

**In the Matter of:**

**GARY BLANCHARD,**

**ARB CASE NO. 15-031**

**COMPLAINANT,**

**ALJ CASE NO. 2014-SOX-020**

**v.**

**DATE: August 29, 2017**

**EXELIS SYSTEMS CORPORATION/VECTRUS  
SYSTEMS CORP.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Hassam Parzivand, Esq; *The Parzivand Law Firm, PLLC*; Sugar Land, Texas and  
Emir Sehic, Esq.; *Sehic Law, PLLC*; Dennis, Massachusetts**

*For the Respondent:*

**Amy L. Bass, Esq. and Sadina Montani, Esq; *Vedder Price P.C.*; Washington,  
District of Columbia.**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown,  
*Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.**

### **DECISION AND ORDER OF REMAND**

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended, codified at 18 U.S.C.A § 1514A (Thomson/West Supp. 2014) (SOX § 806), and its implementing regulations, 29 C.F.R. Part 1980 (2016). On February 13, 2014, Complainant Gary Blanchard filed a complaint alleging that Respondent Exelis Systems Corporation/Vectrus Systems Corporation violated SOX § 806 by retaliating against him because

of several alleged protected activities.<sup>1</sup> On, January 20, 2015, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing Blanchard's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Blanchard appealed the ALJ's ruling to the Administrative Review Board (ARB). For the following reasons, we reverse and remand for further consideration consistent with this Decision and Order of Remand.

### FACTUAL ALLEGATIONS<sup>2</sup>

Respondent Exelis Systems Corporation is a U.S. corporation organized in Delaware, with a principal place of business in Virginia. Prior to 2014, Exelis Systems was a significant subsidiary of Exelis, Incorporated, a publicly-traded company. On April 19, 2010, Exelis Systems hired Blanchard, a United States national, to work under a contract it held with the United States Department of Defense (DOD) at Bagram Air Force Base (Bagram AFB or Bagram), Afghanistan. Blanchard worked as a Security Supervisor in the Force Protection Screening Cell, where his duties included assessment of all local nationals (Afghans) and other country nationals who sought access into Bagram AFB. Blanchard and his team submitted their assessments directly to the U.S. military representative overseeing the security operation.

Blanchard's direct supervisor was Brandon Spann, Exelis Systems' Senior Security Supervisor, and Spann's direct supervisor was Kevin Daniel, Exelis Systems' Personnel Services Regional Manager. In May 2013, Blanchard discovered that Spann and Daniel had violated DOD security policy and had engaged in mail and wire fraud. Specifically, Blanchard contended that Spann attempted to cover up the fact that another employee had allowed an "Other Country National" to enter Bagram AFB without proper credentials. In Blanchard's presence, Spann directed an investigator to refrain from reporting the security breach to the U.S. military. Spann stated that he was concerned that the security breach would reflect badly upon the contractors

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<sup>1</sup> After Complainant filed the claim naming Exelis Systems Corporation as one of the Respondents, the company filed a Motion to Amend Caption on March 9, 2015 as Exelis Systems Corporation became Vectrus Systems Corporation on September 27, 2014. In an order dated November 20, 2015, the Board held that it would allow this company to be identified with both names for purposes of this complaint and amended the caption accordingly. Complainant also named Fluor Intercontinental Incorporated as a respondent in this matter. However, prior to appellate review, Blanchard and Respondent Fluor Intercontinental negotiated a settlement agreement that the Board approved on October 5, 2016. *See Blanchard v. Exelis Systems Corp.*, ARB No. 15-031, ALJ No. 2014-SOX-020 (ARB Oct. 5, 2016). Thus, in this decision, we will only address the issues raised between Complainant and Respondent Exelis/Vectrus.

<sup>2</sup> The background allegations are taken from the August 19, 2014 Affidavit of Gary Blanchard as well as the ALJ's D.&O. that references assertions contained in the parties' briefs filed in connection with Respondents' Memorandum in Support of the Joint Motion to Dismiss. D. & O. at 3 n.1.

when a reduction in force was imminent.<sup>3</sup> On May 20, 2013, Blanchard reported Spann's improper conduct to Daniel. The following day, Blanchard met with Spann and Daniel, and Daniel instructed Blanchard not to report the security breach to U.S. government investigators. Blanchard believed that his supervisors either withheld or falsified information relating to the security breach and that this false information, which was sent to U.S. military personnel in the U.S., constituted mail and wire fraud.

Subsequently, Blanchard alleged that he discovered that Daniel was working fewer hours than he was reporting on his timesheet. As the employees used an electronic, cloud-based, system that is transmitted by wire to the United States for processing, Blanchard believed that this action constituted mail and wire fraud. On May 23, 2013, Blanchard reported Daniel's actions to Venola Riley, Exelis Systems' senior Human Resources Manager at Bagram Air Force Base. Following Blanchard's disclosures, Exelis Systems' human relations staff began investigating Blanchard's conduct rather than the misconduct he reported. On June 20, 2013, Blanchard reported whistleblower retaliation taken against him to Sheila Hickman, Exelis Systems' Deputy Director of Human Resources, based in Colorado Springs, Colorado. Within hours of his complaints to Hickman, Daniel (and Carl Lynch, another Exelis Systems' supervisor) interrogated, threatened, and demoted Blanchard and held him held against his will. On August 22, 2013, Blanchard reported additional retaliatory actions taken against him to Hickman.

On September 4, 2013, Douglas Brown, Exelis Systems' Human Relations Supervisor at Bagram AFB sent a request to terminate Blanchard's employment to an Exelis employee relations analyst based in the U.S. Five other U.S.-based Exelis Systems' employees were contacted in connection with the proposed termination Blanchard's employment, and Frank Peloso, Vice President & Director of HR located in Colorado approved the termination. That approval was then forwarded, copying yet another U.S.-based employee, to Douglas Brown at Bagram AFB. On September 14, 2013, Blanchard was informed that his employment was terminated and given a termination letter at Bagram AFB. Two more U.S. employees subsequently signed and approved the termination of Blanchard's employment.

On February 13, 2014, Blanchard filed his whistleblower complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Exelis Systems Corporation violated SOX by retaliating against him because of his protected activities. OSHA investigated Blanchard's complaint but concluded that SOX § 806 did not cover adverse actions occurring outside the U.S. because of the presumption against extraterritorial application of the law. Blanchard objected to OSHA's findings and the case was assigned to an ALJ. On April 7, 2014, Respondents filed a Joint Motion to Bifurcate (or Alternatively, to Dismiss for Lack of Subject Matter Jurisdiction).

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<sup>3</sup> As of March 2013, there were over 107,000 contractors in Afghanistan compared with 65,700 troops. As of January 2013, U.S. Department of Defense contract obligations in Afghanistan totaled over \$17 billion. MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEPT. OF DEFENSE'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 24 (MAY 17, 2013). For FY2013, products and services sold to the U.S. government accounted for 85% of Exelis' total revenue. Exelis Inc., Annual Report for the fiscal year ended December 31, 2013 (Form 10-K)(February 28, 2014).

The ALJ bifurcated his review of the case “to first address the issue of the extraterritorial application of § 806 of SOX.”<sup>4</sup> The ALJ then dismissed Blanchard’s complaint for failure to state a claim under Federal Rule of Civil Procedure Rule 12(b)(6), based largely on the his finding that SOX § 806 does not apply extraterritorially and Blanchard’s complaint does not fall within the domestic scope of SOX § 806. For the following reasons, we find that Blanchard’s allegations state a claim and fall squarely within the focus of SOX, in general, and SOX § 806, in particular. We therefore reverse the ALJ’s dismissal of the complaint and remand for further consideration.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to issue final agency decisions arising under SOX.<sup>5</sup> The ARB reviews the ALJ’s factual findings for substantial evidence, and conclusions of law de novo.<sup>6</sup> In considering a dismissal for failure to state a claim, the ARB must accept the non-moving party’s factual allegations as true and draw all reasonable inferences in the non-moving party’s favor.<sup>7</sup>

### DISCUSSION

The SOX’s employee protection provision generally prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to categories listed in the SOX whistleblower statute. Section § 806 states:

(a) *Whistleblower Protection For Employees Of Publicly Traded Companies.*—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in

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<sup>4</sup> D. & O. at 2.

<sup>5</sup> See Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see also 29 C.F.R. § 1980.110.

<sup>6</sup> 29 C.F.R. § 1980.110(b). *Gunther v. Deltek, Inc.*, ARB Nos. 13-068, 13-069; ALJ No. 2010-SOX-049, slip op. at 2 (ARB Nov. 26, 2014).

<sup>7</sup> *Tyndall v. U.S. EPA*, ARB No. 96-195, ALJ Nos. 1993-CAA-006, 1995-CAA-005; slip op. at 2 (ARB June 14, 1996).

section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 79c), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) 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 section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, 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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514(a).

To state a claim under SOX § 806, a complainant must allege that he engaged in protected activity, the employer took an unfavorable action against him, and the protected activity was a contributing factor in the adverse action.<sup>8</sup>

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<sup>8</sup> See *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011). SOX complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C.A. § 42121 (Thomson/West Supp. 2016). 18 U.S.C.A. § 1514A(b)(2)(C).

The ALJ made three principle findings: (1) SOX § 806 does not apply extraterritorially; (2) the facts of Blanchard’s complaint do not warrant domestic application of SOX § 806; and (3) Bagram AFB is not a U.S. territory for purposes of enforcing SOX § 806. We address and vacate each of these findings below.

## 1. SOX § 806 applies extraterritorially

### A. *Morrison*

In *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-006 (ARB Dec. 22, 2011) (*en banc*), the Board examined the question of extraterritoriality and SOX at some length. Specifically, we explored whether the alleged protected activity required extraterritorial application of § 806(a)(1). There we began, as we do here, with consideration of the Supreme Court’s reaffirmation, in *Morrison v. National Australian Bank, Ltd.*, that “Congress ordinarily legislates with respect to domestic, not foreign affairs.”<sup>9</sup> Noting that the longstanding “presumption against extraterritorial application” was but a canon of statutory construction, the Court held that, unless a statute contains a contrary intent, “we must presume it is primarily concerned with domestic conditions.”<sup>10</sup>

The *Morrison* Court engaged in a two-step process to explore the issue whether § 10(b) of the Securities Exchange Act of 1934 applies to misrepresentations made regarding the purchase or sale of securities traded only on foreign exchanges. First, the Court examined the relevant statutory language and held “there is no affirmative indication in the [Securities] Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.”<sup>11</sup> After determining that the presumption against extraterritorially applied, the Court next turned to whether the claims in the complaint before it could be considered domestic in nature. In the second step of its analysis, the Court sought to identify the “primary focus” of congressional concern, contained in § 10(b), which the Court ultimately concluded was to protect the “purchase and sale of securities in the United States.”<sup>12</sup> The transactions in question in *Morrison* were purchases of shares on the Australian stock exchange rather than the United States’ securities exchanges. Consequently, the Court reasoned that the transactions were extraterritorial, and therefore, outside the domestic reach of § 10(b). The Court affirmed the dismissal of the claims in that case.

