ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

WILLIAM VILLANUEVA, Complainant v. CORE LABORATORIES NV and SAYBOLT DE COLOMBIA LIMITADA, Respondents	*	ARB Case No. 09-108 ALJ Case No. 2009-SOX-006

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

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v.	*	
	*	ARB Case No. 09-108
CORE LABORATORIES NV	*	
	*	ALJ Case No. 2009-SOX-006
and	*	
SAYBOLT DE COLOMBIA LIMITADA,	*	
Respondents	*	

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FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

INTRODUCTION

Pursuant to 29 C.F.R. 1980.108(a)(1) and the June 24, 2011 Order of the Administrative Review Board ("ARB" or "Board"), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief as amicus curiae in response to the Board's questions regarding the extraterritorial reach of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX"), 18 U.S.C. 1514A.

The Board has requested the Assistant Secretary's views on the following questions regarding the extraterritorial application of SOX Section 806:

(1) What effect, if any, do the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), and Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), have on the issue of extraterritoriality as it relates to SOX Section 806?

(2) Following *Morrison* and Section 929A of the Dodd-Frank Act, is the "conduct or effects" test to any extent applicable to cases arising under SOX Section 806? If so, what quantum of conduct or effect must arise domestically for the Secretary of Labor to exercise jurisdiction over such a complaint?

(3) If any of the requisite elements of the whistleblower complaint filed by William Villanueva ("Villanueva") have occurred in the United States, does the case become territorial such that there is no longer a question of the extraterritorial effect of Section 806?

For the reasons that follow, the Assistant Secretary believes that the Board's precedent holding that SOX Section 806 does not apply extraterritorially continues to be correct. The *Morrison* decision and the enactment of Section 929A of Dodd-Frank do not expand the application of Section 806

extraterritorially. Thus, the administrative law judge properly dismissed Villanueva's complaint based on the foreign nature of Villanueva's employment relationship and the fact that the alleged adverse actions occurred abroad.

STATEMENT OF THE CASE

The instant case involves a SOX whistleblower complaint filed by Villanueva against Core Laboratories NV ("Core Labs") and Saybolt de Colombia Limitada ("Saybolt").[1] Villanueva is a Colombian national who lived and worked in Colombia as the general manager for Saybolt, a Colombian subsidiary of Core Labs. ALJ D & O at 2. Core Labs is a Netherlands company that has securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78*l*, trades shares on the New York Stock Exchange, and has a corporate office in Houston, Texas. *Id*. at 2-3.

Villanueva alleges that Core Labs directed a "transfer price fixing scheme" that resulted in an underreporting of taxable revenue to the Colombian government. ALJ D & O at 2. Additionally, Villanueva alleges that Saybolt, at the direction of Core Labs, wrongfully claimed certain tax exemptions. *Id*. Villanueva states that, from January 2008 through April 2008, he reported these alleged tax irregularities to several Core Labs

[1] This statement of relevant facts is derived from the June 10, 2009 Decision and Order of the Administrative Law Judge ("ALJ"). That decision is referred to herein as "ALJ D & O."

and Saybolt officials, located both in Colombia and Houston. *Id*. at 2-3.[2]

Villanueva argues that Core Labs and Saybolt took two adverse actions against him in retaliation for reporting the alleged tax fraud scheme. ALJ D & O at 3. He claims that he was passed over for a pay raise on April 3, 2008, and that he was ultimately terminated on April 29, 2008. *Id*. Villanueva alleges that the decision to terminate him was made by a Core Labs official located in Houston. *Id*. Villanueva states that he was notified of his discharge in a letter, which was personally delivered to his office in Colombia by a Core Labs official from Houston. *Id*.

Villanueva filed a complaint under SOX Section 806 with OSHA on July 28, 2008. ALJ D & O at 1. OSHA dismissed the complaint, finding no jurisdiction because the alleged adverse actions all occurred outside the U.S. *Id*. Villanueva filed timely objections and requested a hearing before an ALJ. *Id.*

After issuing a notice to show cause and receiving briefs from the parties, the ALJ dismissed Villanueva's complaint, explaining that Section 806 did not apply extraterritorially and, thus, the ALJ lacked subject matter jurisdiction over

[2] The ALJ's decision and the parties' original briefs to the ARB do not make clear why Villanueva believes that his reporting of Colombian tax fraud constitutes protected activity under SOX Section 806.

