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WHISTLEBLOWERS

Don't Tread on Whistleblowers: Mitigating and Managing Retaliation Risks — Part II



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In the first installment of this Article published Jan. 13, we discussed, in Parts I and II, the broad anti-retaliation provisions in SOX and in Dodd-Frank designed to protect employees from adverse employment actions taken in response to the employee's report of possible securities law violations within the organization and to the SEC. As we explained, an employer may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of an action by the employee that is protected by statute. Under SOX and Dodd-Frank, a qualified reporting employee may prosecute a retaliation claim regardless of whether the underlying allegations of a securities law violation are found to have merit. Because the remedies available under Dodd-Frank are more generous than the SOX remedies and the statute of limitations is considerably longer, we explained in Part III that a number of claimants have filed complaints in federal court under Dodd-Frank alleging unlawful retaliation sparked by internal reports protected by SOX. We further discuss the conflicting interpretations of Dodd-Frank's whistleblower-protection provisions in the federal courts.

In this second installment, we discuss in Part IV whether employees working outside the U.S. who report potential violations of the securities laws, either internally and externally, are protected from retaliatory conduct under either SOX or Dodd-Frank. Indeed, more than 10 percent of the whistleblower tips received by the SEC during FY 2012 came from employees working outside the U.S. and as unknown number of additional employees working outside the U.S. reported concerns about potential violations of law only to their employers. Last, in Part V, we outline a number of steps for organizations to consider to improve existing anti-retaliation policies and practices to reduce the risk of retaliation complaints.

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IV. Retaliation Protections for Foreign Whistleblowers?

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A. Extraterritorial Reach of SOX Whistleblower Protection Provisions. As we discussed in Part I, SOX Section 806 provides protection from retaliation for employees of entities subject to the registration or reporting requirements of the Exchange Act.[92] 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.[93] 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.[94]

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.[95] 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.[96] It recognized the presumption announced by the 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.''[97] 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.[98] For those reasons, the First Circuit concluded that Section 806 had no extraterritorial application.[99] The Administrative Review Boards (''ARB'') and Administrative Law Judges (''ALJ'') 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.[100] 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.[101]

In June 2010, the U.S. Supreme Court issued its decision in *Morrison v. National Australia Bank*.[102] 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

[92] 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 Entm't USA*, 2004-SOX-74 (ALJ Apr. 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); *Deutschmann v. Fortis Invs.*, 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 U.S., 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.

[93] *See supra* notes 6-9, ; 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.'').

[94] 18 U.S.C. § 1513(d).

[95] *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), *cert. denied*, 548 U.S. 906 (June 26, 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.).

[96] *Id.*, at 11-15.

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

[98] *Id.* at 10.

[99] *See also Liu v. Siemens AG*, No. 13-0317, 2013 BL 289928, 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).

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

[101] 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 U.S., or the ''effects'' of the transaction on commerce within the U.S. and because some of the wrongful conduct occurred in the U.S., 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.); *Walters v. Deutsche Bank*, 2008-SOX-70 (ALJ Mar. 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.); *Penesso v. LLC Int'l, Inc.*, 2005-SOX-16 (ALJ Mar. 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.).

[102] 130 S. Ct. 2869 (2010).

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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.''[103] In the Court's view, this principle ''rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.''[104] 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.''[105] 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.''[106] The Court succinctly instructed: ''When a statute gives no clear indication of an extraterritorial application, it has none.''[107] 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.[108] 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.[109]

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.''[110] 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.[111]

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 the SEC or DOJ under Section 10(b) that involve extraterritorial elements.[112] 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.[113] 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).[114] 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.''[115] 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

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[103] *Id.* at 2877.
[104] *Id*.
[105] *Id*. at 2881.
[106] *Id*. at 2877 (Internal quotations and citation omitted)
[107] *Id*.
[108] *Id.* at 2881-2882.
[109] *Id*. at 2882.
[110] *Id*. at 2884.
[111] *Id.* at 2888.

[112] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, § 929P(b) (2010).
[113] Dodd-Frank Act, Pub. L. 111-203, § 929Y(a) (2010).
[114] 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 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, (S.D.N.Y. Oct. 13, 2010), 2010 WL 4520690, a *7 n.1 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, , Wachtell, Lipton, Rosen & Katz Client Memorandum, *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, No. 13 C 982, 2013 WL 4012638, at *1 (N.D. Ill. Aug. 6, 2013). The Second Circuit, in *United States v. Vilar*, 729 F.3d 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 67. 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).
[115] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991).

