

[Securities Regulation Daily Wrap Up, DODD-FRANK ACT—S.D.N.Y.: No whistleblower protection unless CFPB has regulated employee's product, \(Feb. 25, 2015\)](#)

Securities Regulation Daily Wrap Up

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By Richard A. Roth, J.D.

A registered broker-dealer's employee could not claim to have been fired in violation of the Dodd-Frank Act whistleblower protection provision because the commercial mortgage-backed securities he analyzed were not subject to a Consumer Financial Protection Bureau regulation, according to a U.S. District Judge for the Southern District of New York. In what apparently is the first opinion considering this application of the whistleblower protection section, the judge decided that the catchall part of the Dodd-Frank Act definition of "financial product or service" applies only to those products or services the CFPB actually has regulated, not to all of those the bureau could choose to regulate (*Murray v. UBS Securities, LLC*, Feb. 24, 2015, Failla, K.).

The employee was a senior commercial mortgage-backed security strategist and executive director at UBS Securities. According to his complaint, senior UBS personnel who were involved in CMBS origination and trading began to pressure him to create reports that supported the company's activities, regardless of what his own research called for. Rather than succumbing to the pressure, the employee complained to his superiors while continuing to create honest reports, he said. Eventually, he was fired.

Covered employee. The employee claimed that the firing violated the Dodd-Frank Act whistleblower protection section, [12 U.S.C. §5567](#). The question, however, was whether he was covered by that section. Based on the interaction between several Dodd-Frank Act definitions, the judge decided he was not.

The whistleblower protection section prohibits retaliation against any person who performs tasks "related to the offering or provision of a consumer financial product or service," the judge began. What, then, is a consumer financial product or service?

Consumer financial product or service. The act includes, at [12 U.S.C. §5481\(15\)](#), a list of covered products or services, the judge said, but the CMBS that the employee dealt with are not among them. However, the Act also includes a catchall provision that picks up "such other financial product or service as may be defined by the Bureau, by regulation . . ." The employee asserted that the phrase "may be defined by the Bureau" meant that any product or service the CFPB could regulate was covered; UBS asserted that only products or services the bureau had chosen actually to regulate were included.

The judge sided with UBS. Accepting the employee's broad construction would require a court to carry out "an elaborate series of hypothetical inquiries" into what the CFPB might decide, with no regulation or rulemaking to provide assistance. For example, a judge would have to decide whether the product or service was a means to evade a federal consumer financial law and whether the CFPB could decide it had a material effect on consumers. The narrower interpretation that required an existing CFPB regulation, not a hypothetical regulation, was better, she decided.

Duplicative claims. Before deciding whether the employee could be a protected whistleblower, the judge had to consider UBS' claim that the suit was duplicative of a previous suit the employee had filed. The employee had filed a suit raising claims based on the same facts in 2012, and UBS said the second suit constituted impermissible claim splitting.

The judge rejected that argument. When the employee filed the 2012 suit, the Department of Labor still was considering the administrative whistleblower claim the Dodd-Frank Act required him to file. Under the Dodd-

Frank Act, the consumer could not file a suit for 210 days after he filed his administrative complaint, meaning he could not include the claim in his 2012 suit.

While the two suits did concern the same factual situation, a claim that could not have been raised in the first suit would not be precluded now, the judge determined.

The case is [No. 14 Civ. 927 \(KPF\)](#).

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Companies: UBS AG; UBS Securities, LLC

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