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The Extraterritorial Application of the Dodd-Frank Whistleblower Provisions

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The Dodd-Frank Wall Street Reform and Consumer Protection Act creates new financial incentives for employees who cooperate with or provide information to the Securities and Exchange Commission (SEC) in connection with violations of the securities laws, and also creates a new anti-retaliation cause of action for employees who participate in this program. Dodd-Frank also expands the existing Sarbanes-Oxley Act (SOX) whistleblower anti-retaliation provision, and creates other new anti-retaliation causes of action for whistleblowers who provide information to the Commodity Futures Trading Commission and the Bureau of Consumer Financial Protection. In response to the new Dodd-Frank whistleblower bounty provisions, plaintiffs' lawyers are already soliciting whistleblowing tips from employees of multinational corporations across the globe.

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However, two preliminary questions that employment lawyers should ask are: 1) whether employees who reside outside the United States may be ineligible for such bounties; and 2) whether such employees could bring whistleblower retaliation claims under Dodd-Frank challenging terminations or other employment actions outside of the United States.

This article focuses on the potential for extraterritorial application of the expanded Sarbanes-Oxley provisions and the new SEC whistleblower cause of action.

Pre-Dodd Frank Analysis of the Extraterritorial Scope of SOX and Other Securities Laws

Prior to Dodd-Frank, the Administrative Review Board (ARB) of the Department of Labor had ruled that SOX protections covered employees of subsidiaries of a publicly traded company where the "particular subsidiary or its employee [acted as] an agent of [the] public parent … according to principles of the general common law of agency." *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, 2006 DOL Ad. Rev. Bd. LEXIS 50, at *31 (2006). But administrative law judges and the courts continued to disagree about whether, and in what circumstances, subsidiaries and their employees were covered by the Act. *See Johnson v. Siemens Building Technologies, Inc.*, 2011 DOL Ad. Rev. Bd. LEXIS 22, at *22-23 (2011) (collecting authorities).

Courts also disagreed as to whether the SOX whistleblower protections applied outside the United States. In the only appellate decision to date examining the question of extraterritorial application of the SOX anti-retaliatory provision, the First Circuit applied the traditional presumption against the extraterritorial application of Congressional statutes. *Carnero v. Boston Scientific Corporation*, 433 F.3d 1 (1st Cir. 2006). This approach mirrors that taken by the Supreme Court in *EEOC v. Arabian American Oil Co.* ("*Aramco*"), 499 U.S. 244 (1991), which held that Title VII did not apply to employees of U.S companies who work outside the United States. (In response to *Aramco*, Congress amended Title VII to explicitly cover U.S. citizens who are employed in a foreign country. 42 U.S.C. § 2000e(f).) The court in *Carnero* held that both the statutory language and legislative history failed to reflect the "necessary clear expression of congressional intent" to overcome this presumption and extend the jurisdiction of the statute to cover acts of retaliation that occur outside the United States. Instead, Congress "tailored the

relevant statute to purely domestic application," while explicitly providing for extraterritorial jurisdiction in other provisions of SOX. As a result, the court declined to extend the anti-retaliation provisions to protect employees of foreign subsidiaries from misconduct that occurred overseas.

The court in *Carnero* was also reluctant to extend the application of the anti-retaliation cause of action in SOX because of the problems and limits of extraterritorial enforcement of such a statute, including "unintended clashes between our laws and those of other nations which could result in international discord." U.S. courts and agencies could potentially interfere with the prerogatives of foreign sovereigns if they interfered with the relationship between foreign employers and their employees, and the court reasoned that Congress had not considered or granted such an extension of jurisdiction.

One federal district court (*O'Mahony v. Accenture*, LTD, 537 F. Supp. 2d 506 (S.D.N.Y. 2008)) and numerous administrative law judges, however, declined to apply *Carnero's* presumption against extraterritorial application as rigidly, engaging instead in an analysis of the "nexus" between the conduct at issue, the employee, and the United States, or the "effects" of the transaction on commerce within the United States. Even these cases, however, have declined to apply whistleblower protections, absent evidence that at least some of the wrongful conduct occurred in the United States.

Then, in June 2010, the Supreme Court ruled in *Morrison v. National Australia Bank*, 130 S. Ct. 2869, that the antifraud provisions of various securities laws, particularly Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), did not extend to transactions in securities that took place outside of the U.S., or to transactions in securities listed on foreign exchanges. The Court also rejected the conduct and effects tests of extraterritorial jurisdiction, because of its "unpredictable and inconsistent application," and established instead a bright-line "transactional test," which evaluated the applicability of Section 10(b) on the grounds of "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." The Court's decision in *Morrison* casts substantial doubt on the continued viability of the conduct and effects tests as applied to the SOX anti-retaliation provision.