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.''[116] 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 Columbia for a Columbian company that was an indirect subsidiary of a Dutch company whose shares traded on the New York Stock Exchange.[117] 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 emails 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.[118] 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.''[119] An appeal of the ARB decision is pending before the U.S. Court of Appeals for the Fifth Circuit.

B. Extraterritorial Reach of Dodd-Frank's Whistleblower Protection Provisions. In the three years since *Morrison*, lower courts have applied the *Morrison* 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.[120] Last term, the Supreme

[116] 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.'').

[117] 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).

[118] 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: i) the location of the protected activity; ii) the location of the job and the company the complainant is fired from; iii) the location of the retaliatory act, and iv) the nationality of the laws allegedly violated that the complainant has been punished for reporting. Because Mr. Villaneuva worked in Columbia and submitted his internal report in Columbia 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.

[119] 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.

[120] 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 Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada,* No. 09-23248-CIV (S.D. Fla. Aug. 6, 2010) (closing of a transaction in the U.S. 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 Assocs. 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) Grp. PLC Sec. Litig.,* 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 insufficient to overcome *Morrison* presumption); *In re Vivendi Universal, S.A. Sec. Litig.,* 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 in-

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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.[121] 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.''[122] It cautioned that a defendant's ''mere corporate presence'' in the U.S. would not suffice because ''[c]orporations are often present in many countries.''[123]

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.''[124] 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.''[125] 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.[126] 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 that 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 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.[127] 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.''[128] While the Court found that the particular ''domestic activity'' of 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.[129]

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dication 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 Cmty. v. RJR Nabisco, Inc.*, 2011 BL 65192, at *8, 2011 U.S. Dist. LEXIS 23538, at *23 (E.D.N.Y. Mar. 7, 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''); *Cedeño et al. 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). 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*, No. 99-2496 (GK), 2011 WL 1252662 (D.D.C. Mar. 28, 2011).

One court has applied *Morrison* to narrow the reach of the Robinson-Patman Act. *See Newmarket Corp. v. Innospec, Inc.*, 2011 BL 133578, at *4, 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'').

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

[122] 133 S. Ct. at 1666, 1669.

[123] *Id.* at 1669.

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

[125] *Id.* at 2883.

[126] *Liu*, 2013 BL 289928, 2013 WL 5692504; *Asadi v. G.E. Energy (USA), LLC*, No. 12-345, 2012 BL 160743, at *5, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012), *aff'd on other grounds*, 720 F.3d 620 (5th Cir. 2013).

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

[128] *Morrison*, 130 S. Ct. at 2884.

[129] Shortly after issuing its *Kiobel* decision, the Supreme Court granted certiorari in *DaimlerChrysler AG v. Bauman*, to review a decision from the Ninth Circuit holding that Daimler AG, the German parent company with no operations or employees in the U.S., could be sued under a California state equivalent of the ATS in federal court by Argentine nationals for human rights abuses allegedly committed by Daimler's Argentine subsidiary in Argentina, because of the contacts that a different Daimler subsidiary, Mercedes Benz USA, had in the state. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 1995 (2013). While *Bauman* involves whether a subsidiary's presence in a state is enough to

Kiobel suggests that something more that 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.

V. Considerations for Mitigating Retaliation Risks

Virtually every organization subject to SOX adopted a zero-tolerance policy for retaliatory behavior. Those policies stand in stark contrast to the findings of a 2011 survey by the Ethics Resource Center of 4,683 employees in the for-profit sector[130] which found that retaliation rates were ''up across the board'' and ''[i]n workplaces where employees at all levels demonstrate a commitment to integrity and ethical business conduct, the rate of retaliation is nearly four times as high as in 2009.''[131] That data suggests that existing policies either are not enforced or are not sufficient to prevent retaliatory behavior.

