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Contacts:

Christopher R. Hall
Chair

Nicholas J. Nastasi
Vice Chair

Brett S. Covington
Newsletter Editor

Brittany E. McCabe
Contributor

Justin B. Ettelson
Contributor

Marisa R. De Feo
Contributor

Saul Ewing LLP

White Collar and Government Enforcement Practice

White Collar Watch

An eye on whistleblowers, false claims and compliance

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SEC at odds with Siemens over whether whistleblower protections extend to employees who report wrongdoing directly to their companies

by Brittany E. McCabe and Christopher R. Hall

IN BRIEF

- **The U.S. Securities and Exchange Commission asserts its position with an amicus brief supporting whistleblowers using internal compliance programs**
- **Siemens' support for a narrow construction of Dodd-Frank whistleblower protections could undermine industry efforts to encourage internal reporting**

The U.S. Securities and Exchange Commission ("SEC") is seeking to expand the definition of a corporate whistleblower to protect employees who report company wrongdoing through internal compliance programs.

The move comes in the form of an amicus brief filed by the SEC in the *Siemens China Ltd.* case. *Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Appellant, Meng-Lin Liu v. Siemens, A.G.*, 2014 WL 663875 (2d Cir. Feb. 20, 2014) (No. 13-4385). In this case, the company terminated a former compliance officer after he reported alleged compliance issues internally, and the employee only then reported the possible Foreign Corrupt Practices Act ("FCPA") violations to the SEC. The employee subsequently brought an action in the U.S. District Court for the Southern District of New York against Siemens under the Anti-Retaliation Provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act claiming the illegal retaliation.

Siemens moved to dismiss on the ground that the employee did not qualify as a "whistleblower." The company argued that the Dodd-Frank Anti-Retaliation Provision protects only employees who report to the SEC while employed. In this case, the plaintiff did not report to the SEC until after the company terminated him.

The district court granted Siemens' motion to dismiss on the ground that the Anti-Retaliation Provision of the Dodd-Frank Act did not protect individuals outside of the United States. The district court did not rule on whether Dodd-Frank protects employees who report wrongdoing internally and wait until after termination to whistleblow to the SEC.

In its amicus brief to the Second Circuit, the SEC asserted that Dodd-Frank and SEC regulations protect whistleblowers whether they report to their employers or to the SEC directly. This interpretation, the SEC noted, encourages employees to report internally at their companies before reporting to the SEC. The commission further noted that it had previously adopted clarifying rules on retaliation which outline "three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission."

The SEC acknowledged the Fifth Circuit's reading of anti-retaliation provisions in *Asadi v. G.E. Energy (USA), L.L.C.*, in which the court determined that "the whistleblower protection provision unambiguously requires individuals to provide information ... to the SEC to qualify for protection." The commission noted, however, that the Fifth Circuit's interpretation would have "no appreciable effect in deterring employers from taking adverse employment action for internal reports." In contrast, the SEC's more expansive interpretation furthered the objective of incentivizing individuals to report internally first.

The SEC amicus brief, while adverse to Siemens in this case, does not necessarily represent a position adverse to industry. A Siemens' victory – while possibly true to the strict letter of the law – might well vindicate the company's interests only in this case. In a future year, with a different employee, the company might well rue the day of any victory here when an employee – concerned about retaliation – scurries first to the SEC rather than the company's internal reporting channel. But these issues are complex, the strategies difficult to choose, and the future implications impossible to predict. Saul Ewing's White Collar and Government Enforcement Practice, with its eye on whistleblower issues, will keep you posted as this case unfolds.

Fourth Circuit decision tolling False Claims Act statute of limitations leaves government contractors vulnerable to whistleblower claims

By Justin B. Ettelson

IN BRIEF

- **Supreme Court asked to review ruling in *Halliburton* case in which the Fourth Circuit ruled that a World War II-era law trumps the statute of limitations on prosecution of whistleblower claims under the False Claims Act.**
- **The decision could affect contractors in an array of industries who supply goods and services to the government if the Supreme Court does not act.**

Government contractors could face whistleblower actions for alleged wrongdoing as far back as at least 12 years ago if the U.S. Supreme Court does not weigh in on a Fourth Circuit decision that effectively extends the deadline to bring whistleblower claims against those who defraud the government during wartime.

Presently, the Supreme Court is considering a petition for review of the Fourth Circuit's decision that held that the statute of limitations for the False Claims Act ("FCA") was suspended – because the United States was "at war" under the Wartime Suspension of Limitations Act ("WSLA") – on October 11, 2002 when Congress authorized the president to use military force in Iraq. In addition, the Fourth Circuit found that the WSLA applies to civil claims as well as criminal prosecutions.

