CLIENT UPDATE

DODD-FRANK'S NEW WHISTLEBLOWER PROTECTIONS: GUIDANCE ON EXTRATERRITORIALITY AND RETROACTIVITY

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Courts in the Southern District of New York and the Southern District of Texas recently have ruled on important aspects regarding the scope and applicability of new whistleblower protection rules enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). In *Asadi v. G.E. Energy (USA), LLC*, No. 120345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), Judge Nancy F. Atlas held that Dodd-Frank's Anti-Retaliation Provision does not apply to conduct outside the territorial United States. Then Judge J. Paul Oetken held in *Leshinsky v. Telvent GIT, S.A.*, No. 10 Civ. 4511, 2012 WL 2686111 (S.D.N.Y. July 9, 2012) that Dodd-Frank's amendment to the whistleblower protections in the Sarbanes Oxley Act of 2002 ("SOX"), which protect employees of public companies' nonpublic subsidiaries, can apply retroactively to claims that arose before the passage of Dodd-Frank in 2010. Both cases have implications for companies that are considering how to address potential whistleblower issues under SOX and Dodd-Frank.

THE *LESHINSKY* DECISION

As enacted in 2002, Section 806 of SOX provided whistleblower protections "for employees of publicly traded companies" who provide information concerning "fraud against shareholders" to their supervisors, any government enforcement agency or Congress or who file or otherwise participate in or assist a lawsuit alleging fraud against shareholders. In the years following passage of SOX, courts

reached divergent conclusions on whether Section 806 reached employees of a company's wholly owned subsidiaries. *Compare Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220, at *4-5 (E.D. Mich. May 14, 2007) (holding that SOX's whistleblower protections did not cover a subsidiary of a public company) *with Morefield v. Exelon Servs, Inc.*, No. 2004 SOX 2, 2004 WL 5030303, at *4 (Dep't of Labor, Jan. 28, 2004) (holding that "employees of non-public subsidiaries of publicly traded companies are covered by the whistleblower protection provisions of Sarbanes-Oxley"). To clarify this ambiguity, Congress included an amendment to SOX in Dodd-Frank specifying that the whistleblower provisions extended to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." *See* Dodd-Frank, Section 929A.

In *Leshinsky*, Judge Oetken considered the "novel question" of whether the Dodd-Frank amendment, Section 929A, applied retroactively to claims that arose prior to the amendment taking effect. Finding that the amendment was merely a "clarification of Congress's intent," as expressed in an existing statute (*i.e.,* SOX), Judge Oetken concluded that the amendment did not raise a retroactivity issue that precluded its application to the case. Accordingly, Judge Oetken ruled that the amendment applied to conduct that pre-dated Dodd-Frank's enactment, and thus the plaintiff, as an employee of a foreign subsidiary whose financial information was included in the consolidated financial statements of the public company, was covered by SOX's whistleblower protections. Judge Oetken noted that in passing SOX, Congress was concerned with addressing corporate malfeasance that "can – and often does – occur within subsidiaries of a public company," and, therefore, it was "reasonable to infer" that Congress intended to protect employees of a corporation's subsidiary when it enacted the whistleblower protections as part of SOX.

THE *ASADI* DECISION

At issue in *Asadi* was whether Dodd-Frank's Anti-Retaliation Provision applied extraterritorially to cover a plaintiff who was a dual Iraqi-U.S. citizen employed in Jordan by a U.S. subsidiary of the General Electric Company. The plaintiff alleged that he was terminated in retaliation for reporting a potential violation of the Foreign Corrupt Practices Act ("FCPA"). As an initial matter, Judge Atlas found that the plaintiff did not qualify as a "whistleblower" because Dodd-Frank defines "whistleblower" as an individual who provides information relating to securities law violations "to the [Securities and Exchange] Commission ["SEC"], in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). The plaintiff had reported the alleged violations to his supervisor

and the company's ombudsperson, but not to the SEC. Thus, Judge Atlas concluded that he did not fit within the statute's definition of a whistleblower.

