ASADI V. GE ENERGY (USA) L.L.C.: A CASE STUDY OF THE LIMITS OF DODD-FRANK ANTI-RETALIATION PROTECTIONS AND THE IMPACT ON CORPORATE COMPLIANCE OBJECTIVES

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I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[1] ("Dodd-Frank," "Dodd-Frank Act," or "the Act") was enacted in the wake of the financial crisis of 2007 and 2008. Among numerous other undertakings, Dodd-Frank provided whistleblower protections and so-called "bounty provisions" for company employees who report securities law violations to the U.S. Securities and Exchange Commission ("SEC"), and sometimes to employers. Under some circumstances, Dodd-Frank also protects employees who report violations of other laws enforceable by the SEC. The whistleblower protections were meant to encourage company employees to report violations of law by protecting them from employment retaliation that may arise as a result of reporting violations. However, a paradox has developed in the application of Dodd-Frank's whistleblower protections. We pose a hypothetical to illustrate:

> A U.S. citizen, who has dual citizenship in Iraq, is employed by a U.S. company as a United States-based employee. He is "temporarily relocated" to Amman, Jordan, where, for five years, he has maintained an office. In Jordan, the employee serves as a liaison to the government of Iraq and coordinates with the Iraqi government to secure and maintain energy service contracts for his employer. The employee learns that his employer has hired someone in country for the alleged purpose of currying favor with Iraq government officials with whom the employee is responsible for negotiating service contracts. The employee becomes concerned that the hiring violates the U.S. Foreign Corrupt Practices Act's ("FCPA") prohibition of bribery of foreign government officials, to which law he believes his company is subject. The employee reports his concerns to his supervisor and the company ombudsman. He is unexpectedly terminated soon thereafter by an e-mail from his employer's human resources office in the United States, which says that he is being terminated under U.S. law.

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1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

> Does this employee have a private right of action under Dodd-Frank for retaliatory termination in violation of the whistleblower protections of that Act for reporting possible FCPA violations to his employer?

The U.S. District Court for the Southern District of Texas answered that question in the negative in *Asadi v. G.E. Energy (USA), L.L.C.*[2] The district court's ruling was affirmed on appeal to the Fifth Circuit.[3]

The courts' rulings—that the employee was not protected by Dodd-Frank's whistleblower protections following his disclosures of potential violations of the FCPA—may surprise the reader from a common-sense perspective and from a factual perspective. In addition, from a legal perspective the courts' decisions may be surprising because of the extent to which the extraterritorial application of the FCPA itself has been discussed by commentators and courts alike. Should not the law protect an employee of a U.S. company who reports potential FCPA violations? The federal courts have said sometimes the answer is "no." In the early district court cases, the courts found that limitations on the extraterritorial application of U.S. laws left unprotected an employee reporting potential violations of U.S. criminal laws where the employee was living and working abroad, with foreign duties and responsibilities, and had only perfunctory connections with the U.S. operations of the company.[4] At the appellate level, this reasoning has not been rejected, but it has not been adopted either; rather, the *Asadi* case was decided on other grounds.[5] However, the reasoning that resulted in the denial of the extraterritorial application of the Dodd-Frank anti-retaliation provisions was grounded in U.S. Supreme Court precedent and therefore could be a possible basis for decision in future cases.

Dodd-Frank's objective to encourage company employees to report violations of U.S. laws, rules, and regulations to law enforcement, agency regulators, and, in some cases, company management, is served by the anti-retaliation protections that the Act's whistleblower provisions offer. Companies want their employees to first report alleged legal violations internally—not externally—so that they can investigate the allegation, decide whether there is a violation, and determine whether they can defend against the allegation, identify any wrongdoers, and remediate the situation. Although in a given situation, a company may determine to self-report identified violations, in general, companies want to make that determination themselves, not have employees make it for them by revealing alleged violations to the government without giving companies an opportunity to perform the steps just mentioned.

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2. No. 4:12-345, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012).
3. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).
4. *See, e.g.*, Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).
5. *Cf.* Liu v. Siemens A.G., No. 13 Civ. 317(WHP), 2013 WL 5692504, at *7–8 (S.D.N.Y. Oct. 21, 2013) (holding that Dodd-Frank whistleblower protections do not have extraterritorial application).

Moreover, the Principles of Federal Prosecution of Business Organizations (the "Principles"), which are the governing guidelines and considerations that the U.S. Department of Justice ("DOJ") follows when making determinations about whether and how to charge a company or otherwise resolve corporate criminal violations, place significant emphasis on the implementation and effectiveness of companies' corporate compliance programs.[6] Dodd-Frank furthers those goals as well by offering protection against retaliation—and real remedies for retaliatory actions—to whistleblowers.

In addition to the anti-retaliation provisions included in the statute, Dodd-Frank also directed the SEC to develop a program and to promulgate rules providing monetary awards to individuals who provide original information to the SEC relating to the violation of a securities law, rule, or regulation. The program was fully implemented in mid-2011 and therefore at the time of this writing has been in effect for two and one-half years. Commentators and employment and securities law practitioners commonly refer to the program as a "bounty" program. There is strong disagreement among commentators, academics and practitioners—typically stemming from which side of the issue they are on—about whether this element of Dodd-Frank has been successful and whether it fosters corporate compliance. One point is clear: the SEC's "bounty" program encourages corporate employees who become aware of legal violations to become statutorily defined "whistleblowers" by reporting violations to the SEC in order to qualify for the monetary awards that the agency offers.