Villanueva's complaint. ALJ D & O at 1-2, 7. Villanueva's argument that SOX Section 806 applied because the locus of the fraudulent activity and retaliation were in the United States was rejected by the ALJ. *Id*. at 4. The ALJ found that Villanueva had no connection with the U.S. *Id.* at 5. During his 24-year career, he was never a U.S. citizen or resident, never worked in the U.S., and never was directly employed by any Core Labs affiliate other than Saybolt. *Id*. That the underlying fraud and the decision to terminate Villanueva may have emanated from the U.S. did not change the result in the ALJ's view because it did not alter the foreign nature of Villanueva's employment relationship. *Id*. at 6-7. Therefore, applying SOX Section 806 to Villanueva's complaint would be an impermissible extraterritorial application of the statute. *Id*. at 7.

On June 23, 2009, Villanueva appealed the ALJ's decision to the Administrative Review Board. The parties subsequently filed briefs in August and September 2009. On appeal, Villanueva argues that he does not seek to apply Section 806 extraterritorially because the fraudulent tax evasion scheme and the retaliation against him were both "directly undertaken and controlled" by Core Labs officials located in Houston. Complainant's Initial Brief at 1. In response, Core Labs and Saybolt assert that the ALJ properly dismissed the case because

Villanueva is a foreign national and resident who worked exclusively overseas for a foreign company. *See* Respondents' Reply Brief at 2. Core Labs and Saybolt argue that because Section 806 lacks extraterritorial reach, its provisions cannot be applied to Villanueva. *Id.*

On June 24, 2011, the Board issued an order directing the parties to file supplemental briefs discussing the relevance of the *Morrison* decision and Section 929A of Dodd-Frank on the issue of extraterritoriality under SOX Section 806. The ARB also requested the Assistant Secretary for OSHA and the Securities and Exchange Commission ("SEC") to file amicus briefs on this issue.

SUMMARY OF THE ARGUMENT

The statutory language, legislative history, and regulatory context of SOX Section 806 do not reflect the necessary clear expression of an affirmative congressional intent to extend its provisions outside the United States. Neither the Supreme Court's decision in *Morrison* nor the enactment of Section 929A of the Dodd-Frank Act expands the application of Section 806 overseas. The Board's precedent holding that Section 806 lacks extraterritorial reach therefore continues to be correct.

In determining whether a case seeks to apply a statute extraterritorially, courts must determine the focus of congressional intent in enacting that statute. The statutory

provisions and relevant legislative history for SOX Section 806 both indicate that Congress was clearly concerned with providing protections for employees from employer retaliation within the context of a domestic employment relationship.

The instant complaint does not seek a permissible territorial application of SOX Section 806. Because the case involves a foreign employment relationship and the alleged acts of employer retaliation occurred in a foreign nation, the provisions of Section 806 do not apply. The administrative law judge therefore properly dismissed Villanueva's complaint.

ARGUMENT

SOX SECTION 806 LACKS EXTRATERRITORIAL REACH AND THE ALJ PROPERLY DISMISSED VILLANUEVA'S COMPLAINT.

A. 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 Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This principle "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Morrison*, 130 S. Ct. at 2877. Unless

Congress has "clearly expressed" an "affirmative intention" to provide a statute with coverage outside the United States, courts must "presume it is primarily concerned with domestic conditions." *Id.* (quoting *Aramco*, 499 U.S. at 248).

Congress drafts legislation "against the backdrop of the presumption against extraterritoriality." *Aramco*, 499 U.S. at 248. The presumption therefore applies in all cases, unless Congress has clearly expressed an affirmative intent to give a statute extraterritorial reach. *See Morrison*, 130 S. Ct. at 2877, 2881. Consequently, the Supreme Court requires "clear evidence of congressional intent" to apply a law extraterritorially. *Smith v. United States*, 507 U.S. 197, 204 (1993). In order to determine whether such congressional intent exists, courts must look to the focus of congressional concern, considering "all available evidence" as to the meaning of the law, including its "text, context, structure, and legislative history." *Morrison,* 130 S. Ct. at 2884 (finding the focus of congressional concern in Section 10(b) of the Exchange Act was on domestic purchases and sales of securities); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir. 2006) (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993)) (noting that courts consider "all available evidence" about the meaning of the statute in searching for clear evidence of Congress's intent).