### B. *RGR Nabisco*

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<sup>9</sup> *Morrison*, 561 U.S. 247, 255 (2010) (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

<sup>10</sup> *Morrison*, 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. at 248).

<sup>11</sup> *Morrison*, 561 U.S. at 265.

<sup>12</sup> *Id.* at 226-227.

Last year, the Supreme Court reexamined extraterritoriality in the context of its finding that the Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially. In *RGR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), the European Community and 26 member states filed suit against RGR Nabisco (RGR) alleging that RGR orchestrated an international money-laundering scheme in association with foreign organized crime.<sup>13</sup> The RICO statute defines “racketeering activity” to include specified, criminal offences (both federal and state) known in RICO jurisprudence as “predicates.” A minimum of two predicate offences committed within 10 years of each other are necessary to constitute a “pattern of racketeering” action in violation of RICO.

Applying the two-step process developed in *Morrison*, the Supreme Court first addressed whether the RICO statute gives a clear indication that it applies extraterritorially. The Court reasoned that, because the RICO statute incorporates a number of predicates that plainly apply to foreign conduct, Congress affirmatively signaled that RICO applies extraterritorially.<sup>14</sup> Significantly, the Court emphasized that a “clear indication” of extraterritoriality will suffice to overcome the presumption and that an “express statement of extraterritoriality is not essential.”<sup>15</sup>

Guided by these principles of extraterritoriality, we consider whether § 806’s substantive prohibitions contain clear indications of extraterritoriality sufficient to rebut the presumption. Section 806 applies to all companies “with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).” This coverage, by definition, includes “foreign private issuers” (corporations incorporated under the laws of a foreign country) that are subject to U.S. securities laws because they elected to trade in the U.S.<sup>16</sup> The intrinsic

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<sup>13</sup> “Greatly simplified, the complaint alleges a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe.” *RGR Nabisco*, 136 S. Ct. at 2098.

<sup>14</sup> Obvious examples of extraterritorial predicate offences included in the definition of “racketeering activity” under § 1961(1) include money laundering (§§ 1956-57) and providing material support to terrorist organizations (§ 2339B), as well as wire fraud (§ 1343), and securities fraud (§ 1344).

<sup>15</sup> *RGR Nabisco*, 136 S. Ct. at 2102.

<sup>16</sup> HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES AND FEDERAL CORPORATE LAW*, § 27:243 (2d ed. July 2017 Update)(“The Securities Act of 1933 and the Exchange Act of 1934 constitute a unified disclosure scheme. Foreign issuers which choose to be listed on a national securities exchange in the United States, like U.S. issuers, must register under the Exchange Act, and become subject to the reporting requirements of the Exchange Act and (except as noted below) the whole panoply of Exchange Act regulation. A foreign issuer does not, of course, have to list its securities on a U.S. exchange.”). Reporting and disclosure requirements under U.S. securities law have long applied to foreign private issuers who wished to sell securities to the public in the U.S. or to list a class of their securities on a U.S. national securities exchange. SOX represented a departure

inclusion of foreign parties within the plain language of § 806's proscription evinces Congressional intent for the statute to apply extraterritorially. Section 806 does not explicitly distinguish between U.S. and foreign companies subject to its authority. Nonetheless, Congress chose to define the statute's coverage by using a particular and technical definition that unambiguously includes foreign firms.<sup>17</sup>

As *RGR Nabisco* explained at length, an express statement of extraterritoriality is unnecessary. Instead, only a "clearly expressed" affirmative congressional intent is required to give a statute extraterritorial effect and this may be derived not only from the text of the statute, but also its context, structure, and legislative history.<sup>18</sup> The Court's rationale for why such "context" demonstrates RICO's extraterritorial reach is equally compelling when applied to § 806:

Assuredly context can be consulted as well." *Morrison, supra*, at 265, 130 S. Ct. 2869. Context is dispositive here. Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"—and by extension a "pattern of racketeering activity"—to encompass violations of predicate statutes that *do* expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect.<sup>[19]</sup>

Similarly, Congress did not state expressly that § 806 applies in foreign countries, but the target of the statute—publicly traded companies that engage in specified misconduct—

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from this disclosure-based regulation by subjecting issuers, domestic and foreign alike, to more burdensome mandates. While SOX, and the SEC rules promulgated under SOX's authority, are generally applicable to foreign companies, a number of SEC rules provide exceptions from SOX requirements for foreign private issuers. *See, e.g.*, Natalya Shnitser, Note, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638, 1653 (2009).

<sup>17</sup> Compare Harvey L. Pitt, Chairman, SEC, A Single Capital Market in Europe: Challenges for Global Companies, Remarks at the Conference of the Institute of Chartered Accountants of England and Wales (Oct. 10, 2002), available at <http://www.sec.gov/news/speech/spch589.htm> ("As we continue our reform of our disclosure and auditing processes, we need to consider how any changes we make will affect foreign as well as domestic issuers and investors. Sarbanes-Oxley generally makes no distinction between U.S. and foreign private issuers listed in the United States. It applies equally to all who seek to access U.S. capital markets. We are committed to implement the Act in a manner fully consistent with its purpose and intent.").

<sup>18</sup> See *RGR Nabisco*, 136 S. Ct. at 2102-3.

<sup>19</sup> *RGR Nabisco*, 136 S. Ct. at 2102-3.

unequivocally includes both domestic and foreign companies (as well as their employees, contractors and agents).

Again, the Supreme Court’s reasoning in the context of the RICO is instructive:

It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results. It would exclude from RICO’s reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States. Imagine, for example, that a foreign corporation has operations in the United States and that one of the corporation’s managers in the United States conducts its U.S. affairs through a pattern of extortion and mail fraud. Such domestic conduct would seem to fall well within what Congress meant to capture in enacting RICO. Congress, after all, does not usually exempt foreigners acting in the United States from U.S. legal requirements. See 764 F.3d, at 138 (“Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States”). Yet RJR’s theory would insulate this scheme from RICO liability—both civil and criminal—because the enterprise at issue is a foreign, not domestic, corporation.<sup>[20]</sup>

By the same token, it is unlikely that Congress intended to limit enforcement of § 806 to U.S. companies and exempt the misconduct of foreign issuers of securities in the U.S. financial market. Such a result would not only give unfair advantage to foreign issuers, it would significantly undermine the twin goals of SOX to protect both shareholders of publically-traded companies as well as the integrity of our increasingly global and interconnected U.S. financial system.<sup>21</sup>

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<sup>20</sup> *Id.* at 2104.

<sup>21</sup> As Senator Sarbanes observed during a hearing prior to passage of SOX, “[i]n little more than two decades, the world’s capital markets have been transformed by the global expansion of business and technology. Companies now can pursue capital in securities markets the world over. Well over 1,300 foreign companies are now listed on U.S. securities exchanges. This compares with a figure of just over 300 in 1986, 15 years ago. The force of this expansion is revealed in the proliferation of new business arrangements, the securitization of credit and novel financial instruments. All of these developments make corporate structures more intricate and traditional accounting notions more difficult to apply. *Accounting Reform and Investor Protection: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs*, 107th Cong. 98 (Feb. 14, 2002)(Opening Statement of Chairman Sarbanes).

The legislative history of § 806 lends additional support for its extraterritorial application. Congress enacted SOX § 806 as part of wide-ranging legislation aimed at restoring market integrity by preventing and uncovering corporate financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws.<sup>22</sup> Section 806 was viewed as a “crucial” component of SOX for “restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted.”<sup>23</sup> Congress adopted SOX against a backdrop of corporate misconduct conducted on a global arena and was well aware that sustaining market integrity would require more than a purely domestic focus. The SOX’s legislative history contains repeated references to the interconnectedness and internationalization of national markets.<sup>24</sup> To quote just one such reference, then Senator Bayh stated:

We exist in a global economy today and transparency and reliability of financial data is critically important to the functioning of the global economy. This has significant effects upon the United States. . . . We are affected by the reliability—or lack thereof—of financial accounting standards abroad. And our country, as we have seen several times in the last decade, can be affected by financial shocks abroad, occasionally brought on by a lack of financial transparency in some other markets.<sup>[25]</sup>

With the passage of SOX, Congress sought to regulate the U.S. financial market in the second millennium—a market heavily globalized and complicated with vast foreign markets and substantial foreign ownership, not to mention outsourcing, off-shoring, and instantaneous cross-border electronic securities transactions in cyberspace. Limiting § 806, a critical weapon in SOX’s arsenal of combating financial misconduct, to domestic activity would severely undercut Congress’ remedial purpose. Congress could not have intended a mechanism so anachronistic and ill-suited to modern market conditions.<sup>26</sup>

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<sup>22</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002); see also *id.* Title VIII—Corporate and Criminal Fraud Accountability, Section 801-807.

<sup>23</sup> *Sylvester v. Parexel Int’l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039,-042; slip op. at 9 (ARB May 25, 2011)(quoting S. Rep. 107-146 at 2 (May 6, 2002)).

<sup>24</sup> See generally *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, slip op. at 34-38 (Mar. 23, 2009).

<sup>25</sup> Accounting Reform and Investor Protection: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs, 107th Cong. 100 (Feb. 14, 2002)(comments of Senator Evan Bayh), Arnold & Porter Sarbanes-Oxley Act Legis. History 8-B (SAROX-LH 8\_B available at <http://www.westlaw.com>).

<sup>26</sup> Within a month of issuance of the *Morrison* decision, Congress responded by partially overriding the opinion. Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1852 (2010)(Dodd-Frank) explicitly codified the long-standing federal court jurisprudence regarding the extraterritorial reach of securities law. Congress

In addition to proscribing the misconduct of publically-traded companies, including foreign issuers, § 806 also directly incorporates extraterritorial statutes into its protected activity provisions. Employees of covered companies are protected under § 806 when they report conduct reasonably believed to “constitute[] a violation of § 1341, § 1343, § 1344, or § 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.”<sup>27</sup> At least three of these six enumerated legal authorities extend to some foreign conduct.<sup>28</sup> Under the *RGR Nabisco* precedent outlined above, this is arguably “a clear indication” of the extraterritorial reach of § 806. However, prior to the issuance of *RGR Nabisco*, the ARB held otherwise. In *Villanueva*, the Board applied *Morrison* to § 806(a)(1) and found no indication of extraterritorial application in the six enumerated categories of protected activity. This holding strikes us as suspect in light of the Supreme Court’s holding in *RGR Nabisco*, but we need not address the issue for purposes of resolution of the case before us so we leave it for another day.

As explained above, *RGR Nabisco* supports our finding that § 806 contains a clear indication that it applies extraterritorially to cover *all* publically-traded domestic and foreign companies and their employees regardless of the location of the affected employer/employee.

