

Corporate & Financial Weekly Digest

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Whistleblower Must Provide Information to the SEC to State a Retaliation Claim Under Dodd-Frank

Co-authored by [Gregory C. Johnson](#)

A New York federal district court recently ruled that, with limited statutorily defined exceptions, a whistleblower asserting private relation claims under the Dodd-Frank Wall Street Reform and Consumer Protection Act must allege that the information he provided was reported to the Securities and Exchange Commission. The court held, however, that the Dodd-Frank Act does not require that the whistleblower directly provide the information to the SEC in order to pursue a claim. Rather, all that is required is that the whistleblower allege that he acted jointly in an effort to provide the information concerning the alleged misconduct to the SEC.

Patrick Egan was a salesman at TradingScreen, Inc., a privately held investment services firm, when he discovered that its chief executive officer was diverting company assets to other entities. Mr. Egan reported the wrongdoing to the company president, who in turn notified the board of directors, and an internal investigation led by a law firm confirmed his allegations. However, the CEO managed to gain control of the board of directors, avoiding termination, and fired Mr. Egan. Mr. Egan sued, seeking relief on various grounds including under the Dodd-Frank Act's provisions permitting a whistleblower who reports securities violations to assert a private right of action if he is retaliated against for providing the information.

Defendants moved to dismiss, arguing, among other things, that the Dodd-Frank Act requires whistleblowers to provide the information to the SEC directly in order to pursue a private right of action. In opposing the motion, Mr. Egan argued that the retaliation provisions did not require that he report the information to the SEC and that, in any event, he had satisfied the requirement by reporting the wrongdoing and cooperating in the internal investigation. Mr. Egan also argued that his disclosures fell under one of several provisions that explicitly did not require disclosure to the SEC.

The U.S. District Court for the Southern District of New York held, as a matter of first impression, that, with the exception of four statutorily defined categories of disclosures, to pursue a retaliation claim, a whistleblower must allege that they provided information to the SEC. In so holding, the court pointed out that an examination of the statutory language indicates that Congress "intended to encourage whistleblowers reporting such [securities] violations to

report to the SEC." The court also held that Mr. Egan's disclosures did not fall under any of the four categories of disclosures that do not require that the information be reported to the SEC.

However, the court also ruled that it was not necessary for Mr. Egan to allege that he had provided the information to the SEC directly; allegations that the information was provided jointly with the law firm conducting the internal investigation were sufficient. Although Mr. Egan had adequately alleged that he acted jointly with the law firm that conducted the internal investigation, his complaint did not set forth sufficient facts to support his allegation, upon information and belief, that the law firm actually provided the information to the SEC. Because it appeared during oral argument that Mr. Egan may be able to provide sufficient facts to support his allegation that the information he disclosed was provided to the SEC, the court granted him leave to amend his complaint. (*Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011))

Katten Muchin Rosenman LLP

Charlotte Chicago Irving London Los Angeles New York Washington, DC