

Securities Regulation Daily Wrap Up, DODD-FRANK ACT—S.D.N.Y.: Anti-retaliation provision does not protect overseas whistleblowers, (Oct. 22, 2013)

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By Anne Sherry, J.D.

The Dodd-Frank Act's anti-retaliation provision does not apply extraterritorially, a district court held in dismissing a whistleblower retaliation complaint with prejudice. Furthermore, the district court held, the complaint must be dismissed because Sarbanes-Oxley Section 806 does not "require or protect" disclosures of FCPA violations (*Liu v. Siemens A.G.*, October 21, 2013, Pauley, W.).

FCPA concerns and retaliation. The court's order describes a pattern in which Meng-Lin Liu, a compliance officer with Siemens China Ltd., continually raised concerns that a kickback scheme conducted by the healthcare division violated the Foreign Corrupt Practices Act (FCPA), even after his superiors retaliated by giving him negative performance evaluations, denying an application for travel reimbursement, and removing his compliance responsibilities. At a Siemens town hall meeting attended by Siemens China's president and CEO, Liu asserted that if Siemens were to follow compliance guidelines, the company would lose 30 percent of its healthcare business. The same day, Liu was instructed not to report for work for the three remaining months of his contract. After the contract expired, he reported possible FCPA violations to the SEC.

Complaint. Liu sued Siemens for violating the Dodd-Frank Act's anti-retaliation provision. Siemens moved to dismiss, arguing that the anti-retaliation provision does not apply extraterritorially and that, furthermore, the portion of the provision Liu relied upon was inapplicable because his disclosures were not "required or protected" under the Sarbanes-Oxley Act, Exchange Act, or any other law, rule, or regulation under the SEC's jurisdiction.

Extraterritoriality. The court, only the second to consider the issue of the extraterritorial application of the anti-retaliation provision, held that it does not apply to overseas whistleblowers. Citing the Supreme Court's *Morrison* decision, the court noted that the anti-retaliation provision's silence on the matter creates a strong presumption against extraterritoriality, particularly given that several Dodd-Frank provisions do apply overseas. Liu's argument that foreign employees are included within the Dodd-Frank Act's definition of "whistleblower" was unavailing, as the issue was not whether Liu was eligible for a whistleblower award, but whether he was protected against retaliation.

"Required or protected." The court dismissed the complaint for the additional reason that Liu's disclosures were not "required or protected." The FCPA does not require or protect any disclosures, and the protections of Sarbanes-Oxley Section 806 do not encompass reports of FCPA violations.

The case is No. 13 Civ. 317.

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

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