Putting aside the debate about the merits or drawbacks of the SEC's monetary award program, the Dodd-Frank anti-retaliation provisions do support corporate compliance efforts, at least in theory. Whistleblowers are, or at least perceive that they are, offered protections for their disclosures. Employees who feel protected in raising sensitive issues with their employers, like allegations of legal violations, are more likely to raise them with their employers rather than with third parties, like law enforcement agencies and officials.

However, when those protections are cut off at the geographic borders of the country—as they were most recently by the district court in the *Asadi* case, and even after the appellate court ruling in that case, could be again—company employees undoubtedly feel exposed. Without those protections in place, employees who discover real evidence of corporate legal violations are likely to go to the place where they feel most likely to obtain legal protections, which is likely to be, accurately or not, government law enforcement and regulatory authorities. Over time, companies will particularly feel the effects of this ruling as it becomes more

6. Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Dep't Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

widely known.[7] Company employees will realize that if they discover evidence of criminal or civil regulatory wrongdoing while working for a U.S. company abroad, they may not be protected from retaliation. Thus, if they report those violations in good faith to their employer and their employer does not embrace those reports and seek to investigate, identify, and remedy them with integrity, they could be transferred, demoted, or subject to other retaliation, like termination. Moreover, these individuals may have no protection from their employer for reports that they make to U.S. law enforcement authorities of the same legal violations.

Increasing the potential impact of the *Asadi* decisions is that modern international companies often engage in manufacturing, sales, services, negotiations, or other business activities in numerous geographic locations around the world. Indeed, approximately forty percent of profit for firms listed in the Standard & Poor's top 500 companies now comes from overseas,[8] and companies are more international in their focus and operations than ever before. Hand-in-hand with the development and expansion of international business endeavors, we have seen the expansion of global law enforcement. New laws have extraterritorial application,[9] existing laws are enforced with increasing reach beyond U.S. borders,[10] and law enforcement bodies in countries around the world are working more collaboratively and in conjunction with each other.[11] Thus, while the enforcement environment is becoming more global and responsible enforcement agencies are finding ways to extend enforcement beyond country borders, *Asadi* may have narrowed the geographic application of a law meant to offer employment protection for individuals who become aware of evidence of legal violations. *Asadi* also made clear that any reports of legal violations must be made to the SEC to trigger the protection of the anti-retaliation provisions. Now that those reports must be made to the SEC, there may be more limited opportunities for internal company

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7. This is especially true as this ruling becomes the basis for additional court decisions, like the recent *Liu v. Siemens A.G.* case. 2013 WL 5692504.

8. Rick Newman, *Why U.S. Companies Aren't So American Anymore*, U.S. NEWS & WORLD REP. (June 30, 2011).

9. *See, e.g.*, Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (amending 15 U.S.C. §§ 77v(a), 78aa, 80b-14).

10. *See, e.g.*, Criminal Information, United States v. Alcatel-Lucent France, S.A., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/12-27-10alcatel-et-al-info.pdf.

11. *See, e.g.*, Press Release, U.S. Dep't of Justice, Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay $11.76 Million Penalty (Apr. 16, 2013) (acknowledging assistance of United Kingdom law enforcement authorities in investigation), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-431.html; Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011) (acknowledging law enforcement assistance from authorities in Greece, Poland, and the United Kingdom), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html; Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010) (acknowledging assistance from Costa Rican and French law enforcement authorities), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

consideration of such issues.

Conceivably, the substantive area in which this tension may have the greatest impact on corporate compliance is that of international anti-corruption and bribery enforcement. Certain countries are considered by commentators, law enforcement agencies, and non-governmental organizations alike to have higher risk profiles in terms of the likelihood of corruption and bribery activities in those jurisdictions.[12] At the same time that there are more opportunities in those countries for foreign bribery, money laundering, or other corruption, there may be fewer employment protections offered to employees of U.S. companies doing business there for reporting violations internally before going to external government law enforcement authorities.

This Article (1) introduces the question of extraterritorial application of Dodd-Frank whistleblower protections with a hypothetical scenario; (2) examines the compliance objectives of the Principles; (3) reviews the statutory whistleblower protections afforded by Dodd-Frank; (4) explains how the law came to deny anti-retaliation protection for a U.S. citizen working for a U.S. company abroad and require SEC reporting by examining the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[13] and analyzing the *Asadi* case and other key federal court cases considering the extraterritorial application of the Dodd-Frank whistleblower protections in the wake of *Morrison*; and (5) discusses the tension between the compliance objectives of the Principles and the *Asadi* district court and appellate decisions. This Article concludes by discussing the importance of the *Asadi* decisions for U.S. companies with employees working abroad, and by advocating for those companies to view *Asadi* as a call for strengthening internal compliance programs to encourage internal reporting.

12. *See, e.g.*, CORRUPTION PERCEPTIONS INDEX 2012, TRANSPARENCY INTERNATIONAL, *available at* http://files.transparency.org/content/download/537/2229/file/2012_CPI___N.pdf; *see also* GLOBAL CORRUPTION BAROMETER 2013, *available at* http://www.transparency.org/whatwedo/pub/global_corruption_barometer_2013.

13. 130 S. Ct. 2869 (2010).