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International Information for International Business

VOLUME 20, NUMBER 7 >>> JULY 2014

Understanding the Global Reach of U.S. Whistleblower Anti-Retaliation Protections

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As the Securities and Exchange Commission's Whistleblower Program continues to gain traction, reports of compliance concerns are likely to increase. Created under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the SEC's Whistleblower Program authorizes payment of bounties to qualified whistleblowers who report "original information" regarding possible violations of the federal securities laws to the SEC.[1] Dodd-Frank also includes broad protections against retaliation for whistleblowers who 1) provide information to the SEC, 2) assist in any SEC investigation or action relating to such information, or 3) make disclosures that are "required or protected" under various securities laws, including the Sarbanes-Oxley Act ("SOX").[2]

U.S. data shows that retaliation claims are on the rise: The Equal Employment Opportunity Commission ("EEOC") reports that retaliation charges filed with the EEOC under all statutes which it enforces amounted to 41.1 percent of the total charges filed for FY 2013,[3] and the Occupational Health and Safety Administration ("OSHA"), which receives and investigates whistleblower retaliation claims under more than 20 U.S. laws, including SOX, reports that the total number of whistleblower retaliation claims increased in FY 2013, as did SOX retaliation claims.[4]

As for foreign whistleblowers, nearly 12 percent of the whistleblower tips received by the SEC during FY 2013 came from employees working outside the U.S., and an unknown number of additional employees working outside the U.S. reported concerns about potential violations of law only to their employers.[5] That number represents nearly a 1 percent increase compared to FY 2012.[6]

Given the increasing trend of foreign whistleblower tips received by the SEC, this article explores whether employees working outside the U.S. who report potential violations of the securities laws, either internally or externally, are protected by the anti-retaliation provisions under either SOX or Dodd-Frank.

Extraterritorial Reach of SOX Whistleblower Protection Provisions

Section 806 of SOX provides protection from retaliation for employees of entities subject to the registration or reporting requirements of the Securities Exchange Act of 1934 ("Exchange Act").[7] Specifically, Section 806 protects any employee of a publicly traded company from discharge or other discriminatory conduct by his or her employer because of "any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of the federal securities laws or any federal statute relating to fraud against shareholders or any SEC rule or regula-

tion "when the information or assistance is provided to or the investigation is conducted by (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[8] By its express terms, SOX does not condition protection from retaliatory conduct upon the external reporting of information to the SEC, another federal regulator, or to Congress.

The text of Section 806 is silent on its extraterritorial application. The legislative history of Section 806 reflects that Congress was primarily concerned about the lack of adequate, uniform state law protections for whistleblowers even though many publicly traded companies did business across the U.S.[9] Where Congress intended SOX provisions to apply extraterritorially, it made its intent clear. For example, in Section 1107 of SOX, Congress amended 18 U.S.C. § 1513, which makes it a crime to retaliate against a witness, victim or informant, to include an express provision of extraterritoriality.[10]

The U.S. Court of Appeals for the First Circuit, which is the only court of appeals to date to address the question, held that there is no extraterritorial reach of Section 806.[11] That court found no mention of extraterritoriality in the language of Section 806, and its lengthy review of the legislative history of Section 806 found no indication that Congress considered, much less intended, Section 806 to apply outside the U.S.[12] It recognized the presumption announced by the U.S. Supreme Court that, where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[13] The Court found that Congress provided for extraterritorial reach in the SOX criminal whistleblower provision, Section 1107, but did not do so in the civil whistleblower provision, Section 806, which reflected that Congress knew how to expressly provide for extraterritorial application where it so intended.[14] For those reasons, the First Circuit concluded that Section 806 had no extraterritorial application.[15]

The U.S. Department of Labor Administrative Review Board ("ARB") and administrative law judges have reached the same conclusion, and dismissed complaints where the complainants were foreign residents working for foreign subsidiaries of U.S. companies outside the U.S. and the retaliation complaint was grounded in adverse actions taking place outside the U.S.[16] In a handful of situations, a significant "nexus" between the alleged wrongful conduct, the complainant, and the U.S. caused the tribunal to conclude that Section 806 protections attached to an employee working outside the U.S.[17]