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clearly intended this provision to reinstate extraterritorial reach to securities law in the context of federal enforcement. See Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don’t Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT’L L. 1, 2 (Winter 2011). In so doing, Congress reaffirmed its recognition that securities law enforcement in today’s environment of multinational corporations and global finance requires extraterritorial authority.

<sup>27</sup> 18 U.S.C.A. § 1514A(a)(1).

<sup>28</sup> The wire fraud statute (§ 1344) contains an express indication of extraterritoriality by prohibiting fraudulent wire communications in foreign commerce:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned. . . .

The securities fraud statute (§ 1348) contains no express extraterritorial authority but nevertheless contains “a clear indication of extraterritorial effect” by incorporating fraud in connection with the publically traded securities of foreign companies. The last enumerated category incorporated in § 806 is “any provision of Federal law relating to fraud against shareholders.” Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1852 (2010)(Dodd-Frank) explicitly codified the extraterritorial reach of securities law. Congress thereby expressed its intention to reinstate extraterritorial reach to securities law in the context of federal enforcement.

This is not to say, however, that § 806 covers all foreign *conduct* of publically-traded foreign companies. The misconduct of a foreign issuer/employer under the statute must still “affect in some significant way” the United States.<sup>29</sup> Blanchard’s complaint alleges significant domestic connections as detailed below. Because § 806 applies extraterritorially and Blanchard’s allegations do not implicate impermissibly extraterritorial violations, he states a claim under § 806.

At this juncture, given our finding that 806 encompasses at least some measure of extraterritoriality, it is worth recalling the Supreme Court’s guidance in *Hartford Fire Ins. Co. v. California*,<sup>30</sup> that even assuming a statute has extraterritorial scope, its authority to reach certain foreign conduct might nevertheless be constrained by principles of international comity or avoidance of conflict of laws. The Court ultimately found that the circumstances of the case before it implicated no such conflict with foreign laws. The same holds true of the facts as alleged by Blanchard. Enforcement of Blanchard’s § 806 complaint and the application of U.S. law to conduct at Bagram would entail neither international discord nor conflict of law issues that would warrant refraining from enforcement or Blanchard’s rights.<sup>31</sup>

## **2. Enforcement of Blanchard’s complaint does not require extraterritorial application of SOX**

Even assuming the ALJ properly applied the presumption against extraterritoriality to § 806, he nevertheless erred in finding that Blanchard’s allegations fail to state a claim under the purely domestic reach of the statute. Although the ALJ cited controlling and relevant precedent—*Morrison*, *Villanueva*, *Dos Santos*—he failed to correctly apply the law to Blanchard’s allegations of fact.

### *A. Villanueva*

The allegations in *Morrison* have been described as “foreign-cubed” because it involved (1) foreign plaintiff(s) suing (2) a foreign corporation and issuer in U.S. court based upon securities transactions in (3) foreign countries.<sup>32</sup> In *Villanueva*, the ARB applied *Morrison* to analyze the applicability of the SOX employee protection provision in a similarly “foreign-

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<sup>29</sup> *RGR Nabisco*, 136 S. Ct. at 2105.

<sup>30</sup> 509 U.S. 764, 798 (1993).

<sup>31</sup> *RGR Nabisco*, 136 S. Ct. at 2100 (“Most notably, [the presumption against extraterritoriality] serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries.”).

<sup>32</sup> *See Morrison v. National Australia Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008).

cubed” case which involved a Columbian citizen’s allegations that his Columbian employer’s Dutch parent company had engaged in Colombian tax fraud.<sup>33</sup>

However, in *Villanueva*, the Board applied the two-step *Morrison* test in reverse order to first determine whether extraterritorial application of § 806 was even necessary. The Board reasoned that if the focus of the case were domestic in nature, there would be no need for extraterritorial enforcement. Significantly, the majority opinion determined that a “primary focus of SOX generally is to prevent and uncover financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws.”<sup>34</sup> Concluding that “the alleged fraud and/or law violations involved Colombian laws with no stated violation or impact on U.S. securities or financial disclosure laws,” the majority held that *Villanueva*’s complaint plainly implicated extraterritorial enforcement.<sup>35</sup> The Board next conducted “an abbreviated *Morrison* step one” textual analysis of the protected activity provision, § 806(a)(1), and concluded that § 806(a)(1)’s silence as to its extraterritorial application limits the SOX definition of protected activity to disclosures related to domestic fraud or securities regulation.<sup>36</sup> The majority dismissed *Villanueva*’s complaint based upon the narrow finding that the alleged Columbian tax fraud *Villanueva* reported was foreign in nature and outside the scope of SOX protected activity.

As noted by former Chief Judge Purcell in a case analogous to the one before us, “*Villanueva* avoided making a comprehensive determination of whether Section 806 of SOX has any extraterritorial application . . . .”<sup>37</sup> Indeed, *Villanueva* explicitly left open the possibility that extraterritorial application of SOX § 806 might be warranted in “a case where the complainant,

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<sup>33</sup> *Villanueva v. Core Labs. NV*, ARB No. 09-108, ALJ No. 2009-SOX-006 (ARB Dec. 22, 2011), *aff’d sub nom on other grounds, Villanueva v. U.S. Dep’t of Labor*, 743 F.3d 103, 108 (5th Cir. 2014)(declining to reach the question of whether Section 806 applies extraterritorially, the court affirmed the ARB’s dismissal on the narrow ground that *Villanueva* failed to show that he engaged in activity protected under Section 806(a)(1)).

<sup>34</sup> *Villanueva*, ARB No. 09-108, slip op. at 10-11.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> *Id.* (“We see no clear context or legislative history extending the six protected categories to include extraterritorial laws without demonstrating a connection to a domestic law.”).

<sup>37</sup> *Dos Santos v. Delta Airlines, Inc.*, ALJ No. 2012-AIR-020, slip op. at 19 n.11 (Jan. 11, 2013). *Dos Santos* was an AIR-21 case involving a U.S. citizen employed by a U.S. airline (Delta Airlines), working as an aircraft maintenance technician in Paris, France. ALJ Purcell initially considered whether the AIR-21 whistleblower provision protects employees from retaliation where at least some of the relevant conduct occurred outside the territorial United States. ALJ Purcell analyzed the facts under the Supreme Court’s test in *Morrison*, as applied by the ARB in *Villanueva*, and held that a Paris-based airline employee who engaged in protected activity in France is covered under AIR-21.

for example, is working for a covered company in the United States, but may have worked in a foreign office of the company for part of the time.”<sup>38</sup>

*B. The ALJ misapplied Villanueva to Blanchard’s complaint*

Neither the Board’s decision in *Villanueva*, nor the Fifth Circuit’s affirmation of it, supports the ALJ’s dismissal of Blanchard’s complaint.<sup>39</sup> Explaining that the statutory language of § 806(a)(1) indicates that the scope of protected activity is limited to violations of U.S. law, the majority held that the fraud Villanueva alleged was principally of a foreign nature—involving violation of foreign tax law that affected foreign companies doing business in a foreign country. In contrast, Blanchard alleged protected activity was based *solely* on violations of U.S. law; in particular, he alleged that his U.S. employer violated the U.S. mail and wire fraud statute by making false statements to the U.S. government in connection with U.S. contractual security and billing obligations.

The ALJ acknowledged that Blanchard established “without issue” his connection to “the primary focus of SOX generally [] to prevent and uncover financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws” as established in *Villanueva*.<sup>40</sup> Construing the evidence in the light most favorable to Complainant, the ALJ recognized that Respondent is a U.S. corporation, organized in Delaware with a principal place of business in Virginia and is publically traded and has common stock listed on the New York Stock Exchange.<sup>41</sup> However, turning to the *additional* focus of the SOX whistleblower provision, the ALJ became fixed on foreign aspects of Blanchard’s protected activity that are not determinative. Citing no legal authority for support, the ALJ concluded that “a Complainant’s connection to the U.S. *must* involve: (1) the location of the allegedly illegal conduct; (2) the location of the discovery of the allegedly illegal conduct; (3) the location of the protected activity and the efforts to address the allegedly illegal conduct; *and* (4) the location of the retaliation.”<sup>42</sup> This was error. Although, as noted in *Villanueva*, these factors may be relevant to an extraterritorial assessment under § 806, they are neither individually nor cumulatively dispositive.<sup>43</sup>

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<sup>38</sup> *Villanueva*, ARB No. 09-108, slip op. at 10 n.22.

<sup>39</sup> In affirming *Villanueva* on narrow grounds, the Fifth Circuit deliberately declined to reach the broader issue of whether § 806 applied extraterritoriality. *Villanueva v. U.S. Dep’t of Labor*, 743 F.3d 103, 109 (2014)(finding that Villanueva failed to allege protected activity).

<sup>40</sup> *Villanueva*, ARB No. 09-108, slip op. at 11.

<sup>41</sup> D. & O. at 21.

<sup>42</sup> D. & O. at 21 (italics added).

<sup>43</sup> *Villanueva*, ARB No. 09-108, slip op. at 10 n.22.

Blanchard’s protected activity allegations involved violations of domestic law covered under § 806(a)(1). As such, extraterritorial reach of the statute is not required to cover Blanchard’s protected activity despite the ALJ’s assertions that the alleged illegal activity occurred in Afghanistan, was discovered in Afghanistan and efforts to address the illegality were largely located in Afghanistan. D. & O. at 21-22. The ALJ’s error may, in part, have been due to a misunderstanding of the ARB’s *Villanueva* decision that is admittedly somewhat confusing. Twice *Villanueva* refers to the “locus of the fraud” or “location of the protected activity” as the basis or “driving force” of the decision. (D. & O. at 10 & n.22). However, read more carefully it is clear *Villanueva* turns not on the actual *location* of the fraud in Colombia, but instead on the more nuanced finding that the “alleged fraud and/or law violations involved Colombian laws with no stated violation or impact on U.S. securities or financial disclosure laws.”<sup>44</sup>

Blanchard’s protected activity claims, unlike those in *Villanueva*, fall squarely within the domestic scope of § 806. Nevertheless, as *Villanueva* advises, the subject complaint must be analyzed in connection with both SOX’s “primary focus,” in general, as well as the “additional focus” of SOX’s whistleblower provision, § 806.<sup>45</sup> Here, the ALJ failed to properly identify the additional focus of § 806 and compounded his error by applying his legal misinterpretation to the facts Blanchard alleged. Although he repeatedly cited *Dos Santos*, the ALJ failed to correctly apply its reasoning to Blanchard’s analogous fact pattern.