SOX and Dodd-Frank encourage whistleblowing as a tool in detecting and preventing misconduct and both protect whistleblowers from retaliation. Recent ARB and federal court decisions interpreting Section 806 of SOX and the SEC implementing rules for Section 922(a) of Dodd-Frank make clear that whistleblower protections will attach in many instances where the underlying report or complaint lacks merit, provided that the individual acted in good faith when making the report.[132] The likely increase in whistleblower retaliation claims, with a concomitant rise in the costs of defending such claims, counsel that organizations covered by SOX and Dodd-Frank take a hard look at critical elements of their compliance framework and make appropriate enhancements.[133]

Possible areas for such a review include:

■ **''Tone at the Top''**: Employees at all levels of an organization take their lead from the most senior management of that organization. The 2011 Ethics Resource Center survey found that ''retaliation declines precipitously when top management and supervisors make ethics a priority and model ethical conduct.''[134] Does the management team emphasize and reemphasize the core values and guiding principles of the organization and the organization's expectation that each employee is personally responsible for acting in accord with those values and principles? Are members of the senior management team personally committed to and act in accordance with the values they promote? Is there a gap between the written and spoken values and principles and the personal conduct of senior management?

■ **Code of Conduct and Whistleblower and Anti-Retaliation Policies (if separate)**: An organization's Code of Conduct and associated policies set forth the written standards by which it conducts its business and the expectations for its employees. Does the Code stress the duty of every employee to speak up when he or she sees or hears something that might involve a violation of the Code, company policies or of the law? Does it provide detailed guidance on the numerous internal mechanisms available for reporting those concerns, including hotlines where employees can report concerns anonymously? Do the Code and complementary compliance policies clearly explain that discrimination or retaliation against employees who report possible misconduct is unlawful and will not be tolerated and that retaliatory conduct will subject that employee to discipline, including termination? Do they include a clear explanation of ''retaliation'' and ''discrimination'' to make clear that they include not only termination and demotion but salary adjustments, harassment, hostile work environment and threatened termination? Do they explain that reports of employment-related retaliation are taken seriously and will be appropriately investigated by persons with authority?

■ **Established Process to Review Every Internal Report of Compliance Concerns or Possible Misconduct**: Where an organization has established fair processes to review internal reports of compliance concerns and of alleged misconduct which are applied uniformly, employees recognize that speaking up will not be futile. Has a written protocol been developed that sets forth the process to be followed after receipt of either type of internal report? Is that written protocol contained in the Code of Conduct or whistleblower policy distributed to employees? Is the organization in a position to demonstrate to employees that the established processes are used in practice?

■ **Established Process to Review and Resolve Retaliation Complaints**: Ten years of experience with retaliation claims filed under Section 806 teaches that employees often file retaliation claims when they perceive there is no resource within the organization to resolve their concerns regarding retaliatory or discriminatory conduct. For an employee to plead and prove a retaliation claim under SOX, he or she must only show that the protected activity was a ''contributing factor'' in the adverse personnel decision, not the only or primary factor. The U.S. Court of Appeals for the Third Circuit recently explained that Congress intended this ''contributing factor'' test to be protective of plaintiff-employees. This fairly low threshold puts a premium on an organization's internal processes to investigate all reports of retaliation or workplace discrimination and remediate legitimate concerns. Of course, retaliation concerns may surface in a variety of other ways, such as conversations with Human Resources, or observations by a co-worker, or comments made to Internal Audit. Wherever such concerns are voiced, the established process should be used to review whether the conduct amounts to retaliation or discrimination, to take appropriate remedial measures, and to take any appropriate disciplinary action against the retaliating employee.

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confer jurisdiction over the parent for the actions of a different subsidiary, the Court's opinion may provide guidance on what is needed, beyond ''mere corporate presence'' in the U.S. to overcome the presumption against extraterritoriality.

[130] *Workplace Ethics in Transition*, *supra* note 83 at 13.

[131] *See Retaliation: When Whistleblowers Become Victims*, *supra* note 83.

[132] Pursuant to Section 922(a), a ''whistleblower'' must only show that he had a ''reasonable belief'' that the information provided related to a possible securities law violation that either had occurred, was occurring, or was about to occur.

[133] *See* William McLucas, Laura Wertheimer & Arian June, *Get Ahead of the Bus or Be Hit by the Bus: Practical Strategies for Meeting the Challenges and Mitigating the Risks of the Dodd-Frank Whistleblower Program*, 44 BLOOMBERG BNA SEC. REG. & L. REPORT 11, 526 (Mar. 12, 2012).

[134] *See Retaliation: When Whistleblowers Become Victims*, *supra* note 83, at 14.