In June 2010, the U.S. Supreme Court issued its decision in *Morrison v. National Australia Bank*[18] (*see WSLR, July 2010, page 9*). There, the Court considered whether Section 10(b) of the Exchange Act allowed Australian investors to recover for securities fraud that inflated the value of shares traded on Australian exchanges where a portion of the fraud involving a U.S. subsidiary took place in the U.S. The Court dismissed plaintiffs' claims, holding that the antifraud provisions of Section 10(b) of the Exchange Act did not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges, even if the losses could have arisen from fraudulent conduct in the U.S.

In its opinion, the Court set forth the framework for determining the extraterritorial application of federal statutes. First, the Court reaffirmed the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[19] In the Court's view, this principle "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters."[20] According to the Court, courts must "apply the presumption in all cases," thereby "preserving a stable background against which Congress can legislate with predictable effects."[21] The presumption that a statute's reach ends at the U.S. border can be overcome only where "the affirmative intention of the Congress [is] clearly expressed to give a statute extraterritorial effect."[22] The Court succinctly instructed: "When a statute gives no clear indication of an extraterritorial application, it has none."[23] After examining the language of Section 10(b) and its legislative history, the Court concluded there was no clear congressional intent to apply the statute extraterritorially.[24] The Court declined to infer a congressional intent to create extraterritorial application from a different section of the Act that has some limited applicability to transactions in other countries.[25]

The Solicitor General in *Morrison* argued that no extraterritorial application of Section 10(b) was warranted because the fraud at issue involved significant conduct in the U.S. that was material to the fraud's success. The Court rejected that argument, explaining that it would effectively nullify the presumption against extraterritoriality because it "is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States."[26]

To determine whether the domestic activity in *Morrison* was sufficient to cause the Section 10(b) cause of action to fall outside the presumption against extraterritoriality, the Court looked at the text and structure of the Exchange Act to find the "focus" of congressional concern. Finding that the "focus" was not on the "the place where the deception originated," but rather on "the purchase or sale of a security listed on an American stock exchange and the purchase or sale of any security in the United States," the Court concluded that the petitioners could not escape the presumption because the shares were not listed on an American exchange and the petitioners had not purchased the shares in the U.S.[27]

Shortly after the June 2010 *Morrison* decision, Congress apparently intended to partly overrule *Morrison* by inserting Section 929P(b), captioned "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws," into Dodd-Frank in an effort to provide federal courts with jurisdiction to hear cases brought by

   ISSN 1357-0889

the SEC or the Department of Justice ("DOJ") under Section 10(b) that involve extraterritorial elements.[28] It also added Section 929Y, titled "Study on Extraterritorial Private Rights of Action," to Dodd-Frank, which directs the SEC to "solicit public comment and thereafter conduct a study to determine the extent to which private rights of action" should be extended to transnational securities frauds[29] (*see analysis at WSLR, October 2010, page 23*).

To be sure, there is disagreement whether Section 929P(b) overturns *Morrison* and enlarges the scope of the government's enforcement powers with respect to Section 10(b) cases with extraterritorial elements, or whether its use of jurisdictional language fails to expand the substantive reach of Section 10(b).[30] There should, however, be no disagreement that Congress understood, from *Morrison* and other Supreme Court cases, that it needed to make "a clear statement that a statute applies overseas"[31] : It sought to provide such a statement in Section 929P(b) and asked the SEC, in Section 929Y, to evaluate the merits of extraterritorial private rights of action.