*i. The additional focus of § 806 is to detect and address financial fraud*

As noted in *Villanueva*, one focus of § 806 is that “of protecting employees who suffer an adverse action for reporting allegations of financial fraud committed by their employer.”<sup>46</sup> However, as explained in *Dos Santos*, “to appreciate the statutory provision’s true purpose, it must be viewed within the context of the greater regulatory scheme to which it contributes, i.e., how does protecting employees further the primary purpose of the statute in general.”<sup>47</sup> To that end, *Dos Santos* invoked another ALJ opinion, *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, slip op. at 2, 25 (Mar. 23, 2009), which itself provides a compelling and comprehensive explanation for why § 806 is principally an antifraud measure, not simply an employee protection provision:

In addition to the language of the statute, the ALJ looked particularly to SOX’s legislative history for evidence that Section 806 is fundamentally an antifraud provision, explaining that “virtually every Senator who commented on the issue described

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<sup>44</sup> D. & O. at 11; see also D. & O. at 9 n.21 (“[*Villanueva*] complained about violations of foreign laws and did not expressly implicate violations of domestic securities or financial disclosure laws.”).

<sup>45</sup> *Villanueva*, ARB No. 09-108, slip op. at 10 n.22.

<sup>46</sup> *Id.*

<sup>47</sup> *Dos Santos*, ALJ No. 2012-AIR-020, slip op at 22.

Section 806 as a measure predominantly designed and intended to increase transparency, encourage disclosures of incipient and actual fraud, and protect investors.” *Id.* at 27. In fact, the ALJ found “not a single example of a reference to Section 806 which describes it as primarily a labor law” in the legislative history, but rather “every reference to the protection of whistleblowers related to its primary purpose as a means of encouraging corporate insiders to challenge the code of corporate silence.” *Id.* In other words, because “worker protection in Section 806 is not an end in itself, [but] simply a method designed to encourage insiders to come forward without fear of retribution,” the ALJ asserted that Section 806’s territorial scope can only be defined by considering the role that Section 806 plays in SOX’s overarching fraud prevention scheme.<sup>[48]</sup>

We agree. The “additional focus” of § 806 is primarily one of financial fraud detection and it is with this focus in mind that we determine that the facts Blanchard alleged fall within the domestic scope of § 806. The ALJ below acknowledged the domestic facts of Blanchard’s complaint:

[I]n attempting to establish further contacts with the United States, Complainant argues that he is a U.S. citizen; (2) he works for a subsidiary of a U.S. publically traded company; (3) he works on a military base “under the territorial jurisdiction of the United States”; (4) the company was contracted to promote U.S. national security; (5) the underlying contract is a U.S. contract; (6) the company is subject to U.S. criminal laws and “numerous regulations regarding government contract”; (7) the base is under the command of the U.S. armed forces; (8) he engaged in protected activity by complaining about violations of U.S. laws; (9) the conduct he reported included fraudulent representations against the U.S. government; and (10) he was terminated by seven U.S. employees, including an officer of a publically traded company.

D. & O. at 24. However, the ALJ ultimately erred by concluding that these facts were “irrelevant” and that Blanchard did not establish “significant enough connectivity to the United States to warrant the domestic application of § 806.” *Id.* at 21, 24.

On the contrary, “this case has the United States written all over it.”<sup>49</sup> Blanchard’s alleged disclosures—regarding a publically-traded, U.S.-based corporation engaged in submitting false claims to the U.S. government in connection with U.S. security and military

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<sup>48</sup> *Walters*, ALJ No. 2008-SOX-070, slip op. at 12-13.

<sup>49</sup> *RJR Nabisco, Inc.* 136 S.Ct. at 2099 (Justice Ginsburg, opinion concurring in part, dissenting in part, and dissenting from judgment).

operation on a U.S. air force base—fall squarely within the type of malfeasance that both SOX and § 806 aimed to deter. Although some recipients of his complaints were located in Afghanistan, others were in the U.S. The conduct that prompted Blanchard’s complaints, although located in Afghanistan, occurred on a U.S. air force base and directly implicated the security of the United States, U.S. military personnel, and U.S. contractors as well as Respondent’s revenue. And as the ALJ conceded, seven U.S. employees approved Blanchard’s termination. Further, neither the location of Blanchard’s job, nor the location of his direct supervisors is conclusive of the territoriality of his complaint. Because § 806 is not principally focused on regulating the terms and conditions of employment, the physical locations of employee and employer, while relevant are not conclusive.<sup>50</sup> Virtually all the key elements alleged in Blanchard’s complaint demonstrate a significant connection with the U.S. securities and fraud detection. Blanchard’s complaint does not require extraterritorial application of § 806.

*ii. The additional focus of § 806 is labor-related employee protection*

But even assuming the ALJ correctly identified the labor aspect of § 806 as the “additional focus” of § 806,<sup>51</sup> enforcement of Blanchard’s complaint does not require extraterritorial application of § 806. The ALJ’s error in this regard was two-fold. First, all but one of the labor factors of Blanchard’s case *are* domestic. Blanchard was a U.S. citizen terminated by a U.S. publically-traded corporation for reporting violations of U.S. criminal law in connection with U.S. military and security interests at Bagram AFB. Furthermore, an Exelis employee located in Colorado Springs, Colorado made the ultimate decision to terminate Blanchard’s employment. The sole material extraterritorial aspect of Blanchard’s complaint is the location of his work site at Bagram AFB within Afghanistan. But in light of the undisputed facts concerning (1) exclusive U.S. control over; (2) U.S. possession of; and (3) the application of U.S. law within the geographical territory of Bagram AFB, the location of Bagram within Afghanistan does not remove Blanchard from the domestic reach of § 806. See Exhibit 32 (Accommodation Consignment Agreement between U.S. and Afghanistan)). As the Supreme Court has explained “questions of extraterritoriality turn on objective factors and practical concerns” and one such factor is the “objective degree of control the [United States] asserts over foreign territory.”<sup>52</sup>

The “driving force” of Blanchard’s complaint is domestic regardless whether one considers the focus of § 806 as primarily directed at detecting financial fraud or employee

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<sup>50</sup> See *Bowman v. United States*, 260 U.S. 94, 98 (1922)( “Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants’ acts and where restricting the statute to the United States territory would severely limit the statute’s effectiveness.”); *cf. Arabian Am. Co.*, 499 U.S. at 255(with respect to Title VII, the Supreme Court concluded that the “focus” of congressional concern was domestic employment).

<sup>51</sup> D. & O. at 21.

<sup>52</sup> *Boumediene v. Bush*, 553 U.S. 723, 754, 764 (2008).

protection.<sup>53</sup> Our decision in this regard is bolstered by the lack of any allegations that enforcement of Blanchard’s complaint would implicate foreign governments, laws, or actors. Because enforcing Blanchard’s rights will not conflict with Afghani laws, one of the principal policy concerns behind extraterritorial restraint is absent.<sup>54</sup>

### 3. The ALJ erred in concluding that Bagram is not a U.S. Territory under § 806.

Finally, we vacate the ALJ’s “threshold” finding that “Bagram AFB is not a territory of the U.S. where United States laws apply.”<sup>55</sup> Given the foregoing dispositive rulings, we consider the ALJ’s determination of Bagram’s status premature, if not tangential, to resolution of the matter before us. We therefore decline to make further findings with respect to whether Bagram may be considered a U.S. territory or possession under § 806. Nevertheless, because the ALJ’s erroneous ruling regarding Bagram ARB has the potential to ultimately distort and confuse an accurate application of extraterritorial law to this case, we address it in some detail.

For starters, the ALJ’s finding that “Bagram AFB is not a territory” is a finding of fact outside the ALJ’s domain at this stage of litigation. On a Rule 12(b)(6) motion to dismiss, an ALJ must accept a complainant’s well-pleaded allegations as true and should not resolve disputed material facts.<sup>56</sup> Given the paucity of evidence the ALJ cited to support his finding, the ALJ may have considered his finding that “Bagram is not a territory” solely one of law. However, the law he cited was off the mark and contained neither facts nor law on point. Even assuming the case law he cited had some relevance to Blanchard’s case, the ALJ did not correctly apply the law.

The ALJ based his holding that “§ 806 does not apply to Bagram” solely on a line of District of Columbia Circuit cases that rely on the Supreme Court’s holding in *Boumediene v. Bush*, 553 U.S. 723, 754, 764 (2008).<sup>57</sup> However, each of those cases was brought by noncitizen, enemy detainees in foreign military bases; and they all pertained to the “extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens.”<sup>58</sup> The facts and line of reasoning in

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<sup>53</sup> See *Villanueva*, ARB No. 09-108, slip op. 10 n.22.

<sup>54</sup> *Arabian American Oil Co.*, 499 U.S. at 248 (The presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”)

<sup>55</sup> D. & O. at 14.

<sup>56</sup> *Evans v. U.S. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 10 (ARB July 31, 2012).

<sup>57</sup> D. & O. at 14(citing *Al Maqaleh v. Hagel*, 437 F.3d 312 (D.C. Cir.2013)(habeas corpus; U.S. Const., Art. I, §9, cl. 2); *Ali v. Rumsfeld*, 649 F.3d 762, 771-72 (D.C. Cir. 2011)(Fifth and Eighth Amendment); *Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010)(Fifth and Eighth Amendment)).

<sup>58</sup> *Al Maqaleh*, 605 F.3d at 93.

these cases are not relevant to the question of whether § 806 applies to the conduct of U.S. citizens at Bagram.

Even assuming the *Boumediene* analysis was germane to Blanchard’s case, the ALJ misapplied it. In *Boumediene*, the Supreme Court ruled that the U.S. Naval Station at Guantanamo Bay, Cuba (Guantanamo) constituted a “de facto territory” of the U.S. and, as such, the writ of habeas corpus (or Suspension Clause, U.S. Const., Art. I, § 9, cl. 2) was available to nonresident detainees held there. Explaining that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism,”<sup>59</sup> the Court concluded that a functional analysis of at least the following three principal factors was necessary to determine the extraterritorial reach of the habeas writ:

- (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.<sup>[60]</sup>

Instead of applying these three factors to the facts Blanchard alleged and then weighing them, the ALJ considered only one—namely, the status of the detention site. In particular, the ALJ found that, because the U.S. had no intention to occupy Bagram permanently (contrary to the *Boumediene* finding with respect to Guantanamo), “SOX § 806 does not apply to Bagram AFB because Bagram AFB is not a territory of the United States.”<sup>61</sup> The ALJ failed to consider the two other *Boumediene* factors that, in Blanchard’s case, would surely have weighed in favor of the extension of extraterritoriality under a functional, not formalistic approach: Blanchard was a U.S. citizen and there were no practical obstacles—such as conflict of laws—that would impede enforcement of his complaint. Finally, assuming that a determination of the nature of U.S. control at Bagram (Factor 2) was necessary, the ALJ further erred by failing to consider whether a finding that Bagram was a U.S. “possession” would affect extraterritorial reach under § 806.

For all these reasons, we vacate the ALJ’s finding that Bagram is not a territory of the U.S. for purposes of determining the extraterritorial reach of § 806, but decline to further address the nature of U.S. control at Bagram.

