

Extraterritorial Application of Dodd-Frank Whistleblower Statute in \$30-35 Million Reward

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On September 22, 2014, the Securities and Exchange Commission (SEC) [announced](#) the largest reward ever given to a whistleblower under the [whistleblower provision](#) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Little is known about the reward of \$30-35 million because much information, such as the name of the offending company and the name of the whistleblower, was redacted, but one thing that is known is that the whistleblower was living in a foreign country. This fact may raise an issue of whether the SEC has appropriately applied a U.S. law in a foreign country; i.e., whether the SEC may apply the U.S. law extraterritorially.

Section 922 of Dodd-Frank, the whistleblower provision, has subsections setting up the whistleblower rewards program and prohibiting retaliation against whistleblowers. The rewards program, set up by section 922(b), directs the SEC to pay an award to any whistleblower voluntarily providing original information to the SEC that leads to the successful enforcement of an administrative or judicial action. The amount of the award shall be not less than 10 percent and not more than 30 percent of the total amount of what is collected in monetary sanctions. Section 922(h) prohibits such retaliatory actions against whistleblowers as discharge, demotion, suspension, threats, or harassment.

A major, fairly recent case concerning extraterritoriality in federal securities law is the 2010 Supreme Court decision, [Morrison v. National Australia Bank](#). This Supreme Court case held that foreign plaintiffs suing foreign and American defendants for alleged fraud in connection with securities traded on foreign securities exchanges do not have a cause of action under U.S. federal securities laws. The majority opinion held that, since the plain language of [section 10\(b\)](#) of the Securities Exchange Act, the general antifraud provision, does not provide a cause of action to foreign plaintiffs suing foreign defendants for fraud in connection with securities traded on foreign securities exchanges, Congress intended that the provision apply only within the territorial jurisdiction of the United States. “Unless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions’” (quoting from [EEOC v. Arabian American Oil Co.](#)). For more on the **Morrison** case, see a previously published legal sidebar: [Extraterritoriality in Securities Regulation: Morrison v. National Australia Bank](#).

In a footnote in its order announcing this whistleblower reward, the SEC defended the appropriateness of the reward to a person living in a foreign country, despite the Supreme Court’s decision in **Morrison**. The SEC reasoned that such application of the whistleblower reward provision is appropriate because the claimant’s information led to the successful enforcement of a covered action brought in the U.S., thereby providing a kind of domestic application, since the “particular aspect that is the ‘focus of congressional concern’ has a sufficient U.S. territorial nexus.” As support for its argument that there is in the instant situation a sufficient U.S. territorial nexus, the SEC quoted from an April 2014 U.S. Court of Appeals for the Second Circuit (Second Circuit) decision ([European Community v. RJR Nabisco, Inc.](#)), which applied **Morrison** and found that “[i]f domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States.” The SEC went on to state:

In our view, there is a sufficient U.S. territorial nexus whenever a claimant’s information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the

U.S. securities laws, by the Commission, the U.S. regulatory agency with enforcement authority for such violations. When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas.

The SEC also made a distinction between the possible extraterritorial application of the whistleblower subsection of Dodd-Frank section 922 and the anti-retaliation subsection. The Second Circuit in August 2014 held in [Liu v. Siemens](#) that there was an insufficient territorial nexus for the anti-retaliation protections to apply to a foreign whistleblower whose company retaliated against him after he made damaging reports concerning his foreign employer. The SEC stated:

[W]e do not find that decision controlling here; the whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions, which are generally focused on preventing retaliatory employment actions and protecting the employment relationship.

As of the date of this sidebar, CRS has not discovered any formal challenges to the SEC's whistleblower reward to a resident of a foreign country. Because of the arguments provided in the footnote to the recent large reward, the SEC appears well-equipped to defend the reward should any formal complaints occur.

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