Contemporaneous with its adoption of these sections of Dodd-Frank, Congress adopted Section 929A, which amended Section 806 to clarify that it reaches employees of a company's subsidiaries and affiliates. Had Congress intended Section 806 to have extraterritorial application, it could have made that intent clear in this amendment. It did not. As the Supreme Court instructed in *Russello v. United States*, when Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[32] Because Congress expressly provided for limited extraterritorial jurisdiction in Section 929P(b) of Dodd-Frank, it is reasonable to presume that it intentionally excluded employees outside the U.S. from the protections of Section 806.

Applying *Morrison*, the ARB, in a 3-2 *en banc* decision issued in December 2011, held that the anti-retaliation protections in Section 806 have no extraterritorial application, and dismissed a retaliation complaint filed by a Colombian employee working in Colombia for a Colombian company that was an indirect subsidiary of a Dutch company whose shares traded on the New York Stock Exchange.[33] The complainant alleged that he had sent e-mails to corporate executives in Houston reporting on tax avoidance schemes outside the U.S. and claimed that executives in the U.S. determined to fire him as a result of those e-mails in violation of Section 806. He maintained that his claim did not require an extraterritorial application of Section 806 because the accounting practices that led to the alleged tax fraud occurred in the U.S. and that the allegedly fraudulent scheme he disclosed and the retaliatory termination of his employment were perpetrated by American executives within the U.S. The ARB rejected that argument.[34]

The ARB then examined whether Section 806 included extraterritorial application. Reviewing the text of the statute and the legislative history, the ARB found no indication that Congress intended Section 806 to apply outside the U.S. It recognized that Congress, in passing Dodd-Frank, vested federal courts with extraterritorial jurisdiction over government enforcement proceedings in Section 929P and provided extraterritorial effect to the criminal sanctions for retaliation against a whistleblower who provides information to a law enforcement officer in Section 1107(d), and found that the silence of Section 806 "as to its extraterritorial application requires that we not extend it in that way."[35] On appeal to the U.S. Court of Appeals for the Fifth Circuit, the parties asked the court to determine whether Section 806 applies outside the U.S. The Fifth Circuit concluded that it was unnecessary for it to reach the extraterritoriality question.[36] Instead, the court found that the complainant failed to show that he was providing information that he reasonably believed violated any of the six categories of U.S. law enumerated in Section 806 — as opposed to violations of *Colombian* law.[37]

Lower courts that have explored the limits of extraterritorial jurisdiction since *Morrison* have applied the Supreme Court's framework to dismiss civil actions against foreign companies under the securities laws and to a number of other federal statutes providing civil remedies to private plaintiffs outside the securities laws.[38] Last term, the Supreme Court, in *Kiobel v. Royal Dutch Petroleum Co.,* applied the *Morrison* framework to analyze the extraterritorial reach of the Alien Tort statute ("ATS"), which creates federal jurisdiction for civil actions brought by aliens for torts committed in violation of the law of nations or a U.S. treaty.[39] The Court affirmed the dismissal of an ATS complaint alleging violations of international law in Nigeria, holding that the presumption against applying federal statutes extraterritorially applied to the ATS. The Court explained that nothing in the text or history of the ATS overcomes the presumption against construing statutes to reach "conduct in the territory of another sovereign." Because "all the relevant conduct" in *Kiobel* "took place outside the United States," the Court held that dismissal of the case was required. The Court added that, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[40] It cautioned that a defendant's "mere corporate presence" in the United States would not suffice because "[c]orporations are often present in many countries."[41]

Extraterritorial Reach of Dodd-Frank's Whistleblower Protection Provisions

Section 922(a) of Dodd-Frank amended the Exchange Act to add a new provision, Section 21F, entitled "Securities Whistleblower Incentives and Protection."[42] Section 21F(b)(1) of Dodd-Frank permits bounties to be paid to "whistleblowers." Section 21F(a)(6) defines a "whistleblower" as any individual or group of individuals "who provide[] . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."