B. The Presumption Applied to SOX Section 806

1. The Board has consistently held that Section 806 of SOX lacks extraterritorial reach. *See Ahluwalia v. ABB, Inc.*, ARB No. 08-008, 2009 WL 6496920 (ARB June 30, 2009); *Pik v. Goldman Sachs Group, Inc.*, ARB No. 08-062, 2009 WL 6496922 (ARB June 30, 2009); *Ede v. Swatch Group Ltd.*, ARB No. 05-053, 2007 WL 1935560 (ARB June 27, 2007).[3] The First Circuit in *Carnero v. Boston Scientific Corp.*, the one court of appeals decision to address the issue, reached the same conclusion. *See* 433 F.3d at 18. In so holding, the First Circuit and the Board correctly found that the statutory language of SOX Section 806 does not reflect the necessary clear expression of an affirmative congressional intent to extend its provisions outside the United States. *Id.*; *Ahluwalia*, 2009 WL 6496920, at *2; *Pik*, 2009 WL 6496922, at *2; *Ede*, 2007 WL 1935560, at *2.[4]

[3] Numerous ALJs also have reached this same conclusion. *See, e.g.*, *Pik v. Credit Suisse AG*, ALJ No. 2011-SOX-00006, 2011 WL 841044 (ALJ Mar. 3, 2011); *Talisse v. UBS AG*, ALJ No. 2008-SOX-00074, 2009 WL 6496752 (ALJ Jan. 8, 2009); *Beck v. Citigroup, Inc.*, ALJ No. 2006-SOX-00003, 2006 WL 3246814 (ALJ Aug. 1, 2006); *Concone v. Capital One Fin. Corp.*, ALJ No. 2005-SOX-00006, 2004 WL 5030305 (ALJ Dec. 3, 2004).

[4] This brief only discusses the territorial reach of SOX Section 806. Because territorial analysis requires an examination of statutory language, legislative history, and context, this brief does not address extraterritoriality under other whistleblower laws enforced by the Department of Labor ("DOL").

Section 806 protects covered employees from employer retaliation for engaging 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. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company . . . 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 [protected activity] done by the employee[.]

18 U.S.C. 1514A(a). Section 806 does not further define "company" or "employee" nor does it contain any provisions specifically addressing extraterritorial application.

Under Section 806, a person alleging discrimination may seek relief by filing a complaint with the Secretary of Labor. *See* 18 U.S.C. 1514A(b)(1)(A). The procedure and burdens of proof in a SOX whistleblower action are governed by the rules of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") whistleblower provision, 49 U.S.C. 42121(b). *See* 18 U.S.C. 1514A(b)(2). Under AIR 21, 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 . . . allegedly occurred or the circuit in which the complainant resided on the date of such violation." 49 U.S.C.

42121(b)(4)(A). Similarly, agency orders may be enforced "in the United States district court for the district in which the violation was found to occur." 49 U.S.C. 42121(b)(5). Finally, if the Secretary does not issue a final order within 180 days of the filing of the complaint, the complainant may bring an action for *de novo* review in the appropriate district court of the United States. *See* 18 U.S.C. 1514A(b)(1)(B).

None of these venue and enforcement provisions make allowances for complaints originating outside of the United States. As the *Carnero* court noted, "[t]here is no venue provision specifically tailored to claims based on conduct abroad." 433 F.3d at 16. Rather, these provisions generally provide for jurisdiction either where the violation occurred or where the complainant resided at the time of the violation. In *Aramco*, the Supreme Court found the similarly limited reach of the venue and investigative provisions of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e *et seq.*, which failed to provide "any mechanisms for overseas enforcement," to be persuasive evidence that Congress did not intend the statute to apply outside the United States. 499 U.S. at 256.

Section 806 also contains no provision addressing potential conflicts with foreign laws that could arise in applying its protections abroad. This silence further suggests that Congress did not anticipate application overseas because Section 806

clearly presents a risk of conflict with foreign laws, particularly where a complainant seeks reinstatement and back wages. *See Aramco*, 499 U.S. at 256 ("[H]ad Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures."); *Carnero*, 433 F.3d at 15. Thus, the venue and enforcement provisions of SOX Section 806 indicate that Congress did not contemplate the statute's application overseas.