The Territorial Scope of the Dodd-Frank Whistleblower Protection Provisions

Dodd-Frank clarified that SOX's whistleblower protections covered employees of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." The explicit expansion of employer coverage to a parent company's subsidiaries and affiliates, however, has raised concerns that Congress intended to include foreign subsidiaries of U.S. corporations within this amendment. Similar concerns have arisen due to the incorporation of explicit grants of extraterritorial jurisdiction for violations of the Securities Act of 1933 (15 U.S.C. § 77v(a)), the Securities Exchange Act of 1934 (15 U.S.C. § 78aa), and the Investment Advisers Act of 1940 (15 U.S.C. § 80b-14). The fear is that the recognition of the extraterritorial application of these provisions encourages courts to find congressional intent to broaden the application of SOX generally. However, applying the presumption against extraterritorial application in *Aramco* and *Morrison*, the better view may be that Congress did not intend for SOX's whistleblower protections to apply outside the United States.

In Section 929P of Dodd-Frank, Congress amended the Securities Act, Exchange Act, and Investment Advisers Act to provide that the "district courts of the United States … shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of [the relevant provisions] … involving … conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Congress apparently intended to overrule the Supreme Court's holding in *Morrison* that the antifraud provisions of the securities laws have no application outside the United States. *See* 156 Cong. Rec. 3771, 5237 (2010). But as counsel for respondents in *Morrison* has noted, the Dodd-Frank provisions merely provide the district courts with "jurisdiction" over actions that involve foreign conduct; they do not purport to extend the territorial reach of the underlying securities laws. *See* George T. Conway, III, Extraterritoriality after Dodd-Frank, available at http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank/.

Putting that wrinkle aside, it is unlikely that Congress intended by enacting Dodd-Frank to extend the scope of whistleblower protection to employees located outside the United States. Because Congress explicitly addressed the extraterritorial application of the securities laws in the antifraud provisions of the Act, courts should presume that Congress did not intend the extraterritorial ap-

plication of other provisions in the same statute — such as the whistleblower protection provisions. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (if 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") (internal quotations omitted). Other provisions reinforce that conclusion. Whereas Section 929P of Dodd-Frank is limited to "action[s] or proceeding[s] brought or instituted by the Commission or the United States," whistleblower retaliation suits are typically brought by private parties. The Commission, however, reserved the right to enforce Dodd-Frank's new whistleblower retaliation provisions for employees who provide information to, or cooperate with, the Commission in an investigation for violations of the securities laws. 17 C.F.R. § 240.21F-2(b)(2).

Section 929Y of Dodd-Frank, by contrast, requires the SEC to solicit public comment and conduct a study "to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 (15 U.S.C. 78u–4) should be extended to cover" extraterritorial conduct. This section demonstrates that Congress was not prepared in Dodd-Frank to extend the scope of private rights of action for violations of the antifraud provisions of the securities laws to conduct that occurred outside the United States. It is highly unlikely that, in the same statute, Congress would create sub silentio a private right of action for foreign individuals to bring claims under Dodd-Frank's whistleblower protection provisions.

Indeed, Dodd-Frank's new whistleblower bounty provision, 15 U.S.C. § 78u-6(a)(6), which includes the new anti-retaliation cause of action for employees who provide information to or cooperate with the Commission, is silent as to whether a foreign employee could: 1) recover a whistleblower award; or 2) seek protection from retaliation. Some commentators have interpreted Congress's silence, and the broad definition of a "whistleblower" as "any individual," as an invitation to foreign employees to apply for a Dodd-Frank whistleblower award. But *Morrison* explicitly rejects reading broadly worded statutes to include conduct that occurs outside the United States, as such a reading ignores the presumption against extraterritoriality: "When a statute gives no clear indication of an extraterritorial application, it has none." Thus, because Congress did not speak directly to this issue, we believe that the new whistleblower award incentives and anti-retaliation protections ought to apply only to employees who reside within the United States.

To be sure, the final rules implementing the Dodd-Frank whistleblower protection regime presume in various places that foreign employees may be covered by the Act. For example, the rules exempt from whistleblower protection any employee who is "a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority." 17 C.F.R. § 240.21F-8(c)(2). One could reason by negative implication that foreign employees of privately owned companies are included in the definition of "whistleblower." But it is unlikely that a court would find that the Commission is able by rule to extend the territorial reach of Dodd-Frank further than what Congress provided. *See, e.g., Aramco*, 499 U.S. at 257-58 (finding EEOC regulations implementing Title VII "insufficiently weighty to overcome the presumption against extraterritorial application"). At a minimum, even if the SEC could be deemed to have the authority to award bounties to persons overseas, we believe the statute does not create a cause of action for individuals to challenge employment decisions abroad.

In short, there is no evidence that Congress intended to broaden whistleblower retaliation protections either under SOX or under the new Dodd-Frank anti-retaliation causes of action to individuals employed by overseas subsidiaries of U.S. companies. To the contrary, the text and structure of the Act suggest the opposite. Employment lawyers should be aware of the arguments against the extraterritorial application of Dodd-Frank in preparation for potential lawsuits brought by employees of their clients' foreign subsidiaries.