To enforce this protection, Section 21F(h)(1)(B) cre-

ates a private right of action in federal court for individuals alleging unlawful retaliation without first exhausting administrative remedies with the Department of Labor.[43] Dodd-Frank provides a generous limitations period for retaliation claims, authorizing an individual to file suit up to six years after the violation occurs, or three years after material facts were known or reasonably should have been known, provided that the claim is brought within 10 years of the violation,[44] while the SOX limitations period is 180 days. Both Dodd-Frank and SOX permit a successful claimant to recover costs and attorneys' fees. SOX, however, limits damages for retaliation claims to reinstatement and actual back pay, while damages under Dodd-Frank can include double back pay.[45]

As with the statutes at issue in *Morrison* and in *Kiobel*, Section 922(a) of Dodd-Frank is silent on its extraterritorial reach. The Court has been unequivocal that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." It has instructed that, where a statute is silent on extraterritoriality, "silence means no extraterritorial application."[46] Other provisions of Dodd-Frank, like Sections 929P(b) and 929Y, make express references to extraterritoriality. While an argument could be made that Congress, by providing for extraterritorial jurisdiction in Section 929P(b), evidenced its intent to protect foreign whistleblowers from retaliation because such whistleblowers could provide information to the SEC that could be used in enforcement actions, such an argument runs afoul of *Morrison*'s clear instruction: "[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."[47]

As of this writing, two district courts have addressed whether Dodd-Frank's protection against retaliation applies extraterritorially, and both have concluded that it does not.[48] While it is too soon to draw conclusions on whether federal courts will permit Dodd-Frank retaliation claims brought by non-U.S. residents working outside the U.S. to go forward, these decisions cast significant doubt on the viability of such claims.

Recognizing the hurdles imposed by *Morrison* and *Kiobel*, foreign whistleblowers are likely to attempt to plead around the presumption against extraterritoriality by alleging a sufficient amount of conduct in the U.S. to justify application of U.S. law. The quality and extent of conduct in the U.S. required to nullify the presumption, however, is an open question. In *Morrison,* the Court determined that the defendant's registration of American Depository Receipts for trade on the New York Stock Exchange, which subjected the defendant to application of the U.S. securities laws, was not sufficient to overcome the presumption against extraterritorial application of U.S. securities laws to foreign conduct.[49] The Court cautioned that the presumption "would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."[50]

While the Court found that the particular "domestic activity" of the defendants was not enough to displace the presumption, it did not define what conduct would suffice. In *Kiobel*, the "domestic activity" amounted to the "mere" corporate presence of a defendant, which the Court determined was not a sufficient nexus with the U.S. to trigger application of U.S. law. *Kiobel* suggests that something more than the domicile of the defendant corporation is required to overcome the presumption: The claims themselves must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality." Exactly how much "domestic activity" will be sufficient to overcome the presumption against the extraterritorial application of Section 922 remains to be seen.

Conclusion

Retaliation claims — whether filed as Section 806 claims with the Department of Labor or as Section 922 claims in federal court — can pose significant risks for employers.

While it remains to be seen whether the increasing trend of reports from foreign whistleblowers will ultimately lead to an increase in the number of successful retaliation claims, employers should take steps to mitigate the potentially increased risks and costs of defending against retaliation generally.

Most organizations have adopted anti-retaliation policies that are provided to employees, as well as hotlines, whether through a third party vendor, web channel, or intranet link, where employees can report retaliation concerns. In our experience, these policies and hotlines can create a sense of complacency that can be dangerous.

We recommend a number of complimentary strategies for organizations to consider adapting into existing programs, controls and crisis response plans to reduce the risk that retaliatory conduct will occur and to detect and remediate retaliatory conduct if it does occur.

NOTES

[1] 15 U.S.C. § 78u-6(a)(6). Dodd-Frank also authorizes bounty payments to qualifying whistleblowers who provide original information relating to a possible violation of the federal commodities laws (including any rules or regulations) that has occurred, is ongoing, or is about to occur.

[2] Section 21F(h)(1)(A)(i-iii).

