ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of:	*	
JOSEPH EDE,	*	
and	*	
MATTHIEU PHANTALA,	*	ARB No. 05-053
Complainants,	*	
v.	*	
SWATCH GROUP AND SWATCH GROUP USA,	*	
Respondents.	*	

BRIEF OF THE ACTING ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

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Pursuant to 29 C.F.R. 1980.108(a)(1), the Acting Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief to assist the Administrative Review Board ("ARB" or the "Board") in resolving an issue of first impression arising under section 806, the employee protection provisions, of Title VIII of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act"), 18 U.S.C. 1514A. Specifically, this case presents an issue regarding the territorial limitations of section 806 of the Act. The Acting Assistant Secretary, who enforces section 806, has a significant interest in how the statute is interpreted. As we discuss

below, the whistleblower provisions of Sarbanes-Oxley do not apply to employees who work exclusively overseas and are subjected to adverse action overseas.

STATEMENT OF THE ISSUE

Whether the ALJ correctly determined that the whistleblower provisions of the Sarbanes-Oxley Act do not apply to employees who work exclusively outside the United States and are subjected to adverse action outside the United States.

STATEMENT OF THE CASE

Joseph Ede ("Ede") and Matthieu Phantala ("Phantala") were employed by Swatch Group at various locations outside the United States (Regional Administrator Letter "Administrator" at 1). Ede was terminated in Singapore, and Phantala resigned in Hong Kong in June 2004 (Administrator at 1). Ede and Phantala filed a complaint with the Department of Labor on June 24, 2004, alleging they were discharged in violation of section 806 of the Act for objecting to and resisting fraudulent activity while employed by Swatch Group (Recommended Decision and Order "RD&O" at 1). OSHA, which is responsible for investigating whistleblower complaints under Sarbanes-Oxley, denied Ede and Phantala's complaint because neither party had worked for Swatch Group in the United States and OSHA therefore lacked jurisdiction to investigate their claims (RD&O at 1-2).

Ede and Phantala requested a hearing before an administrative law judge, and on January 14, 2005 Administrative Law Judge ("ALJ") Ralph A. Romano issued a decision dismissing the complaint (RD&O) on extraterritoriality grounds.[1] The ALJ relied on Carnero v. Boston Scientific Corp., No. Civ.A.04-10031-RWZ, 2004 WL 1922132 (D. Mass. Aug. 27, 2004), appeal docketed, No. 04-2291 (1st Cir. Sept. 30, 2004), a similar case where the district court found OSHA lacked jurisdiction because the complainants "never worked within the United States" (RD&O at 2). Ede and Phantala argued that Carnero was "wrong" and "unpersuasive" because it ignored the purpose the Act which is to protect United States investors (RD&O at 2). The ALJ rejected this argument: "[W]hile the overall purpose of the Act is to eliminate fraud against shareholders, the more specific purpose of the whistleblower provision of the Act is to protect employees who cooperate in enforcing the Act against their employers" (id.). The ALJ found "that as a matter of statutory construction, the whistleblower provision of the Act applies

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[1] Apart from the issue of extraterritoriality, Swatch Group argued below that it is not a covered entity under section 806 because it is not "[a] company with a class of securities under section 12 of the Securities Exchange Act of 1934 . . . or that is required to file reports under section 15(d) of the Securities Exchange Act." 18 U.S.C. 1514A(a). The ALJ did not reach this issue below; accordingly, this issue need not be addressed by the Board on appeal. If the Board concludes that the ALJ erroneously dismissed the complaint on extraterritorial grounds, it should remand the case to the ALJ for further development of the "covered entity" issue.

only to employees working within the United States. Had Congress intended for it to apply to employees in foreign nations, Congress would have made its intent clear" (RD&O at 2). The ALJ also noted that "[m]y colleague recently reached the same conclusion [on extraterritoriality] . . . in *Concone v. Capital One Financial Corp.*, 2005-SOX-6 (ALJ Dec. 3, 2004) . . . in which the ALJ held that Congress intentionally failed to extend whistleblower protections to those who are employed wholly abroad" (id. at 2 n.2).[2]

Ede and Phantala filed a petition for review with the ARB, and the case was accepted for review.