The petition for review was filed in June 2013 by Halliburton Company, Kellogg Brown & Root Services, Inc., KBR, Inc., and Service Employees International (collectively, "Halliburton"), in a case alleging they fraudulently billed the United States for services provided to military forces in Iraq in 2005. The defense industry, however, likely would not be the only industry subject to the extended deadline for *qui tam* actions if the Fourth Circuit's decision is undisturbed or upheld by the Supreme Court. The ramifications could potentially extend to health care providers, Medicare and Medicaid billers, financial institutions, pharmaceutical and medical device companies, construction contractors and many others that provide goods and services to the United States.

Under the FCA, *qui tam* actions must be brought within six years after the date on which the alleged violation occurred. However, the WSLA was enacted during World War II to extend the time to bring charges relating to criminal fraud against the United States. Specifically, "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces … the running of any statute of limitations applicable to any offenses involving fraud or attempted fraud against the United States or any agency thereof … [is] suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation … or by a concurrent resolution of Congress."

In the *Halliburton* case, an employee of the company originally filed a *qui tam* action in 2006 alleging that KBR fraudulently billed the government from mid-January 2005 until April 2005 for providing logistical services in Iraq. After filing a series of amended complaints in 2008, 2009 and 2010 – all of which were dismissed by the district court – the employee refiled the current complaint in June 2011 and it was unsealed in August 2011. In November 2011, the district dourt dismissed the June 2011 complaint concluding that, among other reasons, it was filed beyond the six-year statute of limitations under the FCA and was not tolled by the WSLA. The Fourth Circuit reversed the district court's decision determining that the United States was "at war" under the WSLA because on October 11, 2002, "Congress authorized the President to use military force to 'defend the national security of the United States against the continuing threat posed by Iraq' … ." In addition, the Fourth Circuit found that hostilities had not ended in Iraq when the qui tam action was filed because "[neither] the President nor Congress had met the formal requirements of the [WSLA] for terminating the period of suspension when the claims at issue were presented for payment." Consequently, the Fourth Circuit held that the statute of limitations under the FCA is tolled. In reaching this decision, the Fourth Circuit referenced the Fifth Circuit case of *United States v. Pfluger*. In that 2012 case, the United States used the "at war" provision of the WSLA to extend the statute of limitations in a case of fraud by a soldier accused of taking kickbacks in connection with fuel contracts he arranged. The Fifth Circuit in *Pfluger* similarly ruled that the WSLA "mandates formal requirements for the termination clause to be met."

Halliburton also argued that the WSLA does not apply to civil claims because the statute applies to "offense[s] involving fraud" and that "'offense' ordinarily means only crimes." The Fourth Circuit rejected this argument concluding that "the text of the WSLA, the 1994 amendments, and the legislative history" is persuasive enough to hold "that the WSLA applies to civil claims."

If the Supreme Court accepts the Fourth Circuit's interpretation of the WSLA, another particularly problematic issue is the fact that there has been no formal declaration by either the President or Congress concerning the termination of hostilities in Iraq, and, for that matter, Afghanistan. Consequently, government contractors could be subject to liability under the FCA for an indefinite period of time – and notwithstanding whether the alleged violations have any nexus to either conflict.

Therefore, all companies should consider the *Halliburton* case as a reminder to review the effectiveness of compliance and whistleblower programs to ensure that possible violations are detected early and appropriately reported to management and, in consultation with legal counsel, self-reported to the government, if necessary. Should you have any questions about your compliance programs or the potential reportability of a violation, please do not hesitate to contact the author.

Government seeks to limit First Amendment application to False Claims Act under *Caronia*

by Marisa R. De Feo and Nicholas J. Nastasi

IN BRIEF

- **Government files a Statement of Interest in *Cestra* case to argue that free speech is not an issue in FCA off-label drug promotion cases.**
- **If the court rejects the Government's argument, pharmaceutical producers and medical device manufacturers may gain more freedom to promote their products off-label so long as they are truthful.**

Off-label prescriptions are common among physicians, occurring between 15 percent and 50 percent of the time for any given drug. However, under the False Claims Act ("FCA"), a non-healthcare provider can violate the FCA by engaging in off-label marketing that causes or induces physicians to prescribe drugs for non-FDA approved uses to patients using Medicare, Medicaid or other government programs.

In 2012, however, in *U.S. v. Caronia*, the Second Circuit ruled that off-label promotion by an individual may be constitutionally-protected commercial speech if it is truthful and non-misleading. In *Caronia*, a pharmaceutical company employee who organized speaker programs was convicted of conspiring to distribute a misbranded drug in interstate commerce. The drug was approved for treating adults up to age 65 for certain conditions associated with narcolepsy. However, the drug also demonstrated effectiveness for other indications, which were not approved by the FDA. Caronia was recorded advising physicians that the drug could also be used to treat a variety of off-label conditions and that it was effective in an increased age demographic. Subsequently, the Government brought criminal charges against Caronia for marketing a misbranded drug in violation of the Food, Drug and Cosmetic Act and for conspiring to market a misbranded drug, arising from the off-label promotion. After evidence demonstrated the truthfulness of Caronia's statements, the court held that the statements were protected commercial speech.