[3] U.S. Equal Opportunity Emp't Comm'n, Charge Statistics FY 1997 Through FY 2013, *available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[4] Occupational Safety & Health Admin., Cases Received: FY2005 – FY2013, *available at* http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13.pdf.

[5] U.S. Securities & Exchange Comm'n, 2013 Annual Report to Congress on the Dodd-Frank whistleblower Program, at 22, *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

[6] U.S. Securities & Exchange Comm'n, 2012 Annual Report to Congress on the Dodd-Frank whistleblower Program, at 15, *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.

[7] Foreign private issuers, as defined by Rule 36-4(c) of the Exchange Act, which are subject to SEC reporting and registration obligations, are subject to Section 806. Where a foreign issuer is exempt from SEC filing requirements under Rule 12g3-2(b) of the Exchange Act, it is excluded from coverage. *E.g., Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ April 1, 2005) (finding Section 806 protections did not apply where employer became subject to Exchange Act after a merger on Feb. 2, 2004, but adverse action occurred on Jan. 22, 2004);

   ISSN 1357-0889

Deutschmann v. Fortis Investments, 2006-SOX-80 (ALJ June 14, 2006) (finding Section 806 protections did not apply where corporation was registered only on European stock exchanges with securities exempt from SEC registration under Rule 12g3-2(b)). Conversely, where a foreign entity does business in the United States, it is subject to Section 806 because SOX applies to companies "with a class of securities registered under § 12 of the Securities Exchange Act" or "required to file reports" under the Exchange Act.

[8] 18 U.S.C. § 1514A(a).

[9] *See* S. Rep. No. 107-146 (2002); Statement of Senator Leahy, 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (Section 806 was created to remedy the situation where "corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas . . .) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions.").

[10] 18 U.S.C. § 1513(d).

[11] *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), *cert. denied*, 548 U.S. 906 (2006) (finding no extraterritorial application of Section 806 where complainant was a foreign citizen working abroad who was employed and paid by a foreign subsidiary of a U.S. corporation, whose duties were performed outside the U.S., and whose complaint was made outside the U.S.).

[12] *Id.*, 433 F.3d at 11-15.

[13] *Id.* at 9-11, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted; internal quotations omitted).

[14] *Id.* at 10.

[15] *See also Liu v. Siemens AG*, No. 13-0317, 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013) (dismissing plaintiff's SOX Section 806 retaliation claim, reasoning that disclosures made outside the U.S. are not entitled to SOX Section 806 protection because Section 806 has no extraterritorial application).

[16] *See, e.g.*, *In re Ahluwalia v. ABB, Inc.*, ARB No. 08-008, 2009 WL 6496920 (ARB June 30, 2009); *In re Pik v. Goldman Sachs Group, Inc.*, ARB No. 08-062, 2009 WL 6496922 (ARB June 30, 2009); *In re Salian v. Reedhycalog UK*, ARB No. 07-080, ALJ No. 2007-SOX-20 (ARB Dec. 31, 2008); *In re Ede v. Swatch Group Ltd.*, ARB No. 05-053, 2007 WL 1935560 (ARB June 27, 2007); *In re Pik v. Credit Suisse AG*, ALJ No. 2011-SOX-00006, 2011 WL 841044 (ALJ March 3, 2011); *In re Talisse v. UBS AG*, ALJ No. 2008-SOX-00074, 2009 WL 6496752 (ALJ Jan. 8, 2009); *In re Beck v. Citigroup, Inc.*, ALJ No. 2006-SOX-00003, 2006 WL 3246814 (ALJ Aug. 1, 2006); *In re Concone v. Capital One Financial Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2005); *In re Concone v. Capital One Fin. Corp.*, ALJ No. 2005-SOX-00006, 2004 WL 5030305 (ALJ Dec. 3, 2004).