## CONCLUSION

For the reasons stated above, we **REVERSE** the ALJ’s decision dismissing Blanchard’s complaint. In addition, we **FIND** both that § 806 applies extraterritorially and that the allegations in Blanchard’s complaint are within the domestic scope of § 806. We also **VACATE** the ALJ’s finding that Bagram AFB is not a U.S. territory. Finally, we **REMAND** this case to the ALJ for proceedings consistent with this decision.

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<sup>59</sup> *Boumediene*, 553 U.S. at 764.

<sup>60</sup> *Id.* at 766.

<sup>61</sup> D. & O. at 14.

**SO ORDERED.**

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**JOANNE ROYCE**  
**Administrative Appeals Judge**

**Paul M. Igasaki, Chief Administrative Appeals Judge, concurring.**

I join Judge Royce in **REVERSING** the ALJ's decision dismissing Complainant Blanchard's complaint. I also find that Complainant's allegations are within the domestic scope of § 806. Because I believe that this case is a domestic one, involving a U.S. corporation with securities listed on a U.S. exchange, contracting with the U.S. military on a U.S. base that is U.S. territory for purposes of the law and facts of this case, and employing a U.S. citizen employee contesting the application of U.S. rules and actions taken against him by managers in the U.S. or acting on their decisions, I do not agree that it presents an opportunity to define the general extraterritoriality of § 806, or, as the ALJ has done, rule against Complainant because the matter is extraterritorial. We also **VACATE** the ALJ's finding that Bagram AFB is not a U.S. territory for purposes of this case. I concur, as Judge Brown also noted, that we make no further findings about the strength of the underlying whistleblower case beyond it being within coverage of SOX § 806.

Both Judge Royce and Judge Brown discuss at length why SOX § 806 applies extraterritorially. I do not necessarily disagree with their reasoning. There would seem to be instances when a case with extraterritorial features might be within the scope of SOX § 806 or beyond it. Judge Brown indicates in his concurrence that *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-006 (ARB Dec. 22, 2011) was limited to the facts of that case. I agree. But the facts of this case compel similar limitations. Judge Royce and I agree that the ALJ in this case was incorrect in holding that the location of Bagram Air Force Base, within the boundaries of another country, makes this matter extraterritorial as to SOX § 806. Once that is found, there are no other foreign characteristics of this case. However interesting, or even necessary, a discussion of extraterritoriality is, this case does not give us the opportunity to go beyond holding that the location of Bagram does not make the case extraterritorial. Nor does any other factor as reviewed in Judge Royce's decision. This is an interesting discussion that, depending upon the facts of a future case that does present questions of extraterritoriality, could be considered by the judges reviewing that case.

I concur that this case should be remanded to the ALJ for proceedings consistent with this decision.

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**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. Cooper Brown, Administrative Appeals Judge, concurring.**

I join with Judge Royce in holding that Section 806 of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A, applies extraterritorially. My reason for writing separately is to make clear that while I agree that Congress intended the prohibitions and protections of Section 806 to apply extraterritorially, as the Supreme Court did in *RJR Nabisco*<sup>62</sup> in finding that RICO's extraterritorial reach was limited, I conclude that it is only with respect to certain applications of SOX's whistleblower protection provision that the presumption against extraterritoriality has been rebutted. It is by analyzing the Sarbanes-Oxley Act as a whole that one finds Congress's intent to protect both domestic and foreign-based employees of U.S. domestic or foreign publicly traded companies who "blow the whistle" on activity the employee reasonably believes violates one or more of the "predicate" acts or provisions of Section 806,<sup>63</sup> provided the alleged wrongdoing of which the employee complains involves U.S. domestic violations of the "predicate" act or provision unless the "predicate" act/provision itself extends its reach extraterritorially.

Before turning to the analysis upon which my conclusion is based, however, it is important to emphasize what the Board's decision in this case is *not* about. In holding that 18 U.S.C.A. § 1514A has extraterritorial application, the decision herein reached is *not* a rejection of the Board's prior ruling in *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-006 (ARB Dec. 22, 2011). As Chief Judge Purcell recognized in *Dos Santos v. Delta Airlines*, ALJ No. 2012-AIR-020 (Jan. 11, 2013), "[r]ather than establishing a decisive bright-line test for determining the territoriality of every Section 806 complaint, the ARB [in *Villanueva*] limited its finding to the facts of the case before it. . . . *Villanueva* avoided making a comprehensive determination of whether Section 806 of SOX has any extraterritorial application, and instead narrowed its [*Morrison*] step one inquiry, ultimately finding that Section 806's definition of protected activity does not include complaints about alleged violations of purely extraterritorial laws." *Dos Santos*, ALJ No. 2012-AIR-020, slip op. at 16, 19 n.11. The decision in which Judge Royce and I concur addressing the extraterritorial reach of Section 806 goes beyond the *Villanueva* majority's narrow inquiry to address Section 806's general extraterritorial applicability.

Additionally, we do *not* address the question of whether Blanchard engaged in SOX-protected activity<sup>64</sup> or whether, if he did, his protected activity was a contributing factor in the

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<sup>62</sup> *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016).

<sup>63</sup> 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any SEC rule or regulation, or any provision of Federal law relating to fraud against shareholders (hereafter at times referred to as Section 806's "predicate" acts or provisions).

<sup>64</sup> See *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 14-22 (ARB May 25, 2011).

adverse action that is alleged to have been taken against him. These issues, as well as whether Respondents can prove by clear and convincing evidence that the adverse action about which Blanchard complains would have been taken against him in the absence of any SOX-protected activity, remain for the ALJ to resolve upon remand. The issues before the Board are effectively two: (1) whether Section 806 is intended to apply extraterritorially, and (2) whether Blanchard's complaint involves a permissible domestic application of SOX's whistleblower protection provision.<sup>65</sup> Judge Royce addresses both of these questions. Judge Igasaki addresses the second. I address only the extraterritorial reach of Section 806.

Three times in the last seven years the Supreme Court has considered whether a federal statute applies extraterritorially—in *Morrison v. National Australia Bank*, 561 U.S. 247, 130 S. Ct. 2869 (2010), *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and most recently in *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016). The Court's decisions reflect a two-step framework for analyzing extraterritoriality issues. "At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco*. 136 S. Ct. at 2101. "[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions."

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<sup>65</sup> An additional issue raised by Complainant on appeal is the manner by which the ALJ reached his conclusion dismissing his case. Complainant argues both that the ALJ committed reversible error in dismissing his case for failure to state a claim (pursuant to Fed. R. Civ. P. 12(b)(6)) when Respondents had sought dismissal for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), and that the ALJ should have analyzed Respondents' motion under summary judgment standards. The question Respondents' motion raised, as to what conduct Section 806 reaches, asked what conduct Section 806 prohibits. It was thus a merits question, whereas "[s]ubject-matter jurisdiction, by contrast, refers to a tribunal's 'power to hear a case.'" *Morrison*, 561 U.S. at 254 (citation omitted). Treating Respondents' motion as one seeking dismissal for failure to state a claim, rather than for lack of subject matter jurisdiction, does not in this case constitute reversible error. *Morrison, supra*; *Sylvester*, ARB No. 07-123, slip op. at 10-12. The same holds true with respect to Complainant's summary judgment argument. Because the question of whether Section 806 has extraterritorial applicability is a legal question, the ALJ was not called upon to determine whether there existed material issues of fact that would preclude ruling upon Respondents' motion. Remanding to the ALJ to reconsider Respondents' motion as one seeking summary judgment would only result in a new summary judgment label for the same Rule 12(b)(6) conclusion.

*Morrison*, 561 U.S. at 255 (quoting *E.E.O.C. v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991)).<sup>66</sup>

Although emphasizing the primacy of a statute’s text in discerning whether Congress intended to give the statute extraterritorial effect, the *Morrison* Court made it clear that it was not articulating a “clear statement rule” (*i.e.*, requiring that a statute say “this law applies abroad”), as context and other sources of statutory meaning may be relevant in determining Congress’s intent. *Morrison*, 561 U.S. at 265. All available indicia of congressional intent, including a statutory provision’s purpose, structure, context, legislative history, and any pertinent amendments, are thus to be considered in assessing whether the provision has extraterritorial application. *Morrison*, 561 U.S. at 279; *Kiobel*, 133 S. Ct. at 1665-1668; *RJR Nabisco*, 136 S. Ct. at 2101; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993).<sup>67</sup>

In disregard of the scope of the assessment that is required, the ALJ in the present case looked no farther than the text of SOX Section 806 and, having found “no express congressional intent in the language of § 806 for the statute to apply extraterritorially,” concluded that “this silence implies only territorial application of the law.” ALJ D. & O., slip op. at 18. Yet, as the cited Supreme Court authority attests, search of the text of the provision in question for an expressed “clear statement” of extraterritoriality is only the beginning of the analysis that is required.

When scrutinizing SOX Section 806 to determine whether it has extraterritorial applicability, we necessarily examine the provision within the overall context of the Sarbanes-Oxley Act as a whole. Doing so is consistent with the Supreme Court’s analysis in other extraterritorial cases where the *entirety of the Act* in which the particular statutory provision at issue was analyzed—and not merely the statutory provision upon which the cause of action is based. In *RJR Nabisco*, the Court noted that context was “dispositive” in finding that RICO

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<sup>66</sup> Step two of the *Morrison* analysis follows upon a determination that the statute in question is not to be given extraterritorial effect. At this second step, the court engages in a separate inquiry to determine whether the complaint before the court involves a permissible *domestic* application of the statute in question, which requires consideration of the “focus of congressional concern.” *Morrison*, 561 U.S. at 266. “If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.” *RJR Nabisco*, 136 S. Ct. at 2101. However, if the statute is found at step one to have extraterritorial effect, the scope of the statute’s extraterritorial reach “turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’” *Id.*

<sup>67</sup> See also *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 178 (2d Cir. 2014); *S.E.C. v. Traffic Monsoon, LLC*, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 1166333 at \*10 (D. Utah 2017) (noting the Supreme Court’s recognition “that the judicial presumption against the extraterritorial application of a statute may be rebutted by referring to all available evidence about the meaning of a statute—including the context provided by related statutes, history of amendments, underlying purpose, and legislative history”).

presented “a clear, affirmative indication” that the prohibitions of 18 U.S.C. § 1962 applied to foreign racketeering activity in particular cases. 136 S. Ct. at 2102. In *Morrison*, the issue was whether Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), applied to misrepresentations made in connection with the purchase or sale of securities traded only on foreign exchanges. After noting that “[o]n its face, § 10(b) contains nothing to suggest it applies abroad,” 130 S. Ct. at 2881, the Court proceeded to examine the Securities Exchange Act as a whole, reviewing in particular a number of provisions cited by the petitioners and the Solicitor General in support of their argument that Section 10(b) should be applied extraterritorially. Based upon its overall statutory evaluation, the Court concluded that “there is no affirmative indication *in the Exchange Act* that § 10(b) applies extraterritorially, and we therefore conclude that it does not.” 130 S. Ct. at 2883 (emphasis added). Similarly, in *E.E.O.C. v. Arabian American Oil Co.* (ARAMCO), 499 U.S. 244 (1991) (cited extensively by *Morrison*), the Court looked to the statute as a whole in addressing whether Congress intended the protections of Title VII, found at 42 U.S.C. §§ 2000e-2 and 2000e-3, to apply to U.S. citizens employed by American employers outside of the United States. In holding that Title VII did not extend its protections extraterritorially, the Court concluded that “[t]he statute *as a whole* indicates a concern that it not unduly interfere with the sovereignty and laws of the States.” 499 U.S. at 255 (emphasis added).<sup>68</sup>

SOX Section 806, as Judge Royce notes, presents two indicia of extraterritorial applicability. First, the prohibitions of the provision expressly apply, without distinction, to all companies “with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).” 18 U.S.C.A. § 1514A(a). By definition, this coverage extends, without distinction, to both U.S. and foreign corporations (referred to as “foreign private issuers”<sup>69</sup>) listed on a national securities exchange in the United States.<sup>70</sup> As of

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<sup>68</sup> Congress subsequently amended Title VII to extend protection to United States citizens working overseas. See Civil Rights Act of 1991, § 109(a), 105 Stat. 1077, codified at 42 U.S.C. § 2000e(f) (“With respect to employment in a foreign country,” the term “employee” “includes an individual who is a citizen of the United States.”).