2. Section 806's silence regarding extraterritorial application contrasts sharply with other provisions of Sarbanes-Oxley, bolstering the conclusion that the provision does not apply overseas. *See Carnero*, 433 F.3d at 9-11; *see also Barnhart v. Sigmon Coal Co., Inc.*, 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.") (citation omitted). Section 806's statutory silence is significant because Congress knows how to expressly provide for extraterritorial application where it so intends.[5] Congress

[5] For example, Congress passed the Civil Rights Act of 1991 in response to the Supreme Court's decision in *Aramco*, in which the Court held that Title VII did not apply extraterritorially. *See* Section 109 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1077 (1991). The Act explicitly amended Title VII and the Americans with Disabilities Act ("ADA") to apply to

addressed the extraterritorial application of other provisions of Sarbanes-Oxley. *See, e.g.*, 15 U.S.C. 7216(c) (requiring registration of foreign accounting firms if they audit public companies but providing that the SEC or the Public Company Accounting Oversight Board may exempt those accounting firms from Sarbanes-Oxley). Congress also explicitly conferred extraterritorial reach upon the criminal whistleblower provision of Sarbanes-Oxley. *See* 18 U.S.C. 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section."). The fact that SOX's criminal whistleblower provision (Section 1107) expressly provides for extraterritorial reach, while its civil whistleblower provision (Section 806) contains no such language, reflects that where Congress intended SOX provisions to apply extraterritorially, it so clearly provided. *See Carnero*, 433 F.3d at 9-11.[6]

3. Finally, as the *Carnero* court discussed at length, the legislative history of SOX Section 806 similarly contains no evidence that Congress affirmatively intended the statute to

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United States citizens working abroad for United States companies. *See* 42 U.S.C. 2000e(f), 12111(4). Congress also amended those statutes to include provisions addressing conflicts with foreign laws. *See* 42 U.S.C. 2000e-1(b), 12112(c)(1).

[6] SOX Section 1107 amended 18 U.S.C. 1513, an obstruction of justice statute, to provide criminal penalties for retaliation against anyone providing truthful information to law enforcement about the commission of any federal offense. The Department of Justice ("DOJ") enforces Section 1107.

apply outside the United States. *See* 433 F.3d at 8. The relevant legislative history reflects that Congress was primarily concerned about the lack of adequate whistleblower protections for employees of private companies in many states. *Id.* at 11-13; *see* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy) (Section 806 was created to remedy the situation where "corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas . . .) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions."). Senator Leahy, the primary sponsor of SOX Section 806, further stated that the legislation thus "sets a *national* floor for employee protections in the context of publicly traded companies." S. Rep. No. 107-146, 2002 WL 863249, at *17 (2002) (emphasis added). By contrast, the legislative history of those sections of Sarbanes-Oxley that specifically provide for extraterritorial application indicate that Congress expressly considered the application of those provisions to foreign entities. *See Carnero*, 433 F.3d at 13-14 (reviewing legislative history of SOX Section 106, among other sections). As with Section 806's text, the silence in the legislative history of Section 806 is telling. The legislative history of SOX Section

806 provides no indication that Congress considered, let alone intended, its application overseas. *Id.* at 11-15. As the First Circuit and the Board previously held, all available evidence indicates that Congress did not intend SOX Section 806 to have extraterritorial reach.

C. The Supreme Court's *Morrison* Decision and Section 929A of Dodd-Frank Do Not Extend the Application of Section 806 Overseas.

1. The *Morrison* decision and Section 929A of Dodd-Frank do not change the analysis of whether SOX Section 806 applies extraterritorially. In *Morrison*, the Supreme Court considered whether Section 10(b) of the Exchange Act allowed Australian investors to recover for securities fraud that inflated the value of shares traded on Australian exchanges where a portion of the fraud took place in the U.S. *See* 130 S. Ct. at 2875-76. The Court dismissed the plaintiffs' claims, holding that Section 10(b) only applied to transactions in securities listed on United States exchanges and domestic transactions in other securities, and strongly reemphasized the presumption against extraterritoriality. *Id.* at 2877-84. The Court explained that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878. The Court consequently refused to apply the "conduct or effects" test to cases brought under Section 10(b) of the Exchange Act.

Id. at 2878-81.[7] The Court explained that the test constituted a "disregard of the presumption against extraterritoriality" and was both "complex in formulation and unpredictable in application." *Id.* at 2878. The Court observed that the test lacked any textual basis and consequently rejected using the test in favor of applying the presumption against extraterritoriality. *Id.* at 2879-81. *Morrison* therefore emphasizes that Congress must provide a clear or affirmative indication of a statute's extraterritorial reach in order for its provisions to apply outside the United States. *Id.* at 2883.