[17] Where the facts alleged did not require the extraterritorial application of Section 806 because of the "nexus" between the conduct at issue, the employee, and the United States, or the "effects" of the transaction on commerce within the United States and because some of the wrongful conduct occurred in the United States, one court and numerous ALJs have concluded that the protections of Section 806 attached to a foreign employee. *See O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (finding Section 806 protections applied where employee, who worked in France for a U.S. subsidiary, alleged fraud occurred in the U.S., and the alleged retaliatory conduct occurred in the U.S.); *In re Walters v. Deutsche Bank*, 2008-SOX-70 (ALJ March 23, 2009) (finding Section 806 protections applied to an employee who worked in Switzerland but protected activity and decision to retaliate occurred in the U.S.); *In re Penesso v. LLC International, Inc.*, 2005-SOX-16 (ALJ March 4, 2005) (denying summary decision to employer where complainant was a U.S. citizen employed in Italy by the Italian subsidiary of a U.S. corporation, came to respondent's U.S. headquarters to report about financial improprieties he believed were taking place in Italy, and at least one of the retaliatory actions was taken in the U.S.).

[18] 130 S. Ct. 2869 (2010).

[19] *Id.* at 2877.

[20] *Id.*

[21] *Id.* at 2881.

[22] *Id.* at 2877 (internal quotations and citation omitted)

[23] *Id.*

[24] *Id.* at 2881-2882.

[25] *Id.* at 2882.

[26] *Id.* at 2884.

[27] *Id.* at 2888.

[28] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, § 929P(b) (2010).

[29] Dodd-Frank Act, Pub. L. 111-203, § 929Y(a) (2010).

[30] Compare Statement of Representative Paul Kanjorski, 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (purpose of Section 929P(b) "is to make clear" that in actions or proceedings brought by SEC or the Department of Justice, federal securities laws "may have extraterritorial application . . . irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States"); SEC Request for Comments – Study on Extraterritorial Private Rights of Action Request for Comments at 4-5, *available at* www.sec.gov/rules/other/2010/34-63174.pdf; SEC's Memorandum of Law in Opposition to Defendant Tourre's Motion for Judgment on the Pleadings, *S.E.C. v. Goldman Sachs & Co. (Tourre)*, No. 10-3229, 2010 WL 4520690, at *7 n.1 (S.D.N.Y. Oct. 13, 2010) with Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 Harv. Bus. L. Rev. 195, 208 (2011) ("Section 929P was 'stillborn' in that it conferred jurisdiction that could not be used for anything substantive . . . until a further statute were enacted.") Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 Ohio St. L. J. 537, 570-71 (2011) ("the language of the Act as drafted . . . may not have any effect on the application of Section 10(b), depending on the willingness of the courts to overlook the plain language of the statute"); George Conway, *Memorandum on the Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged* (July 21, 2010), *available at* http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf.

A federal district court in Illinois recently reviewed the ambiguity of Section 929P(b) and questioned whether that provision could be interpreted to nullify *Morrison*'s bright line rule on the extraterritorial reach of the Exchange Act. *SEC v. A Chicago Conv. Ctr., LLC*, 961 F. Supp. 2d 905, 911-12 (N.D. Ill. 2013). The Second Circuit, in *United States v. Vilar*, 729 F.2d 62 (2d Cir. 2013), held that Section 10(b) of the Exchange Act does not apply to extraterritorial conduct, whether liability is sought civilly or criminally, but found that the record at trial "confirms that [defendants] did perpetrate fraud in connection with domestic securities transactions" and affirmed the convictions. *Id.* at 70. Because defendants' misconduct and conviction occurred prior to the passage of Dodd-Frank, the Second Circuit did not address the applicability of Section 929P(b).

[31] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991).

[32] 464 U.S. 16, 23 (1983). *See also Morrison*, 130 S. Ct. at 2883 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.").

[33] Final Decision and Order of the Department of Labor's Administrative Review Board, *Villanueva v. Core Labs. NV*, ARB Case No. 09-108, ALJ Case No. 2009-SOX-006, 2011 WL 6981989, at *1 (Dep't of Labor, Dec. 22, 2011) (*en banc*).