<sup>69</sup> The term “foreign private issuer” includes nationals of any foreign country or any corporation or other organization incorporated or organized under the laws of any foreign country, unless more than 50% of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and any of the following applies: (1) the majority of the issuer’s executive officers or directors are U.S. citizens or residents; (2) more than 50% of the issuer’s assets are located in the United States; or (3) the issuer’s business is administered principally in the United States. 17 C.F.R. § 230.405; 17 C.F.R. § 240.3b-4(c).

June 30, 2017, there were 491 foreign private issuers from forty six foreign countries listed with the New York Stock Exchange and NYSE MKT.<sup>71</sup> Once registered under the Exchange Act, the foreign companies effectively agree to submit to the Act's reporting requirements and the whole panoply of Exchange Act regulations.<sup>72</sup> An important indicium of extraterritorial application, still the fact that a company has listed securities on a U.S. exchange will not necessarily, in and of itself, overcome the presumption against extraterritoriality. More is required. *Liu Meng-Lin* 763 F.3d at 180 (citing *Morrison*, 561 U.S. at 263). Thus I turn, as did Judge Royce, to the second indicium of extraterritorial applicability found in Section 806: the provision's "predicate" acts. An employee of a covered company is protected under 18 U.S.C.A. § 1514A(a)(1) from retaliation when the employee reports conduct that he or she reasonably believes "constitutes a violation of [18 U.S.C.] section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Accordingly, as the Supreme Court did in *RJR Nabisco* in assessing the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO), we examine the several "predicate" acts of Section 806 to determine whether they evidence extraterritorial applicability. Judge Royce concluded that at least three of the six enumerated legal authorities extend to some foreign conduct, thereby giving Section 806 extraterritorial reach.<sup>73</sup> In agreeing with Judge Royce that SOX Section 806 has extraterritorial reach based upon the extraterritorial applicability of its "predicate" provisions, I find it necessary to look no further than the wire fraud provision (18 U.S.C. § 1343), upon which Complainant Blanchard relies in the present case, for evidence of Section 806's extraterritorial applicability.

In reaching the conclusion that the wire fraud provision applies extraterritorially, I am mindful of the Court's cautionary admonition in *Morrison* that "general reference to foreign commerce . . . does not defeat the presumption against extraterritoriality," 130 S. Ct. at 2882, and

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<sup>70</sup> "Foreign issuers which choose to be listed on a national securities exchange in the United States, like U.S. issuers, must register under the Exchange Act." 3F Sec. & Fed. Corp. Law § 27:243 (2d ed.). The Exchange Act requires the registration of all issuers meeting the shareholder and asset criteria of 15 U.S.C. § 78l(g)(1) if engaged in a business affecting interstate commerce (defined to include "trade, commerce, transportation or communication . . . between any foreign country and any State," 15 U.S.C. § 78c(a)(17)), unless exempted from doing so pursuant to 15 U.S.C. § 78l(g)(3). See 17 C.F.R. § 240.12g3-2. For a discussion of the circumstances under which a foreign private issuer becomes an Exchange Act "issuer," see 3D Sec. & Fed. Corp. Law § 23:39.15 (2d ed.).

<sup>71</sup> See <https://www.nyse.com/publicdocs/nyse/data/CurListofallStocks.pdf>.

<sup>72</sup> 3F Sec. & Fed. Corp. Law § 27:243 (2d ed.). Unless in the case of a foreign private issuer it is exempted from specific reporting and regulatory requirements by the SEC. See 15 U.S.C. § 78l(g)(3); 17 C.F.R. § 240.12g3-2.

<sup>73</sup> Cited by Judge Royce: 18 U.S.C. § 1343 (wire fraud) and § 1348 (securities fraud), and the last enumerated category incorporated in SOX Section 806 involving "any provision of Federal law relating to fraud against shareholders," which generally includes Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)), Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)), and Section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)).

aware of subsequent case authority that has construed the wire fraud statute, in light of *Morrison*'s admonition, as having domestic applicability only.<sup>74</sup> However, I do not read Section 1343 to embody a mere "general reference to foreign commerce." To the contrary, and unlike several of its companion fraud provisions,<sup>75</sup> Section 1343's proscription against fraud pursued "by means of wire . . . communication in interstate *or foreign commerce*" (emphasis added) is at the heart of the prohibited activity to which the statute applies. Yet, even if this were not the case and all six of the "predicate" provisions were construed as having domestic applicability only, this would not preclude finding that Congress intended Section 806 to have extraterritorial applicability, as hereafter explained.

Ultimately, the answer to Section 806's extraterritorial applicability is found in review of the Sarbanes-Oxley Act as a whole. The Sarbanes-Oxley Act of 2002 (SOX), P.L. 107-204, 116 Stat. 745, is a major piece of legislation bundling together under Titles I through XI a large number of diverse and independent statutes designed to achieve the Act's investor-protection goals through improving the quality of and transparency in financial reporting and auditing of publicly traded companies. *Spinner v. Landau*, ARB No. 10-111, ALJ No. 2010-SOX-020, slip op. at 13 (ARB May 31, 2012) (citation omitted). Under its various Titles, SOX provides for the promulgation of codes of ethics and various other means for holding publicly traded companies, domestic and foreign alike, to higher reporting standards, while increasing criminal penalties for securities fraud and other violations. Within the overall statutory context and construct of SOX, the purpose of Title VIII (which includes at Section 806 the whistleblower protection provisions codified at 18 U.S.C.A. § 1514A) "is to provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations, to disallow debts incurred in violation of securities fraud laws from being discharged in bankruptcy, [and] to protect whistleblowers who report fraud against retaliation by their employers." S. Rep. No. 107-146, p. 2 (2002).

It is only by fully understanding SOX's overall statutory construct and the role that Section 806 plays within that context in support and furtherance of SOX's larger statutory purpose, that one can appreciate the essential extraterritorial applicability of Section 806. As Judge Royce previously noted in *Villanueva*, ARB No. 09-108, slip op. at 17, this extraterritorial applicability "is reflected throughout SOX where numerous other provisions are routinely accorded extraterritorial application despite the absence of express extraterritorial language. This intrinsic extraterritoriality is based upon the fact that, like Section 806, they contain prescriptions linked to companies that are publicly traded," *i.e.*, any company, domestic or foreign, required to register its securities under Section 12 of the Exchange Act (15 U.S.C. §

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<sup>74</sup> *E.g.*, *European Cmty. v. RJR Nabisco*, 764 F.3d 129, 140-141 (2d Cir. 2014); *U.S. v. Siderenko*, 102 F. Supp. 3d 1124, 1128-29 (N.D. Ca. 2015).

<sup>75</sup> *Compare* 18 U.S.C. §§ 1341, 1342, 1344.

78I), or required to file reports under Section 15(d) of that Act (15 U.S.C. § 78o(d)).<sup>76</sup> Once registered under the Exchange Act, a publicly traded foreign company is not only subject to the Exchange Act's reporting requirements and the SEC's multitude of regulations, the company becomes subject to a host of requirements and obligations imposed under the Sarbanes-Oxley Act.

Nowhere is this better demonstrated than in the corporate responsibility mandates of Title III of SOX, which subjects all publicly traded companies, domestic and foreign, to requirements and prohibitions governing, among other things, the filing of periodic reports under the Exchange Act, and assuring that audit committees are not subjected to improper influence or insider trading. Section 301 (15 U.S.C. § 78j-1(m)) regulates internal accounting and auditing controls of both domestic and foreign publicly traded companies, mandates that these companies establish procedures for anonymous and/or confidential reporting of accounting misconduct, and imposes rules and standards relating to the audit committees that domestic and foreign issuers alike are required to establish.<sup>77</sup> Section 302 (15 U.S.C. § 7241) mandates that the Securities and Exchange Commission establish rules requiring domestic and foreign companies to certify the material completeness and accuracy of their periodic reports filed with the Commission,<sup>78</sup> with the additional proviso that should a domestic issuer reincorporate or engage in any other transaction that results in the transfer of the corporate domicile or offices of the issuer from inside the United States to outside of the U.S., the legal force of Section 302's requirements shall still apply. Similarly, Section 306 (15 U.S.C. § 7244), which deals with insider trades during pension fund black-out periods, has been accorded extraterritorial reach, subject to certain

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<sup>76</sup> Like Title VIII of SOX, Titles I through VII and IX through XI do not specifically mention foreign publicly traded companies or foreign issuers but, as the First Circuit noted in referring to use of the term "issuer" in Section 301, *Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 10 (1st Cir. 2006), the term as defined at Section 2 of SOX includes foreign as well as domestic companies whose securities are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Act. *See* 15 U.S.C. § 7201(7).

<sup>77</sup> Under Section 301, foreign private issuers that are registered companies under the Securities Exchange Act must generally comply with the following rules regarding the audit committees of their board of directors: (a) the audit committee must be responsible for the appointment, compensation, retention, termination and oversight of the issuer's external auditors, (b) the audit committee must have procedures for the treatment of complaints or submissions identifying possible accounting misdeeds, (c) the audit committee must be able to obtain advice and assistance from outside advisors as it deems necessary to carry out its duties, (d) the issuer must provide appropriate funding for the audit committee to perform its duties, and (e) each audit committee member must be an "independent" member of the Board (as determined under Exchange Act Rule 10A-3). Exemptions from certain of these rules may nevertheless be available for foreign private issuers that have a board of auditors or one or more statutory auditors who are appointed pursuant to the law or listing provisions of the issuer's home country or securities exchange and who meet certain other standards of independence. 15 U.S.C. § 78j-1(m).