To overcome this broad First Amendment protection established in *Caronia*, the Government now frequently pleads that off-label marketing was either false or misleading. In an attempt to further distance itself from *Caronia*, the Government filed a Statement of Interest late last year seeking to completely bar the First Amendment protections as applied to the FCA in *U.S. ex rel. Cestra, et al. v. Cephalon, Inc.* In *Cestra*, the defendant filed a motion to dismiss, arguing, among other things, that its alleged off-label promotion with regard to FCA violations was protected speech under the First Amendment pursuant to *Caronia*. In its Statement of Interest, the Government argued that an off-label promotion FCA case does not implicate the free speech concerns because under the FCA it is "irrelevant whether a party causes the submission of a false claim by words, by conduct, or by a combination of both." In other words, even though speech is the means by which the false claim is submitted, the First Amendment is not applicable. The Government also seeks to limit the First Amendment defense to criminal prosecutions and eliminate it from the civil actions where the Government has recovered billions of dollars for off-label promotion of pharmaceutical products.

The U.S. District Court for the Southern District of New York has not yet ruled on the motion to dismiss in the *Cestra* case and it is unclear whether the court will address the issues raised in the Government's Statement of Interest relating to FCA claims. If the court finds the speech at issue false and misleading, the First Amendment concerns will be moot. No other courts have directly addressed the application of the First Amendment to the FCA. However, should the Government's position be accepted, it will undoubtedly diminish the impact of the *Caronia* case. If the court rejects the Government's argument, it will be more difficult for the

Government to establish FCA liability for the off-label promotion of pharmaceutical products and medical devices. Many times such promotion is supported by studies establishing the efficacy and safety of such use – even without FDA approval. In such cases, it may be difficult for the Government to prove that the commercial speech is false and misleading. Saul Ewing will continue to monitor updates on this topic.

The Saul Ewing White Collar and Government Enforcement Practice

Christopher R. Hall, Chair
215.972.7180
chall@saul.com

Nicholas J. Nastasi,
Vice Chair
215.972.8445
nnastasi@saul.com

Jennifer L. Beidel
215.972.7850
jbeidel@saul.com

Andrea P. Brockway
215.972.7114
abrockway@saul.com

Brett S. Covington
202.295.6689
bcovington@saul.com

Marisa R. De Feo
215.972.1976
mdefeo@saul.com

Jennifer A. DeRose
410.332.8930
jderose@saul.com

Justin B. Ettelson
215.972.7106
jettelson@saul.com

Patrick M. Hromisin
215.972.8396
phromisin@saul.com

Aaron Kornblith
202.295.6619
akornblith@saul.com

Keith R. Lorenze
215.972.1888
klorenze@saul.com

Timothy J. Lyon
412.209.2516
tlyon@saul.com

Brittany E. McCabe
215.972.7125
bmccabe@saul.com

David R. Moffitt
610.251.5758
dmoffitt@saul.com

Joseph F. O'Dea, Jr.
215.972.7109
jodea@saul.com

Christine M. Pickel
215.972.7785
cpickel@saul.com

Courtney L. Schultz
215.972.7717
cschultz@saul.com

Gregory G. Schwab
215.972.7534
gschwab@saul.com

Brian P. Simons
215.972.7194
bsimons@saul.com

Matthew J. Smith
215.972.7535
mjsmith@saul.com

Nicholas C. Stewart
202.295.6629
nstewart@saul.com

Meghan Talbot
215.972.1970
mtalbot@saul.com

Chad T. Williams
302.421.6899
cwilliams@saul.com

Baltimore, MD
500 East Pratt St.
Charles O. Monk, II
410.332.8668

Boston, MA
131 Dartmouth St.
Richard D. Gass
617.723.3300

Chesterbrook, PA
1200 Liberty Ridge Dr.
Michael S. Burg
610.251.5750
Nathaniel Metz
610.251.5099

Harrisburg, PA
2 North Second St.
Joel C. Hopkins
717.257.7525

Newark, NJ
One Riverfront Plaza
Stephen B. Genzer
973.286.6712

New York, NY
555 Fifth Ave.,
Michael S. Gugig
212.980.7200

Philadelphia, PA
1500 Market St.
Bruce D. Armon
215.972.7985

Pittsburgh, PA
One PPG Place
Charles Kelly
412.209.2532
David R. Berk
412.209.2511

Princeton, NJ
750 College Rd. E
Marc A. Citron
609.452.3105

Washington, DC
1919 Pennsylvania Ave, NW
Mark L. Gruhin
202.342.3444
Andrew F. Palmieri
202.295.6674

Wilmington, DE
222 Delaware Ave.
Wendie C. Stabler
302.421.6865
William E. Manning
302.421.6868