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CLIENT MEMORANDUM

Second Circuit Issues Key Decision on the Extraterritorial Applicability of The Dodd-Frank Whistleblower Protection Provisions

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AUTHORS

Martin Weinstein | **Robert Meyer** | **Jeffrey Clark**

On August 14, 2014, the Second Circuit Court of Appeals issued a key decision in *Liu v. Siemens AG*, No. 13-4385-cv, on the extraterritorial applicability of the whistleblower protection provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The Second Circuit held that Dodd-Frank's whistleblower retaliation provision does not apply extraterritorially, and thus foreign nationals employed by foreign companies abroad cannot claim retaliation under Dodd-Frank where the events at issue allegedly occurred abroad, even if the company in question has securities traded on a U.S. stock exchange. The decision also includes statements calling into question whether Dodd-Frank's whistleblower bounty provisions—which require the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission to provide bounties to whistleblowers under certain circumstances—apply extraterritorially. The decision is particularly important for cases involving the Foreign Corrupt Practices Act ("FCPA"), as well as for other securities cases involving issues arising outside the United States.

Background

Plaintiff Liu Meng-Lin ("Liu"), a citizen of Taiwan, worked as a compliance officer for the healthcare division of Siemens China, Ltd. ("Siemens China"), a wholly owned Chinese subsidiary of defendant Siemens AG ("Siemens"). Siemens is a German corporation, but it also had American Depositary Receipts ("ADRs") traded on the New York Stock Exchange ("NYSE").

According to the complaint, Liu learned about improper payments to government officials in North Korea and China and reported the payments to his superiors. According to Liu, Siemens reacted by restricting his authority as a compliance officer, demoting him, and eventually firing him. Liu's complaint does not allege that any conduct occurred in the United States.

Two months after Siemens China fired him, Liu reported the alleged improper payments to the SEC and claimed that Siemens had violated the FCPA. Liu then filed a complaint in the Southern District of New York, alleging that his termination violated Dodd-Frank's antiretaliation provision, 15 U.S.C. § 78u-6(h)(1)(A). Siemens moved to dismiss Liu's complaint, arguing that the antiretaliation provision does not apply extraterritorially. The district court agreed, holding that the antiretaliation provision does not apply extraterritorially and that the complaint sought an extraterritorial application of the statute. On appeal, the Second Circuit affirmed.

The Presumption Against Extraterritoriality

In interpreting statutes, courts, including the U.S. Supreme Court, apply a "presumption against extraterritoriality." Under the presumption against extraterritoriality, courts interpret statutes as applying "only within the territorial jurisdiction of the United States" unless "a contrary intent appears." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). "This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit on Congress' power to legislate. It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* (internal citations omitted).

The presumption against extraterritoriality has a long history and has arisen recently in several notable cases before the U.S. Supreme Court. In particular, in *Morrison v. National Australia Bank Ltd.*, the Supreme Court issued a landmark ruling applying the presumption to the Exchange Act, holding that Section 10(b) of the Exchange Act does not apply extraterritorially. The Supreme Court subsequently issued another important decision, in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), holding that the Alien Tort Statute does not apply extraterritorially.

Under the presumption against extraterritoriality, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 561 U.S. at 255) (alteration omitted). The presumption is rebutted only when the statute's "text, history, and purposes . . . evince a 'clear indication of extraterritoriality.'" *Id.* at 1665 (quoting *Morrison*, 561 U.S. at 265). Courts have held that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality, *id.*, nor do "fleeting reference[s]" to possible international ramifications of an otherwise domestic statute, *Morrison*, 561 U.S. at 263.

The Second Circuit's Decision

In *Liu v. Siemens AG*, the Second Circuit applied the presumption against extraterritoriality to the Dodd-Frank antiretaliation provision and held that the provision does not apply extraterritorially because of the absence of any direct evidence of any congressional intent to do so. The antiretaliation provision specifies, in relevant part, that "[n]o employer

may discharge, . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . , this chapter, . . . and any other law, rule, or regulation subject to the jurisdiction of the [SEC]." 15 U.S.C. § 78u-6(h)(1)(A).

Arguing in favor of the extraterritorial application of the provision, Liu cited the fact that the statute covered employees generally and the fact that other provisions in Dodd-Frank authorize extraterritorial jurisdiction for suits brought by the SEC or the U.S. government. The Second Circuit, however, found that this was not evidence of a clear and affirmative indication of an intent to apply the statute extraterritorially, reiterating that general terms are insufficient to override the presumption.

