



Courts confirm: Dodd-Frank whistleblowers must report to the SEC, Dodd-Frank whistleblower protections do not extend to conduct outside the US

Employment Alert

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By:

A recent decision by the Fifth Circuit Court of Appeals has confirmed that the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act only confer protections to whistleblowers who report conduct to the Securities and Exchange Commission.

Whistleblowers must report conduct to the SEC

Dodd-Frank¹ encourages individuals to provide information helpful to the SEC relating to potential violations of US securities laws. The whistleblower program permits the SEC to pay monetary awards to those individuals who provide information leading to a successful enforcement action. It creates a cause of action for retaliation when an individual suffers an adverse employment action in response to providing helpful information to the SEC.

Following the adoption of the program, the SEC promulgated regulations² that **expand the definition of “whistleblower” to include any individual who has reported information which could lead to prosecution by the SEC** for violations of US securities laws, even if the individual does not report that information directly to the SEC. Under this expansive SEC regulation, a “whistleblower” would **include an individual who only made an internal complaint at the company**, but did not report the alleged conduct to the SEC.

However, following several rulings by lower courts, the Fifth Circuit recently considered whether an employee could maintain a claim for retaliation against his employer after he was demoted, then fired, for complaining to managers and a corporate ombudsman that the company was engaged in questionable lobbying efforts with an official in the Iraqi government. The employee did not report the alleged conduct to the SEC. The employer moved for and **obtained a dismissal of the employee’s retaliation claim on the grounds that the Dodd-Frank anti-retaliation protections did not apply** because the employee only reported internally and not to the SEC.

The Fifth Circuit, dismissing the employee’s arguments that the more expansive SEC regulation provided protection, stating that “there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.” Following the Fifth Circuit’s decision, a federal court in the Northern District of California subsequently dismissed a Dodd-Frank retaliation claim on a motion to dismiss, concluding that

because the employee only made a complaint internally to management and never reported the conduct to the SEC, the anti-retaliation provision of Dodd-Frank **did not apply**.

Notably, on November 13, 2013, shortly before the scheduled release of the SEC's annual whistleblower report presented to Congress, the SEC's Deputy Director of the SEC's Office of the Whistleblower, Jane Norberg, stated that the Fifth Circuit's decision was "not very helpful" to the SEC's efforts to encourage internal reporting. She further commented, "[h]opefully, the issue will be sorted out once and for all because there are a lot of conflicting decisions out there."

While the Fifth Circuit's decision is the leading authority on the applicability of Dodd-Frank's anti-retaliation provision for conduct that is not reported to the SEC, Norberg's comments highlight the SEC's contemplation of a potential circuit split on the issue. Several district courts outside the Fifth Circuit, most notably in the Southern District of New York and, more recently, the District of Massachusetts, have adopted the opposite view – that an employee can receive protection as a Dodd-Frank whistleblower, even if the employee fails to report the conduct at issue to the SEC and, instead, reports the conduct internally.

Conduct reported outside of the US does not warrant whistleblower protection

In another case, the Southern District of New York also concluded recently that Dodd-Frank's anti-retaliation protections do not apply to conduct outside of the United States.

In the *Liu* case, the employee had worked as a compliance officer in the company's Taiwan office. The employee accused the employer of engaging in a kickback scheme selling medical imaging equipment to public hospitals. After the employee reported the conduct to officials in the Taiwan office, the company allegedly stripped him of his responsibilities and later fired him.

The federal court judge concluded that while Dodd-Frank does cover non-US activity, the whistleblower anti-retaliation provisions do not apply to conduct occurring "extraterritorially." Notably, **a foreign employee who is not protected by Dodd-Frank's anti-retaliation provisions may still be eligible to receive a monetary award** for providing information to the SEC.

Stay current

It is important to **stay current on the developing case law** construing the parameters of the anti-retaliation provisions of Dodd-Frank and other whistleblower protection laws.

Concomitantly, it is imperative for companies to ensure that they have in place a **robust internal compliance procedure**. That procedure should both encourage employees to report corporate misconduct internally as well as expressly promise bona fide protections against retaliation.

Clearly, no matter which way the wind blows in the courts on these issues, one thing is certain: there are **more whistleblowing laws on the horizon** in Congress and our state legislatures.

For more information, please contact Grant Alexander and Michael J. Sheehan, who are members of DLA Piper's Whistleblower Taskforce.

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¹ Dodd-Frank Section 992, 15 U.S.C. § 78u-6.

² 17 C.F.R. § 240.21F-2(b).