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The established process must be sufficiently robust and independent from supervisors of any aggrieved employee. Where an organization has clear processes that require prompt review of internal reports of alleged retaliatory conduct and redress of any improper conduct, employees perceive that a ''zero tolerance'' policy has teeth.

■ **Mandatory Employee Training**: The standards announced in the Code and the internal mechanisms available to report deviations from those standards should be explained to employees through mandatory, periodic training. Because individuals typically act on the basis of perceptions, mandatory training should also target employee perceptions. Have employees been surveyed individually or in focus groups regarding their understanding of the obligation to speak up to report compliance concerns, the organization's commitment to take reported compliance concerns seriously and willingness to address problems and the extent that they believe they will experience retaliation if they report concerns? Does current training explain the benefits to the organization from employee reports of compliance concerns? Does it address the processes adopted by the organization to review reported compliance concerns so that employees can appreciate that the processes are fair and thorough? Does it make clear that retaliation or discrimination against an employee who reports conduct that he or she ''reasonably believes'' violated or might violate certain federal laws is unlawful? Does it explain the potential consequences when retaliatory conduct is found?

■ **Mandatory Training for Managers**: As we have explained, survey data shows that an overwhelming number of employees who speak up to report compliance concerns within an organization speak to an immediate supervisor or to more senior managers with perceived authority to remedy the concern.[135] This same data makes clear that many of these reporting employees become external whistleblowers when a manager or supervisor reacts defensively, dismisses the report or, worse, takes action that the employee considers to be retaliatory. No written protocol for handling internal reports of possible misconduct will be useful unless supervisors and managers are trained on how to recognize protected activity and how to respond appropriately. Specific mandatory whistleblower training should be required for managers, in addition to any compliance training provided to all employees. This training could include: 1) real-life examples of the broad scope of conduct protected under SOX Section 806 and Section 922 of Dodd-Frank; 2) a script for supervisors with appropriate words to use when responding to an employee's report of a compliance concern or possible misconduct and scenario based role-playing so supervisors are comfortable with the scripted response; 3) a reminder of the organization's established processes to escalate such reports to the function in the organization charged with prompt review and investigation of internal reports; 4) the critical need to consistently and contemporaneously document performance issues for every underperforming employee; 5) real-life examples of the breadth of the protection against retaliatory or discriminatory conduct, including subtle inequities in how a reporting employee/whistleblower is treated; and 6) the consequences to the organization and the individual of behaviors found to be retaliatory or discriminatory. Training should test the manager's understanding of what should and should not be said to a reporting employee and the imperative to escalate all internal reports so they can be reviewed and addressed.

■ **Regular Communications Across the Organization**: Experience has shown that it is not sufficient to inform employees about their obligation to report compliance concerns or possible misconduct and about the organization's commitment to review all such reports and address inappropriate conduct and its zero tolerance for retaliation against reporting employees. These messages must be reinforced on a continual basis through many different vehicles, such as formal communications from senior management, weekly department meetings, town hall meetings, annual letters from the Chief Executive Officer, and in one on one performance reviews. What communications are sent on a regular basis to all employees about the organization's established processes to review reported compliance concerns and address misconduct? Do the communications explain that mandatory training has been provided to management to reassure employees that managers understand the protections in place for those who report? Have managers incorporated those message points into their briefings to employees and in informal discussions?

■ **Reinforce the Compliance Culture**: Survey data suggests that employees must continually be reminded about the organization's commitment to compliance, their obligation to speak up and report conduct that may violate the Code, policies or law, the different internal mechanisms available for such reporting, and the organization's intolerance of retaliation against any reporting employee. In addition to driving home those messages through regular communications with employees, a reminder could appear on the log-in page of the organization's intranet with a link to the Code, whistleblower and anti-retaliation policies, if separate, the number of the anonymous hotline, and a brief summary of other internal reporting mechanisms. The same reminders could be summarized on one page and that page could be inserted at the front of employee manuals and distributed as a stand-alone page to all employees. Articles in employee newsletters, blogs and intranets could highlight the benefit to the organization from internal employee reports.