[34] The ARB identified four factors in cases involving potential extraterritorial application of Section 806 to consider whether the quality and quantity of contacts with the U.S. were sufficient to void the presumption of extraterritoriality: 1) the location of the protected activity; 2) the location of the job and the company the complainant is fired from; 3) the location of the retaliatory act; and 4) the nationality of the laws allegedly violated that the complainant has been punished for reporting. Because Mr. Villaneuva worked in Colombia and submitted his internal report in Colombia regarding violations of foreign laws and did not identify any violations of U.S. law, the ARB concluded that the quality and quantity of domestic contacts were not sufficient to overcome the presumption. In *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-20 (ALJ Jan. 11, 2013), the ALJ applied these four factors to the facts alleged by the complainant, a U.S. citizen working for Delta Airlines in Paris, France, who complained of unlawful retaliation under the Ford Aviation Investment and Reform Act for the 21st Century after he reported that his supervisor falsified safety clearance documents. Because the ALJ concluded that the complaint fell within the activity protected by statute, the ALJ found that the alleged facts did not require extraterritorial application of the statute.

[35] Final Decision and Order of the Department of Labor's Administrative Review Board, *Villanueva v. Core Labs. NV*, ARB Case No. 09-108, ALJ Case No. 2009-SOX-006, 2011 WL 6981989, at *9 (ALJ Dec. 22, 2011). In an *amicus* brief filed by the U.S. Department of Labor in the ARB proceeding, the Department of Labor argued that "SOX Section 806 does not have extraterritorial reach over alleged acts of employer retaliation occurring in a foreign nation." Brief for the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae, *Villanueva v. Core Labs NV,* ARB Case No. 09-108, ALJ Case No. 2009-SOX-006 (Dep't of Labor Aug. 23, 2011), *available at* http://www.dol.gov/sol/media/briefs/main.htm.

[36] *Villanueva v. United States Department of Labor*, 743 F.3d 103 (5th Cir. 2014).

[37] *Id.*

[38] Applying *Morrison* in securities law cases, courts have found that the presence of one or more connections to the U.S. has not been sufficient to overcome the strong presumption against extraterritoriality. *E.g., Quail Cruise Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09-23248-CIV (S.D. Fla. Aug. 6, 2010) (closing of a transaction in the United States that otherwise has no connection to this country does not overcome the *Morrison* presumption); *In re Alstom SA Sec. Litig.,* No. 03 Civ. 6595 (VM) (S.D.N.Y. (Sept. 13, 2010) (dismissing claims even though a "buy order" was placed in the U.S. by U.S. citizens); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.,* No. 08 Civ. 1958 (JGK), at 20-22 (S.D.N.Y. Oct. 4, 2010) ("the mere act of electronically transmitting a purchase order from within the United States" to a foreign exchange is "insufficient to subject the purchase to the coverage of Section 10(b)"); *Absolute Activist Value Master Fund Ltd. v. Florian Homm,* No. 09 CV 08862, at 10 (S.D.N.Y. Dec. 22, 2010) ("mere fact that a stock is listed on a domestic exchange does not give rise to a claim under domestic securities laws when the shares are purchased elsewhere"); *Elliott Associates v. Porsche Automobil Holding SE*, No. 10 Civ. 0532 (HB) (S.D.N.Y. Dec. 30, 2010) (choice of U.S. law and forum in a stock purchase contract insufficient to overcome the presumption); *In re Royal Bank of Scotland (RBS) Group PLC Securities Litigation,* No. 09 Civ. 300 (S.D.N.Y. Jan. 11, 2011) (allegation that plaintiffs are U.S. residents who were in the U.S. when they purchased foreign securities insufficient to overcome *Morrison* presumption); *In re Vivendi Universal, S.A. Securities Litigation,* No. 02-CV-05571, at 17, 19 (S.D.N.Y. Feb. 22, 2011) (even though American investors purchased foreign shares "listed" on the NYSE and "registered" with the SEC, the court found that such listing and registration alone "cannot carry the freight that plaintiffs ask it to bear" because it is "contrary to the spirit" of *Morrison*, and threw out most of a securities class action jury verdict).

