

The SEC's rule implementing Sec. 21F does not require reporting to the Commission to qualify as a whistleblower. Some courts have afforded this rule deference under *Chevron*, while others, notably the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, have construed the plain language of the statute to mean that only "whistleblowers" are protected, and only those who reported information to the SEC are whistleblowers. Because the district court in *Liu v. Siemens A.G.* held that the employee was not covered under the anti-retaliation provision for other reasons, it found "no need … to wade into this debate."

The SEC, however, finds itself squarely in the middle of it. Defending its rulemaking in its *amicus* brief, the agency stresses the importance of internal company reporting in deterring, detecting, and stopping unlawful conduct that may harm investors. It argues that its rulemaking implementing the monetary award provisions was carefully calibrated not to disincentivize employees from reporting internally, and the agency likewise clarified the statute's retaliation prohibition to protect an employee who engages in whistleblowing whether or not the employee separately reports to the Commission.

***Chevron* deference.** Under *Chevron*, the SEC stated, a court considering whether an agency interpretation is permissible must determine whether there is an unambiguously expressed intent of Congress on the precise question at issue. If there is an ambiguity in the statute, the agency has discretion to resolve the apparent conflict. The court must determine whether the agency's interpretation is rational and not inconsistent with the statute.

The *amicus* brief argues that there is considerable tension between the statute's broad description of protected whistleblowing activity and its narrow definition of "whistleblower." "If Congress had actually intended to protect only those 'required or protected' disclosures" that are separately reported to the SEC, the agency posits, "why would Congress craft clause (iii) to unnecessarily suggest that it protects a much broader class of disclosures than it actually does ?" The narrow definition of "whistleblower" renders clause (iii) nearly superfluous, in the

SEC's view, because it would only provide any additional protection if the employer were unaware that the employee had already reported to the Commission, and in that case, the clause would not effectively deter employers from taking adverse action for internal reporting.

The Commission urges that its interpretation is reasonable "because it resolves the statutory ambiguity in a manner that effectuates the broad employment anti-retaliation protections that clause (iii) contemplates" and avoids disincentivizing individuals from reporting internally first when appropriate. Lastly, it enhances the SEC's ability to bring enforcement actions when employers retaliate for internal reporting.

Statement. In a statement, Sean McKessy, chief of the Office of the Whistleblower, said, "The Commission's whistleblower program both encourages whistleblowers to report wrongdoing and protects them when they do. Today's filing makes clear that under SEC rules, whistleblowers are entitled to protection regardless of whether they report wrongdoing to their employer or the Commission. The Commission's brief supports the anti-retaliation protections under the Dodd-Frank Act that I believe are critical to the success of the SEC's whistleblower program."

The case is No. 13-4385.

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Companies: Siemens A.G.; Siemens China Ltd.

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