■ **Notify Managers and Supervisors of an Internal Report From an Employee They Supervise**: Depending on the organization, it may be advisable in certain circumstances to notify the reporting employee's direct supervisor and perhaps more senior management that an internal report has been submitted raising compliance concerns or possible misconduct and the identity of the reporting employee, where that employee has not asked the organization to keep his identity confidential. That same notice could remind recipients that the internal report will be investigated pursuant to the organization's written policy and that the organization has zero tolerance for any retaliation against the reporting employee. The notice could direct that no internal discus-

[135] William McLucas, Laura Wertheimer & Arian June, *Preparing for the Deluge: How to Respond When Employees Speak Up and Report Possible Compliance Violations*, 44 Bloomberg BNA Sec. Reg. & L. Report 19, 922 (May 7, 2012); McLucas et al., *supra* note 133.

sions or communications, including e-mail, should occur regarding the facts underlying the report or with the reporting employee about the report, or about the reporting employee. Perhaps most importantly, the notice should underscore that no employment action involving the reporting employee may be taken unless and until it is reviewed and approved by either Human Resources or the General Counsel. In other organizations, it may be appropriate to shield the reporting employee's direct supervisors and managers up the chain from any investigation of the internal report of compliance concerns or potential misconduct. The approach taken should be documented to show the organization's efforts to prevent retaliatory conduct.

■ **Close the Communications Gap**: We have written previously about studies showing that employees who report internally are more likely to air their concerns outside the organization when they perceive that the organization does not take their reported concerns seriously or that they have been ostracized by co-workers or supervisors for speaking up to report their concerns.[136] Speaking at a recent conference, SEC Associate Enforcement Director Stephen Cohen reported that ''almost uniformly, the whistleblowers in my investigations have reported internally [and] in most instances repeatedly and to multiple people. They were either not listened to, or were retaliated against'' before they complained to the SEC.[137] Even in those organizations which adopt ''best practices'' for review of internal complaints, a failure to keep the reporting employee updated on the progress of the ongoing review is likely to raise questions about the organization's commitment to get to the bottom of the concern and to deal with it appropriately.

How an organization responds to a reporting employee may, in many instances, control whether the situation can be managed and resolved internally or whether the employee reports to a third party. We again recommend that organizations consider designating an individual to serve as liaison to the reporting employee. The designated liaison serves a critical role: where reporting employees perceive that their concerns are being taken seriously and will be (and have been) reviewed fairly and thoroughly, they are more likely to have confidence in the organization's internal investigation and conclusions and less likely to report their concerns externally. At the liaison's first contact with a reporting employee, that individual should be assured that the organization will not tolerate retaliation, that any form of retaliatory conduct, including perceptions of subtle retaliation, such as exclusion from conferences, or networking events, should be reported immediately using a reporting mechanism with which the employee is comfortable, and that the organization will address any reported concerns immediately. As part of the liaison's regular status updates to the reporting employee, the liaison could remind the employee that the organization does not tolerate retaliation and could encourage the employee to bring forward concerns about unfair treatment and perceived retaliation. The designated liaison should be an individual with a track record of fairness and trustworthiness. Before appointing a designated liaison, organizations should consider employee perceptions. For example, in some organizations, employees may question the trustworthiness of Human Resources and it may be prudent to go outside management and select an Internal Audit employee or employee in the compliance function. Of course, retaliation concerns may surface in a variety of other ways, such as conversations with Human Resources, or observations by a co-worker, or comments made to Internal Audit. Communications between the reporting employee should be documented.

■ **Review Proposed Performance Evaluations and Employment Actions for Reporting Employees and Known Whistleblowers**: Neither Section 806 of SOX nor Section 922(a) of Dodd-Frank prohibit an employer from taking adverse employment action against a reporting employee for reasons unrelated to the protected activities. A temporal relationship between protected activity and any adverse employment action, however, could be perceived by the employee as retaliatory and give rise to a retaliation claim. If a direct manager concludes that adverse employment action involving a reporting employee, such as negative performance reviews, downward compensation adjustments, proposed disciplinary actions and the like, is warranted, it is critical for an organization to require experienced staff in its Human Resources and General Counsel function to review the recommended adverse action and make an independent determination of whether it is clearly supported by contemporaneous documentation of performance issues, consistent with treatment of other similarly situated employees, and fair. Even where those criteria are met, a considered evaluation should be made whether the contemplated adverse action could be considered retaliatory and of the risks to the organization from a potential retaliation lawsuit and public airing of alleged compliance failings. Experienced staff in Human Resources and the General Counsel function should also be consulted with respect to any decisions involving compensation, performance reviews, and promotions to minimize the risk that reporting employees will perceive that they have being treated less favorably because they reported the potential violations. Organizations should document the grounds for every adverse employment action taken against a reporting employee.