ARGUMENT

THE WHISTLEBLOWER PROVISIONS OF SARBANES-OXLEY DO NOT APPLY TO EMPLOYEES WHO WORK EXCLUSIVELY OVERSEAS AND ARE SUBJECTED TO ADVERSE ACTION OVERSEAS.

1. The Presumption Against Extraterritoriality

Although "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States[,] . . . [i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991) (citing Foley Bros., Inc. v. Filardo,

[2] Concone v. Capital One Corporation, ARB Case No. 05-038, is also currently on appeal before the Board.

336 U.S. 281, 285 (1949)). "Th[is] presumption against extraterritoriality has been around for nearly as long as there have been federal statutes." William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int'l L. 85 (1998) (citing presumption cases from as early as 1808).

The presumption against extraterritoriality has been strictly applied in interpreting labor and employment statutes. In the seminal case of Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949), the Supreme Court held the Eight Hour Law did not apply "in foreign countries" because "Congress entertained [no] intention other than the normal one" that the statute apply domestically. Id. at 284-85. The Court explained that the presumption against extraterritoriality "is a valid approach whereby unexpressed congressional intent may be ascertained[,]" and "is based on the assumption that Congress is primarily concerned with domestic conditions." Id. More recently, the Supreme Court applied this "longstanding principle" to Title VII, restricting that statute's reach to the territorial boundaries of the United States. See Aramco, 499 U.S. at 258.[3]

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[3] In response to Aramco, Congress amended Title VII and the Americans with Disabilities Act ("ADA") to apply to American citizens working abroad for United States companies. See Section 109 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1077 (Nov. 21, 1991). Specifically, the definition of "employee" under those statutes was amended to include: "With

The Court explained that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." 499 U.S. at 248. Moreover, the Court said, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality" and any contrary intention of Congress must be "clearly expressed." Id. (citations omitted). To that end, the Court concluded even statutes like Title VII that contain broad but boilerplate jurisdictional language "that expressly refer[s] to 'foreign commerce' do not apply abroad." Id. at 251.

The presumption against extraterritoriality has been applied to numerous other labor and employment statutes in

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respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." 42 U.S.C. 2000e(f) and 42 U.S.C. 12111(4). Title VII and the ADA also were amended to address the situation where compliance with these statutes would violate foreign law, 42 U.S.C. 2000e-1(b) and 42 U.S.C. 12112(c)(1), and to provide that if an employer controls a corporation whose place of incorporation is a foreign country, any prohibited practice "engaged in by such corporation shall be presumed to be engaged in by such employer." 42 U.S.C. 2003e-1(c)(1) and 42 U.S.C. 12111(c)(2)(A). Earlier, in 1984, Congress had enacted similar amendments to the Age Discrimination in Employment Act ("ADEA"). Specifically, the ADEA was amended to provide: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. 630(f). Furthermore, the ADEA was amended to provide: "If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer." Id. at 623(h)(1).

addition to Title VII and the Eight Hour Law. See New York Cent. R. Co. v. Chisolm, 268 U.S. 29, 31 (1925) (Federal Employees Liability Act "contains no words which definitely disclose an intention to give it extraterritorial effect[.]"); Asplundh Tree Expert Co. v. NLRB, 365 F.3d 168, 175-76 (3d. Cir. 2004) (finding boilerplate jurisdictional language in National Labor Relations Act insufficient to overcome presumption that statute does not apply extraterritorially to employees temporarily detailed to Canada); Reyes-Gaona v. North Carolina Growers Assoc., Inc., 250 F.3d 861, 866 (4th Cir.), cert. denied, 534 U.S. 995 (2001) ("Since the [1984 ADEA amendments] do not reach the case at bar, there remains nothing in the text of the ADEA to rebut the presumption against extending [the statute] to cover foreign nationals in foreign countries.]"); Pfeiffer v. W.M. Wrigley Jr. Co., 755 F.2d 554, 557 (7th Cir. 1985) ("The fear of outright collisions between domestic and foreign law . . . lies behind the presumption against the extraterritorial application of federal statutes" and "[the court finds] no good reason for departing from it" in pre-1984 ADEA amendments case involving American employee of German subsidiary of American corporation); Air Line Dispatchers Ass'n v. Nat'l Mediation Bd., 189 F.2d 685, 691 (D.C. Cir. 1951), cert. denied, 342 U.S. 849 (1951) ("Legislation is ordinarily to be given only domestic application" and here we find no