The plaintiff, however, maintained that he could qualify as a whistleblower under Dodd-Frank's Anti-Retaliation Provision, which prohibits an employer from retaliating against an employee for making disclosures that are "required or protected" under SOX. 15 U.S.C. § 78u-6(h)(1)(A)(iii). Judge Atlas did not reach the merits of the plaintiff's argument on this point, instead ruling on whether the Anti-Retaliation Provision had extraterritorial effect. In considering this issue, Judge Atlas relied on the Supreme Court's decision in *Morrison v. Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869, 2877 (2010) and the "longstanding" principle of statutory construction that statutes will not be applied extraterritorially unless a "contrary intent" is evident. The court observed that unlike Section 929P(b) of Dodd-Frank, which explicitly grants district courts jurisdiction over an action or proceeding brought by the SEC or the Department of Justice involving conduct outside the United States, the Anti-Retaliation Provision lacks an express grant of extraterritoriality.

Judge Atlas also rejected the plaintiff's argument that the Anti-Retaliation Provision should apply to him because he was "terminated in the U.S. 'as an at-will employee, as allowed under U.S. law.'" The court noted that the majority of events giving rise to the suit occurred outside of the United States and therefore the facts were insufficient to bring the plaintiffs' claim within the Anti-Retaliation Provision's ambit. Again relying on *Morrison*, Judge Atlas concluded that the Anti-Retaliation Provision did not protect his "extraterritorial whistleblowing activity."

Finally, the plaintiff argued that even if the Anti-Retaliation Provision was not *per se* extraterritorial, the provision's incorporation of SOX and FCPA reporting protections or requirements served to extend the Anti-Retaliation Provision's reach to protect extraterritorial disclosures. Judge Atlas rejected this argument on the grounds that SOX does not expressly provide for extraterritorial effect and the FCPA does not contain any provisions protecting or requiring disclosure of alleged violations of the FCPA.

Although the *Asadi* decision is the first to address the extraterritorial reach of Dodd-Frank's Anti-Retaliation Provision, its analysis is consistent with rulings that have addressed the extraterritoriality issue in the context of the whistleblower protections under SOX. During the past few years, several courts held that SOX did not have extraterritorial effect. The most significant of these was *Carnero v. Boston Scientific Corp.*, where the First Circuit concluded that SOX did not provide for its extraterritorial application and therefore did not protect a foreign whistleblower working outside of the United States, 433 F.3d 1, 18 (1st Cir. 2006). Similarly, in *Villanueva v. Core Labs. NV*, a Department of Labor

Administrative Review Board considered whether a foreign whistleblower who worked for a Colombian company in Colombia was covered by SOX's whistleblower protections. ALJ Case No. 2009-SOX-006, 2011 WL 6981989, at *1 (Dep't of Labor, Dec. 22, 2011) (en banc). The Board considered the effect of Dodd-Frank's amendment to SOX's whistleblower protections and noted that there was nothing in the amendment specifying that the protections would have extraterritorial effect. Applying *Morrison* and relying upon *Carnero*, the Board ruled that SOX's whistleblower protections did not apply extraterritorially.

POSSIBLE TENSION BETWEEN *LESHINSKY* AND *ASADI* DECISIONS

In interpreting the retroactive applicability of SOX to a foreign subsidiary, the *Leshinsky* court did not address the larger issue of whether SOX or Dodd-Frank were intended to apply to extraterritorial conduct in private causes of action at all. It remains to be seen how courts will reconcile Congress' amendment to SOX clarifying that the whistleblower provisions extend to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company" with the extraterritorial limitations imposed by the Supreme Court's decision in *Morrison* as interpreted by the *Asadi* court. Although the novelty and difficulty of these issues likely means that other District and Circuit courts may reach different decisions on the retroactive and extraterritorial applicability of SOX and Dodd-Frank's Anti-Retaliation Provision, the *Leshinsky* and *Asadi* cases provide some useful guidance for companies regarding the potential scope and reach of the whistleblower provisions. Undoubtedly, companies and, eventually, courts will continue to wrestle with the applicability of these whistleblower provisions to particular facts and circumstances of each case.

Please do not hesitate to contact us if you have any questions.

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