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. Expansive reading of the statutory protections against retaliation by the ARB and by federal courts makes it easier for many retaliation claims to survive dispositive motions. And once discovery begins, weaknesses in an employer's compliance framework may begin to emerge, potentially creating another avenue of interest for other regulators.

Historically, SOX retaliation claimants fared poorly in administrative process. In May 2010, then-newly appointed Assistant Secretary of Labor David Michaels recognized that Occupational Safety and Health Administration (''OSHA'') investigators found merit in only 3 percent of all whistleblower retaliation claims filed with OSHA for Fiscal Year 2009, which he attributed to ''a series of institutional, administrative and legislative barriers that stand between many whistleblowers and justice'' and OSHA's ''failure to protect legitimate

[136] *Id.*

[137] Richard Hill, *SEC Official Says Whistleblowers Almost Always Report Internally First*, 45 BLOOMBERG BNA SEC. REG. & L. REP. 872 (May 13, 2013).

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whistleblowers.''[138] He served notice that such barriers must come down and OSHA must step up its efforts to protect whistleblowers from retaliation because protections from retaliation embody a ''decades-old belief held by Congress, stakeholders, employers and society, that whistleblowers play an essential role in protecting workers and the public.''[139] After a top-to-bottom review of its Whistleblower Program, OSHA announced a series of initiatives[140] which it has implemented.[141]

There is no question that this overhaul will result in an increased number of OSHA investigations. While it remains to be seen whether revamping of the Whistleblower Program will ultimately lead to an increase in the number of successful retaliation claims, employers should expect a sea change in the way in which OSHA staff investigate Section 806 retaliation claims, including witness interviews and substantial document requests and should understand that, pursuant to the *Whistleblower Investigations Manual*, documents that they provide to OSHA investigators will likely be provided to the complainants.

What can be done to mitigate the potentially increased risks and costs of defending against retaliation claims filed with OSHA or in court? 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.

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[138] David Michaels, Assistant Sec'y of Labor For Occupational Safety and Health, ''Whistleblowers and OSHA: Strengthening Professional Integrity,'' Address Before the Professionals for the Public Interest (May 11, 2010), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2206.

[139] *Id.*

[140] Press Release, U.S. Dep't of Labor, U.S. Dep't of Labor's OSHA Announces Measures to Improve Whistleblower Protection Program (Aug. 1, 2011), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20394; Memorandum from David Michaels, Assistant Sec'y of Labor for OSHA (Aug. 1, 2011), *available at* http://www.whistleblowers.gov/cover_memo.html.

[141] To date, OSHA has implemented several enhancements to the Whistleblower Program. *See, e.g.*, Press Release, U.S. Dep't of Labor, U.S. Dep't of Labor's OSHA Whistleblower Protection Program Moved to Office of the Assistant Sec'y (Mar. 1, 2012), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=21909 (realigning the Whistleblower Program under the Office of the Assistant Sec'y to provide ''a significantly elevated priority status for whistleblower enforcement'' and establishing a separate line item for the Whistleblower Program to ''better track and hold accountable its activities and accomplishments''); U.S. DEP'T OF LABOR, FY 2013 BUDGET IN BRIEF, 54 *available at* http://www.dol.gov/dol/budget/2013/PDF/FY2013BIB.pdf (increasing the number of personnel in the Whistleblower Program, including additional investigators ''to reduce the backlog of whistleblower claims, expedite the handling of current complaints received by the agency, and prepare for a high volume of complex cases with recently passed laws involving health care reform, food and safety, and finance reform'' and significantly ''enhanc[ing] the training of whistleblower investigators and supervisors''); Press Release, U.S. Dep't of Labor, U.S. Dep't of Labor's OSHA Issues Updated Whistleblower Investigations Manual (Sept. 21, 2011), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20712 (updating the *Whistleblower Investigations Manual* to explain procedural changes that make it easier for employees to file and prosecute whistleblower complaints); Memorandum from David Michaels, *supra* note 140 (expanding OSHA's database and adding self-audit requirements ''to ensure that complaints are properly handled and on a timely basis'' and ''to better track the progress of investigations'' and appeals); Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as amended, 29 C.F.R. § 1980 (2011) (adopting revised regulations implementing several of the whistleblower protection provisions, including revised regulations for SOX retaliation claims).