<sup>78</sup> Section 302 contains no specific reference to foreign application, yet the SEC has applied it extraterritorially. *See* SEC Rule at 17 C.F.R. § 240.13a-14(a); Form 20-F, Certifications.

limitations, even though it does not specifically reference foreign private issuers. *See* 17 C.F.R. § 245.100(b)(2)(i),(ii)(A), (B).

Title IV of SOX, addressing enhanced corporate financial disclosure requirements, similarly makes no distinction in its coverage between domestic and foreign issuers. The ALJ in *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070 (Mar. 23, 2009), discussed in detail Title IV's extraterritorial coverage of foreign companies with securities listed on U.S. exchanges, which merits repeating:

Neither Section 401(a)(ii), requiring disclosure of material off-balance sheet transactions, nor Section 410(b), dealing with the use of non-GAAP accounting, expressly provide for extraterritorial application of either provision; yet Section 401(a)(ii) has been accorded extraterritorial application. *See*, SEC Form 20-F, Item 5. Pursuant to Section 401(b), the SEC adopted Regulation G which addresses the problem of financial information not prepared in accordance with generally accepted accounting principles (GAAP); and it applies to foreign private issuers, subject to a limited exception. 17 C.F.R. §§ 244.100(c)(1)(2) and (3). Section 402 of Sarbanes-Oxley contains conflict-of-interest provisions that do not specifically reference foreign executives, but this section has been accorded extraterritorial effect, with an exception for foreign banks. *See*, 17 C.F.R. § 240.13k-1; 69 F. R. No. 84, April 30, 2004, at 24016. Section 403 of Sarbanes-Oxley requires disclosure of transactions involving management and principal stockholders. The statutory provision does not specifically reference foreign transactions, but it applies extraterritorially, subject to an accommodation for foreign issuers. *See*, 17 C.F.R. § 229.404, *Instructions to Item 404, No. (2)*. Section 404 of Sarbanes-Oxley requires management to assess the company's internal controls. The provision does not specifically reference foreign management, but it has been accorded extraterritorial application, subject to an accommodation that extended the compliance deadline for Section 404(b) for certain foreign private issuers that were accelerated filers for amendments to Forms 20-F and 40-F. *See*, SEC Release Nos. 33-8730A; 34-54294A; File No. S7-06-03 dated August 9, 2006; SEC Form 20-F, Certifications, Nos. 4 and 5.<sup>[79]</sup> Section 406(a) requires implementation of a code of ethics for senior

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<sup>79</sup> The SEC explained this provision as follows: "Section 404 of the Sarbanes-Oxley Act makes no distinction between domestic and foreign issuers and, by its terms, clearly applies to foreign private issuers. These amendments, therefore, apply the management report on internal control over financial reporting requirement to foreign private issuers. . . ." Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports; Final Rule, 68 Fed. Reg. 36,636, 36,647 (June 18, 2003) (codified at 17 C.F.R. Parts 210, 228, 229, 240, 249, 270, 274).

financial officials. It does not specifically require the implementation of a code applicable to foreign financial officials; however, the requirement has extraterritorial reach. *See, e.g.*, 17 C.F.R. Section 249.220f (SEC Form 20–F, Item 16B applicable to foreign private issuers).

*Walters*, ALJ No. 2008-SOX-070, slip op. at 33.

Other provisions of SOX similarly apply to foreign companies, whose securities are registered on a U.S. exchange, without express reference to foreign application. Section 906 (codified at 18 U.S.C. § 1350) requires the chief executive officer and chief financial officer of any issuer filing periodic reports containing financial statements with the SEC to certify that the periodic reports fully comply with the requirements of section 13(a) or 15(d) of the Securities Exchange Act (15 U.S.C. § 78m or § 78o(d)) and that the information contained therein fairly present the financial condition of the issuer. Knowingly or willingly failing to comply with the certification requirement will subject the corporate officer to criminal liability. *See* 18 U.S.C. § 1350(c). SOX Section 1105 amended 15 U.S.C. § 78u-3 by adding subsection (f), which empowers the SEC as part of any cease-and-desist proceeding brought pursuant to subsection 78u-3(a) to bar an officer or director of any publicly traded company (domestic or foreign) found to have violated Section 10(b) of the Exchange Act from continuing to serve in such capacity “if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.”

The Sarbanes-Oxley Act does contain two provisions, and incorporates a third, that expressly provide for extraterritorial application. Section 106 applies to foreign accounting firms when they audit publicly traded companies, and Section 307 applies to foreign attorneys who appear and practice before the SEC. A third provision, Section 1107, does not itself mention foreign entities or individuals but, because it is incorporated into a statute that does, has extraterritorial reach. The three provisions have been cited to demonstrate that Congress was well able in its passage of SOX to call for extraterritorial application when it so desired, thus justifying construing Section 806 as not having extraterritorial reach under the canon of statutory construction 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.” *Liu Meng-Lin* 763 F.3d at 181 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Carnero*, 433 F.3d at 10-11; *Villanueva*, ARB No. 09-108, slip op. at 12; *Beck v. Citigroup*, ALJ No. 2006-SOX-003 (Aug. 1, 2006). However, application of this canon of statutory construction to rule out the extraterritorial application of Section 806 evidences a fundamental misunderstanding of the scope of the Sarbanes-Oxley Act, and of the cited provisions’ respective roles within the overall context of SOX in achieving the Act’s purpose.

The SOX reforms addressed to companies required to register their securities under Section 12 of the Exchange Act or file reports under Section 15(d) of that Act do not specifically mention foreign application because they acquire extraterritorial reach through the obligations the SOX provisions impose upon the publicly traded companies. Because the coverage of the Exchange Act provisions encompasses, by definition, foreign as well as domestic publicly traded

companies, an express statement of extraterritoriality is unnecessary. However, in imposing reform through SOX on publicly traded companies, Congress was also well aware of the fact that the investment fraud by these companies of congressional concern could not be fully addressed if Congress ignored the role that contractors and subcontractors, including accountants, auditors and lawyers, played in defrauding investors and in accomplishing subsequent cover up of the wrongdoing.<sup>80</sup> However, to assure full and comprehensive coverage against the wrongdoing SOX seeks to address, Congress necessarily had to expressly impose the prohibitions and obligations of SOX pertaining to independent contractors and subcontractors retained by publicly traded companies extraterritorially.<sup>81</sup> In the absence of such extraterritorial application, foreign-based accountants, auditors, and lawyers of foreign private issuers and domestic publicly traded companies doing business abroad could not be effectively regulated. Congress clearly recognized the gaping hole in SOX's otherwise comprehensive coverage that such an omission would create, and by express extraterritorial language—unnecessary for assuring coverage of publicly traded companies, domestic and foreign alike—assured that relevant conduct of foreign-based accountants, auditors and lawyers was covered.

Accordingly, Section 106 of SOX (15 U.S.C. § 7216) expressly applies to foreign public accounting firms, requiring such firms to register with the Public Company Accounting Oversight Board established pursuant to Section 101 of the Act where they prepare or furnish audit reports for any publicly traded company (and in other specified circumstances). Section 106 imposes its requirements and obligations upon such foreign accounting firms in the same manner and to the same extent as U.S. public accounting firms, unless otherwise exempted by the SEC or the Board.<sup>82</sup> Under Title II, Sections 201 through 206, registered foreign public accounting firms (as well as domestic firms) are subject to various prohibitions designed to maintain auditing independence. Section 307 (15 U.S.C. § 7245) directs the SEC to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of domestic and foreign issuers, including a rule requiring the internal reporting of material violations of securities law or a breach of fiduciary duty or similar violation by the company. In promulgating the mandated rules, the SEC has applied the standards of conduct and the internal reporting provision to domestic and foreign attorneys. *See* 17 C.F.R. § 205.2(a)(2)(ii), (c), (j) (2005) (defining “attorney” to include “any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign,” who appears before the SEC).

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<sup>80</sup> *See*, S. Rep. 107-147, 2002 WL 863249 at \*2-5, 7, 20-21 (May 6, 2002); S. Rep. 107-205, at \*14, 22, 24 (July 3, 2002).

<sup>81</sup> *See, e.g.*, 116 Stat. 750-765, 773-774, 784; SOX §§ 101-107, 203-206, 307.

<sup>82</sup> Section 106 also requires any foreign public accounting firm that performs material services upon which a registered public accounting firm relies or itself prepares an audit report for an issuer to produce its audit work papers for review by the SEC or the Board where requested, and further subjects the foreign accounting firms “to the jurisdiction of the courts of the United States” for enforcement of any request for the firm’s work papers. 15 U.S.C. §7216(b)(1)(B).

As noted, Section 1107 (18 U.S.C. § 1513(e)) has also been cited as providing extraterritorial reach warranting comparison to Section 806's silence, cited to bolster the interpretation that Congress did not intend Section 806 to have extraterritorial application under the aforementioned canon of statutory construction "where Congress includes particular language in one section of a statute but omits it in another section . . . ." This is a false comparison from which no meaning can be derived. The extraterritorial reach of Section 1107 is not found in the provision itself, but in a companion section in existence prior to SOX's passage, found at 18 U.S.C. § 1513(d), which provides for "extraterritorial Federal jurisdiction" over any offense under 18 U.S.C. § 1513.<sup>83</sup>

From the foregoing it is clear, as Judge Levin concluded in *Walters*, ALJ No. 2008-SOX-070, slip op. at 33, that the financial, accounting, and corporate governance reforms established throughout SOX "are bounded not by borders, but by the scope of operations contributing to the publicly traded multinational company's consolidated financial reports." Like the various SOX provisions cited that apply extraterritorially notwithstanding no express statement to that effect, the absence of specific reference in Section 806 to foreign entities or employees working abroad is not an accurate indication of congressional intent to exclude from coverage employees who work abroad. Nor, when properly understood, can significance be drawn from the fact that SOX provisions governing the conduct of independent contractors, such as accountants, auditors, and attorneys, include specific references to foreign application. As an interpretive device, such comparison only leads to erroneous conclusions that, as Judge Levin's decision in *Walters* demonstrates, are contrary to the legislative intent and purpose of Section 806.