Liu also pointed to the SEC whistleblower bounty provision, 15 U.S.C. § 78u-6(b), in arguing in favor of extraterritoriality. This provision allows the SEC to award a bounty to "whistleblowers who voluntarily provide[] original information to the [SEC] that [leads] to [a] successful enforcement" action. *Id.* § 78u-6(b)(1). In arguing for extraterritorial application, Liu cited language in an SEC rule and in the SEC's promulgation of the rule on the bounty provision. More specifically, Liu cited (i) an SEC rule excluding eligibility for awards for employees of foreign governments, 17 C.F.R. § 240.21F-8(c)(2), and (ii) the SEC's promulgation of the final whistleblower protection rule, which includes a discussion of the tax filing procedures for a "whistleblower who is a foreign national" and a discussion on whether a whistleblower's possible violations of foreign law should affect award eligibility, 76 Fed. Reg. 34300, 34320, 34348 n.370 (June 13, 2011). Based on this language, Liu argued that the SEC had interpreted the bounty provision as having international reach. The Second Circuit, however, rejected Liu's arguments for two reasons.

First, the Second Circuit raised doubts as to whether the SEC, by rule or otherwise, could override the presumption against extraterritoriality. The Second Circuit stated: "Given the strong presumption that statutes are limited to domestic application in the absence of clear expression of congressional intent to the contrary, it is far from clear that an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given deference." Slip Op. at 17. The Second Circuit noted that *Morrison* had described the presumption as a "canon of construction," 561 U.S. at 255, which the Second Circuit identified as precisely one of the "devices of judicial construction" that could resolve congressional intent without the need to resort to agency rules. Slip Op. at 17-18 (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004)). In addition, the Second Circuit identified precedent that contradicted Liu's argument, noting: "At least one district court has interpreted our own precedent to mean that 'no regulation could 'supply, on Congress's behalf, the clear legislative intent required to overcome[]' . . . the presumption against extraterritoriality." *Id.* at 18 (quoting *Souryal v. Torres Advanced Enter. Solutions, LLC*, 847 F. Supp. 2d 835, 843 (E.D. Va. 2012), quoting *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir. 2006)).

Second, the Second Circuit found that the extraterritoriality of the whistleblower bounty provision was irrelevant to whether the law's antiretaliation protections apply extraterritorially because congressional intent to override the presumption had to

be expressed in the antiretaliation provision itself. In considering the issue, the Second Circuit identified policy differences as to why the antiretaliation and bounty provisions could rationally be treated differently—with potential extraterritorial application for one but not the other. Accordingly, the Second Circuit rejected Liu's argument and concluded that the bounty provision did not support extraterritorial application of the antiretaliation provision, even if, for the sake of argument, the bounty provision applies extraterritorially.

Although the Second Circuit did not issue a definitive holding on the whistleblower bounty provision, the opinion casts serious doubt on whether the bounty provision applies extraterritorially.

Discussion

Dodd-Frank's whistleblower provisions are an important device for U.S. enforcement authorities. Since Dodd-Frank's enactment, authorities have received thousands of whistleblower reports, many from outside the United States. Many whistleblowers have hired counsel to file reports on their behalf, and lawyers have even begun advertising abroad to attract whistleblowers. The Second Circuit's decision is important because it restricts the ability of foreign nationals to file antiretaliation claims and calls into question the ability of foreign nationals to receive bounties.

The Second Circuit's decision left some important issues unresolved. One unresolved issue is what kind of connection to the United States will suffice to qualify conduct as "extraterritorial." In *Liu*, all of the main allegations were extraterritorial (foreign national, foreign company, foreign improper payments, and foreign acts of retaliation); the only "domestic" fact was that Siemens had ADRs traded on the NYSE. Although Liu reported the conduct to the SEC, he did so only after he was fired, and thus retaliation for the SEC reporting in the United States did not form the basis for his whistleblower retaliation claim. Under these circumstances, the Second Circuit found the allegations insufficient to move the case outside the scope of the presumption against extraterritoriality.

In *Morrison*, the Supreme Court instructed courts to look to the "focus" of "congressional concern" to determine whether the conduct in question is extraterritorial; there, the Supreme Court found that "the focus on the Exchange Act is not upon the place where the deception originated, but upon the purchases and sales of securities in the United States." 561 U.S. at 266. Following that approach, the *Morrison* Court concluded that Section 10(b) of the Exchange Act reached conduct "only in connection with the purchase or sale of a security listed on an American stock exchange" or the "purchase or sale of any other security in the United States." *Id.* at 273. It is unclear how courts would apply the "focus" test to both the antiretaliation and the bounty provisions.

Overall, the Second Circuit's decision is important because it prohibits the extraterritorial applicability of the Dodd-Frank antiretaliation protections and calls into question the extraterritorial applicability of other Dodd-Frank provisions, including the whistleblower bounty provision. Going forward, this decision could have a significant impact on the availability of rewards and whistleblower protections when the parties and the conduct lack significant connections to the United States.

If you have any questions or need assistance on FCPA compliance, please contact Martin Weinstein (202-303-1122, mweinstein@willkie.com), Robert Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey Clark (202-303-1139, jdclark@willkie.com), or the Willkie attorney with whom you regularly work.

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