"specific direction in the [Railway Labor] Act . . . permitting [the National Mediation Board] to extend its jurisdiction beyond the continental limits of the United States and its territories.") (internal quotation marks omitted); see also Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 618 (1990) ("Applying only the clear congressional intent standard, courts have rejected extraterritorial application in every ambiguous employment statute since Foley Bros.").

2. The Presumption Applied to Section 806 of Sarbanes-Oxley

When the Sarbanes-Oxley Act is viewed against the backdrop of this presumption, it is clear Congress did not intend the whistleblower provisions to apply to foreign workers who are subjected to adverse actions overseas. Indeed, the one federal court that has interpreted the jurisdictional scope of the Sarbanes-Oxley whistleblower provisions concluded these provisions do not reach foreign nationals who are employed exclusively overseas. See Carnero v. Boston Scientific Corp., 2004 WL 1922132, *1 (D. Mass. Aug. 27, 2004), appeal docketed, No. 04-2291 (1st Cir. Sept. 30, 2004) (finding nothing in statute or legislative history to suggest provisions were meant to apply abroad). The conclusion in Carnero was correct. As discussed below, neither the language of the statute nor the

legislative history expresses any intention that the provisions apply extraterritorially.

a. Language of the Act

Sarbanes-Oxley was enacted to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. Section 806 of the Act is a whistleblower provision designed to protect employees from employer retaliation when an employee engages in protected activity under the Act:

> 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)) . . . 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 [protected activity] by the employee[.]

18 U.S.C. 1514A(a). Section 806 does not further define company or employee. Nor does it draw any distinction between foreign and American corporations or between foreign and American workers. See Carnero, 2004 WL 1922132, at *1 ("[We consider] whether any distinction is drawn between alien employees and those who are citizens of the United States" and "the absence of such distinction suggests that the law is to be applied only within the United States.").

Although on its face this neutral language might appear to encompass the foreign operations of foreign companies publicly traded in the United States, Congress legislates against the backdrop of the presumption that its laws apply only domestically, and there is no contrary congressional statement to overcome that here. The silence is particularly telling because Congress has conferred extraterritorial coverage -- in varying degrees -- on other employment laws in recent years, so Congress knows how to accomplish that end. See supra, n.3. Moreover, such legislation often involves explicit trade-offs with the laws of foreign countries. See, e.g., Section 109(b)(1)(B) of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1077 (Nov. 21, 1991) ("It shall not be unlawful under [the statute] for an employer . . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located."). As the Supreme Court said about Title VII before the 1991 amendments, "had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures." Aramco, 499 U.S. at 256. So too would Congress have explicitly addressed other nations' laws had it intended section 806 to apply abroad. See Carnero, 2004 WL 1922132, at

*2 ("Nothing in Section 1514A remotely suggests that Congress intended it to apply outside of the United States" including the fact that "application of Section 1514A overseas may conflict with foreign laws, which is especially likely where plaintiff seeks to be reinstated to his job.").