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<sup>83</sup> A further erroneous distinction was drawn by the majority in *Villanueva*, ARB No. 09-108, slip op. at 12, comparing Section 929A of the Dodd-Frank Act, Pub. L. No. 111-203 (2010), which amended SOX Section 806, to Section 929P of Dodd-Frank, an amendment extending the federal court's jurisdiction extraterritorially in the wake of *Morrison* to include claims brought by the SEC under Section 10(b) of the Exchange Act. Section 929A clarified 18 U.S.C.A. § 1514A's coverage to include "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of an otherwise covered company, and like 18 U.S.C.A. § 1514A, its statutory text was silent as to its extraterritorial application. Section 929P of Dodd Frank, on the other hand, expressly expanded the scope of federal court jurisdiction over Section 10(b) actions or proceedings initiated by the Securities Exchange Commission involving the violation by foreign investors of "securities transactions occur[ing] outside the United States" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." The two provisions are so distinct in purpose and context that the attempt to derive meaning from the comparison of these two provisions is to attempt to derive meaning through the proverbial comparison of the orange to the apple. As an amendment to 18 U.S.C.A. § 1514A, an express statement in Section 929A of its extraterritorial reach is no more necessary than is the necessity of an express statement of extraterritoriality in the SOX provision itself, for the reasons that are elsewhere explained. Section 929P of Dodd-Frank, on the other hand, does not involve amendment to SOX but amendment of the Exchange Act of 1934 (at 15 U.S.C. § 78aa) in order to assure the extraterritorial jurisdiction of the federal courts to entertain Section 10(b) actions in certain circumstances where, per *Morrison*, it had been held that no such jurisdiction previously existed.

The legislative history of SOX as a whole, which Judge Levin examined in detail in *Walters* clearly evidences Congress's acknowledgment of the extraterritorial reach of the Act's reforms and of Congress's intent to cover violations of Section 806 involving employees working abroad for publicly traded companies, domestic or foreign. As Judge Levin chronicles at length, Congress's concerns were neither limited to U.S. companies whose securities are registered on national stock exchanges, nor to U.S. operations of multinationals. Congress clearly understood the need, within the reform regime SOX contemplated, of encouraging whistleblowers, wherever located, to serve as a deterrent against fraud, and was fully aware of the undesirable consequences should the requirements of SOX, including those under Section 806, not be applied evenhandedly to all publicly traded companies, whether based in the U.S. or abroad.<sup>84</sup>

Judge Levin also rejected as determinative a number of other factors that have on occasion been cited to support the contention that Congress did not intend to extend Section 806's reach extraterritorially. *Walters*, ALJ No. 2008-SOX-070, slip op. at 38-41. Most notable among the factors he addressed is the concern that application of Section 806 to whistleblowers employed abroad could result in conflicts with foreign law—a concern at the core of the presumption against extraterritoriality.<sup>85</sup> However, as Judge Levin points out, this is only a concern if Section 806 is construed as primarily a labor law, which he held it is not.

Careful scrutiny of Section 806 within SOX's overall context, as Judge Levin provided in *Walters*, establishes the basis for concluding that Section 806 is predominately an antifraud law. Consequently, the fact that an individual employed abroad may be able to assert his or her rights under foreign labor law as a foreign employee is not inconsistent with his or her right to assert whistleblower protection under Section 806. Judge Levin's examination of the whistleblower provision in relationship to the whole of the Sarbanes-Oxley Act is worth recounting:

Time and again, the legislative history of Sarbanes-Oxley reflects Congressional appreciation for the important antifraud contribution whistleblowers can make and the unique role inside whistleblowers can play in deterring financial fraud and misrepresentation. The role Congress envisioned for the whistleblower was best described by Senator Leahy: "When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why." *See*, Senate Banking Committee Legis. History, Vol. III. at 1300-01. . . .

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<sup>84</sup> Rather than recite Judge Levin's excellent and detailed legislative analysis, the reader is urged to review *Walters*, ALJ No. 2008-SOX-070, slip op. at 34-38.

<sup>85</sup> *See, e.g., Carnero*, 433 F.3d at 15 (expressing concern that the extraterritorial application of Section 806 would interfere with the employment relationship between foreign employers and their foreign employees).

Senator Leahy justified the protection Section 806 affords to whistleblowers based on the importance of the unique, inside, financial perspective they can provide. Worker protection in Section 806 is not an end in itself, it is simply a method designed to encourage insiders to come forward without fear of retribution. As Senator Leahy's comments confirm: "We learn from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Look what [Enron was] doing on this chart. There is no way we could have known about this without that kind of a whistleblower." *See*, Senate Banking Committee Legis. History, Vol. III, at 1632. In what now appears as a prescient response anticipating decisions like *Savastano*, *Srivastava*, *Bothwell*, and *Burke*, which deny that Congress intended to hold a corporate parent like Enron directly responsible for adverse action against a whistleblower in a subsidiary, Senator Leahy emphasized that Congress was dealing not only with the web of subsidiaries Enron and other corporations had used systematically to defraud stockholders, but the realization that the average investor and professional accountant, in many instances, were unlikely, without inside assistance, to untangle the complex corporate structure in which fraud or financial misrepresentation could fester undetected. As Senator Grassley noted, the WorldCom situation, among others, demonstrated that: "if fraud is repeatedly covered up by corporate insiders or contrived to defeat established internal controls," even a company's external auditors may not detect the financial misrepresentations. *See*, Senate Banking Committee Legis. History, Vol. III, at 1498.

....

Further indications that the predominant purpose of Section 806 is fraud detection, not worker protection, proliferate. The goals of the Act, as Senator Leahy described them, are transparency, forthright financial decision-making, and accountability. His amendment, he explained, accomplishes these goals in a number of ways, specifically: "first, it created a new federal felony for securities fraud, second, it prohibited shredding of documents for 5 years, and third, the amendment protects corporate whistleblowers." *Id.* at 1231-33 (emphasis added). According to Senator Leahy, whistleblower protection is an important means of achieving the amendment's goals, and Senator Corzine concurred. *Id.* at 1273. Senator Sarbanes explained: "Senator Leahy and his colleagues on the Judiciary Committee have moved ahead and provided additional protections and remedies for corporate whistleblowers that I think will help to ensure that employees will

not be punished *for taking steps to prevent corporate malfeasance.*” Id. at 1299. (emphasis added).

Senator Johnson, too, observed that the protection of corporate whistleblowers against retaliation by their employers was: “*designed to protect investors from corporate greed.*” Senate Banking Committee Legis. History, Vol. III, at 1461 (emphasis added). As Senator Johnson envisioned it, Section 806 protects whistleblowers for the primary purpose of protecting investors. The purpose of whistleblower protection as an antifraud measure was also confirmed by Senator Daschle. In his view: “The amendment does not just protect ‘paper evidence,’ it also protects valuable testimony from people . . . . *This bill is going to help prosecutors gain important insider testimony on fraud and put a permanent dent in the corporate code of silence.*” Id. at 1226 (emphasis added). Senator Graham, too, viewed the protection for corporate whistleblowers as: “*designed to protect investors from corporate greed.*” Id. at 1461 (emphasis added). Senator Boxer, in fact, listed five specific antifraud provisions in the bill, including, Section 806 as the fifth, stating: “*And finally, it protects whistleblowers who reveal unethical acts by the companies for which they work.*” See, Id. at 1526. She continued: “Unfortunately, the House recently passed a bill that is weak and will not get the job done.” Among the reasons Senator Boxer considered the House bill weak antifraud legislation was its failure: “. . . to protect whistleblowers.” Id. Summing up, the Senate Judiciary Committee Report observed: “. . . often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to ‘who knew what, and when,’ crucial questions *not only in the Enron matter but in all complex securities fraud investigations . . . .*” (emphasis added).

*Walters*, ALJ No. 2008-SOX-070, slip op. at 9-11.

Clearly, the worker protection afforded by Section 806 is secondary to one of Sarbanes-Oxley’s most important antifraud components: the whistleblower’s disclosures. Again turning to Judge Levin in *Walters*:

Section 3(b)(1) of Sarbanes-Oxley, for example, states that: “IN GENERAL.—A violation by any person of this Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) . . . .” A violation of Section 806 is, of course, a violation of Sarbanes-Oxley; and although the Department of Labor does not enforce the Securities Exchange Act of 1934, Section 806, may still be

construed as an antifraud provision consistent with Section 3(b)(1). To be sure, Section 3(b)(1) is designed to aid SEC enforcement; but so, too, is Section 806.

The SEC's overall compliance mission benefits when inside whistleblowers report potential fraud, deception, or questionable accounting or financial disclosures to those individuals within their organization in a position to correct it. As such, Section 806(a)(1)(C) facilitates the SEC's voluntary compliance goals. Beyond that, however, Section 806(a)(1)(A) encourages whistleblowers to provide information to a "Federal regulatory or law enforcement agency," while Section 806 (a)(1)(C)(2) specifically protects whistleblowers who: "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Like Section 3(b)(1), Section 806, by its express terms, aids and facilitates the SEC's antifraud enforcement efforts.

Section 806, moreover, does not protect employees for the sake of improving labor standards or conditions. Whistleblowers act on a wholly voluntary basis; and if they remain silent, their jobs are not in jeopardy. They can "get along" if they "go along." Inaction and silence will provide all the protection they need. Yet, the primary goal of Section 806 is not labor protection. It provides job security, in theory at least, as a means of encouraging employees voluntarily to take an action Congress deems in the public interest. Like a reward to an informant, Section 806 affords an inducement to volunteers to provide needed information. It is no more intended primarily as a job protection measure than a reward is intended primarily to enrich the informant. Although it uses job protection as the method to achieve its purpose, the whistleblower protection provision in Section 806 is intended by Congress to serve as a vital antifraud reform designed to protect public investors by creating an environment in which whistleblowers can come forward without fear of losing their jobs.

*Walters*, ALJ No. 2008-SOX-070, slip op. at 12-13.

In *Villanueva*, the majority held that Section 806 did not apply extraterritorially to a whistleblower complaint by a foreign-based employee against his foreign employer where the complainant alleged violations of purely extraterritorial laws. I dissented from the majority in that case because, while I agreed with Judge Royce's opinion therein as to the extraterritorial applicability of Section 806, I nevertheless was of the opinion that under the *Morrison* "step

two” analysis the relevant evidence of record presented what I considered a domestic claim under Section 806. *See Villanueva*, ARB No. 09-108, slip op. at 19-30.

In concluding in the present case that Congress clearly intended Section 806 to have extraterritorial applicability, I do not disagree with the majority’s conclusion in *Villanueva* that Section 806’s extraterritorial reach does not extend to whistleblower complaints by foreign employees alleging violation by a foreign publicly traded company of foreign law. Based on the analysis herein conducted of the Sarbanes-Oxley Act as a whole, complemented by the excellent in depth analysis provided by Judge Levin in *Walters*, it is clear that Congress intended to extend Section 806’s protection to any foreign-based employee of a U.S. domestic or foreign publicly traded company, provided the alleged wrongdoing of which the employee complains involves U.S. domestic violations of the “predicate” act or provision of Section 806 unless the “predicate” act or provision itself extends its reach extraterritorially.

For this reason, I join with Judge Royce in vacating the decision herein appealed and remanding this case for further proceedings.

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**E. COOPER BROWN**  
**Administrative Appeals Judge**