Courts have also used the *Morrison* framework to analyze whether the Racketeer Influenced Corrupt Organizations Act (RICO) should be applied extraterritorially. Guided by the Court's announcement that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," lower courts have recognized that RICO is silent as to any extraterritorial application and contains no evidence of Congressional intent to apply it extraterritorially. These courts have sought to determine the location of the enterprise, as demonstrated by the quality and quantity of contacts, to determine whether it falls within the ambit of the civil RICO statute. *E.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 30–31 (2d Cir. 2010) (*per curiam*) (affirmed dismissal of civil RICO claim on the grounds that civil RICO does not reach the alleged conduct of an enterprise "to take over a substantial portion of the Russian oil industry," notwithstanding statute's express reference to "foreign commerce" and explicit extraterritorial effect of certain predicate acts in the RICO statute); *European Community v. RJR Nabisco, Inc.*, 2011 U.S. Dist. LEXIS 23538, at *23 (E.D.N.Y. March 8, 2011) (dismissing plaintiffs' RICO complaint because, "when read as a whole, [the complaint] strongly suggests [that] the money laundering cycle [engaged by the alleged enterprise] was directed by South American and European criminal organizations, . . . [and] not [by] Defendants in the United States"), *recons. denied*, 2011 U.S. Dist. LEXIS 41219 (E.D.N.Y. April 14, 2011), *dismissed by* 2011 U.S. Dist. LEXIS 51651 (E.D.N.Y. May 12, 2011); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010) (dismissing RICO claims by a foreign plaintiff against a RICO enterprise comprised of the "[t]he foreign exchange regime of the government of Venezuela" where predicate acts of money laundering involved transfers into and out of the district by U.S. banks), *aff'd*, 457 F. App'x 25 (2d Cir. 2012). Indeed, the District Court for the District of Columbia nullified its prior decision granting prospective injunctive relief against British American Tobacco Company ("BAT") where it found that the sole basis for BAT's RICO liability was its foreign conduct and where the intervening Supreme Court decision in *Morrison* invalidated that basis for liability. *United States v. Phillip Morris USA, Inc.*, 783 F. Supp. 2d 23 (D.D.C. 2011).

One court has applied *Morrison* to narrow the reach of the Robinson-Patman Act. *See Newmarket Corp. v. Innospec, Inc.*, 2011 U.S. Dist LEXIS 54901, at *12 (E.D. Va. May 20, 2011) (dismissing a claim concerning payments made to Iraqi and Indonesian officials because "the language of [that Act] contains no intention that it is to apply extraterritorially").

[39] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

[40] 133 S. Ct. at 1666, 1669.

[41] *Id.* at 1669.

[42] 15 U.S.C. § 78u-6.

[43] 15 U.S.C. § 78u-6(h)(1)(B)(i) (2010). Individuals bringing Section 806 SOX retaliation claims must first file their claims with the Dep't of Labor. 18 U.S.C. § 1514A(b). In the event that a final administrative determination is not made within 180 days, the individual can remove his or her retaliation claim to federal court.

[44] *Compare* 18 U.S.C. § 1514A, *with* 15 U.S.C. § 78u-6(h).

[45] *Compare* 18 U.S.C. § 1514A(b)-(c), *with* 15 U.S.C. § 78u-6(h).

[46] *Morrison*, 130 S. Ct. at 2881.

[47] *Id.* at 2883.

[48] *Liu*, 2013 WL 5692504; *Asadi v. G.E. Energy (USA), LLC*, No. 12-345, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012), *aff'd on other grounds*, 720 F.3d 620 (5th Cir. 2013).

[49] *Morrison*, 130 S. Ct. at 2875, 2883, 2888.

[50] *Id.* at 2884.

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   ISSN 1357-0889