The venue and jurisdiction provisions of section 806 further suggest a solely domestic application. Section 806 incorporates the venue provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121(b)(4)(A), which provides that any person adversely affected or aggrieved by a final order of the Secretary "may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation." As there is no United States Court of Appeals that has jurisdiction outside of the territorial boundaries of the United States, if a worker resides or is fired abroad, no United States Court of Appeals would have jurisdiction under section 806's venue provision. Similarly, under section 806, final agency orders may be enforced in the United States district courts. See 49 U.S.C. 42121(b) (incorporated by 18 U.S.C. 1514A(b)). No United States district court has jurisdiction to enforce its orders outside of the territorial boundaries of the United States. The

Supreme Court in Aramco recognized the similarly limited reach of the investigative and venue provisions of Title VII to be persuasive evidence that Congress did not intend Title VII to apply extraterritorially. See Aramco, 499 U.S. at 256.[4]

b. Legislative History of the Act

There is similarly no evidence of extraterritorial intent in the legislative history of section 806 of the Act, and Congress would have indicated such an objective had it intended to wade into this murky area of international relations. "The protection of workers is a particularly local matter, and nothing in the legislative history supports plaintiff's assertion that the language of Section 1514A protecting an 'employee' was meant to include all employees wherever they may

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[4] Sarbanes-Oxley also contains a criminal anti-retaliation provision that does apply extraterritorially. Section 1107, the anti-retaliation provision, was an amendment to an existing criminal obstruction of justice statute that expressly applies overseas. See 18 U.S.C. 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section."). The obstruction of justice statute, however, is enforceable solely by the Department of Justice. The Department of Labor has no jurisdiction to enforce section 1107. Indeed, if anything, the codification of the criminal anti-retaliation provision of section 1107 (with express extraterritoriality) simultaneously with the civil whistleblower provisions of section 806 suggests that where Congress intended extraterritorial application under Sarbanes-Oxley, it so provided. Cf. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) ("[When] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted).

work." Carnero, 2004 WL 1922132, at *2. To the contrary, the sparse legislative history that exists regarding the Act's whistleblower provisions shows a purely domestic focus. See, e.g., 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy) (section 806 was drafted to remedy current situation where "corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas . . .) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions.").

c. Section 806 is an Employment Law Provision.

Although courts have not always applied the presumption against extraterritoriality in the securities law context, see, e.g., SEC v. Berger, 322 F.3d 187, 192-96 (2d Cir. 2003), those cases have no application here. The Securities Acts of 1933 and 1934 contain broad jurisdiction and venue provisions, and foreign issuers of securities are required to register with the Securities and Exchange Commission ("SEC"). See, e.g., 17 C.F.R. 249.220f (SEC Form 20-F for foreign private issuers). The SEC coordinates with foreign authorities to bring actions against foreign companies. See, e.g., Litigation Release 17782 (October 10, 2002) (acknowledging assistance of "the Belgian Ministry of Justice (pursuant to the provisions of the Mutual

Legal Assistance Treaty in effect between the United States and Belgium)"). Section 806 is not a securities law provision, however, but an employment law provision which prohibits discharge, demotion, suspension and other employment related discrimination. See 18 U.S.C. 1514A(a). Unlike most of Sarbanes-Oxley, which is administered by the SEC, section 806 is administered by the Department of Labor. See 18 U.S.C. 1514A(b). Whistleblower laws like this one have traditionally been regarded as employment related, see English v. General Elec. Co., 496 U.S. 72, 83 and n.6 (1990) (Energy Reorganization Act whistleblower provision bears some relation to nuclear safety but "paramount purpose was the protection of employees") (internal quotation marks omitted), and no whistleblower law enforced by the Department of Labor has ever been given extraterritorial effect.

CONCLUSION

For the reasons set forth above, the Board should hold that section 806 does not apply extraterritorially to employees who work overseas and are subjected to adverse action overseas.

CERTIFICATE OF SERVICE

I certify that copies of this Brief of the Acting Assistant Secretary have been served upon the following individuals by deposit in first-class mail this 6th day of April, 2005:

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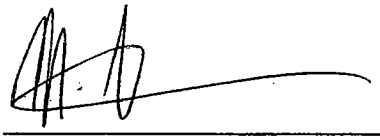

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