In addition, in order to avoid impermissible extraterritorial applications of federal statutes, *Morrison* instructs courts to determine whether the "'focus' of congressional concern" occurred in the United States, as the Court had done in *Aramco*. *Morrison*, 130 S. Ct. at 2884 (quoting *Aramco*, 499 U.S. at 255). In *Aramco*, the Supreme Court refused to apply Title VII abroad, even though the plaintiff had been hired in the United States and was an American citizen, because the Court concluded that "neither that territorial event nor that relationship was the 'focus' of congressional concern, but rather domestic employment." *Id.* (quoting *Aramco*, 499 U.S. at

[7] Generally, the "conduct" test focuses on "whether the wrongful conduct occurred in the United States" and the "effects" test asks "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Morrison*, 130 S. Ct. at 2879 (internal citation omitted).

255). Applying the same reasoning, the Court determined that the focus of the Exchange Act was not on the location where the deception originated, but rather on the "purchases and sales of securities in the United States." *Id.*

As discussed above, an analysis of SOX Section 806's text, legislative history, and regulatory context demonstrates that Section 806 lacks the necessary clear expression of Congress's affirmative intent to apply the whistleblower provisions abroad. To the contrary, the text and legislative history indicate that the focus of congressional concern in enacting SOX Section 806 was generally on the domestic employment relationship, and specifically on acts of retaliation occurring in the United States. In particular, Congress was concerned with creating uniform national protections against retaliation for employees who report corporate fraud to their employers, federal regulatory or law enforcement agencies, or Congress. Sarbanes-Oxley was enacted in the wake of the Enron and WorldCom scandals to restore investor confidence in the nation's financial markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. *See Carnero*, 433 F.3d at 9. To further these purposes, Section 806 provides whistleblower protection to employees of publicly traded companies who report corporate fraud or certain other violations of law. *See* 148

Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.").

SOX Section 806's text and legislative history indicate that Congress "gave no consideration to either the possibility or the problems of overseas application." *Carnero*, 433 F.3d at 8. Because SOX Section 806 is silent as to its extraterritorial application, it therefore has none. *See Morrison*, 130 S. Ct. at 2878. In addition, the statutory language of SOX Section 806 provides no support for the use of the "conduct or effects" test, which the Court refused to apply in *Morrison*.[8]

2. The enactment of Section 929A of Dodd-Frank, likewise, does not extend the application of SOX Section 806 abroad. Section 929A amended SOX Section 806 by clarifying that an employee of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of an otherwise covered company is protected against retaliation for engaging in protected activity. 18 U.S.C.

[8] A few cases have relied upon the "conduct or effects" test to extend SOX whistleblower protections to employees working abroad where significant domestic conduct occurred or where a substantial nexus with the United States existed. *See, e.g., O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 512-14 (S.D.N.Y. 2008); *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-70, 2009 WL 6496755, at *24-27 (ALJ Mar. 23, 2009).

1514A(a).[9] The legislative history explains that Section 929A of Dodd-Frank:

> Amends Section 806 of [SOX] to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of [SOX] creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

S. Rep. No. 111-176, 2010 WL 1796592, at *99 (2010).

Neither the text nor the legislative history of Dodd-Frank Section 929A reflects any congressional intent that the amendment provide SOX Section 806 with extraterritorial reach or extend use of the "conduct or effects" test to SOX whistleblower cases. Rather, in passing the amendment, Congress merely clarified that subsidiary coverage exists under Section 806.[10]

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[9] The ARB has concluded that Section 929A of the Dodd-Frank Act is merely "a clarification of Section 806 and does not create retroactive effects." *Johnson v. Siemens Bldg. Tech., Inc.*, ARB No. 08-032, 2011 WL 1247202, at *11 (ARB Mar. 31, 2011). Accordingly, in the instant case, both Core Labs and its subsidiary, Saybolt, are covered companies under Section 806.

[10] In the cases concluding that SOX Section 806 lacks extraterritorial reach, lack of subsidiary coverage has not been a dispositive or even relevant issue. In those cases, the courts assumed as a preliminary matter that the subsidiary was a covered employer, but ultimately dismissed on independent extraterritorial grounds. *See, e.g.*, *Carnero*, 433 F.3d at 6 (assuming that employee who worked for foreign subsidiary was covered by SOX); *Ahluwalia*, 2009 WL 6496920, at *3 (explaining

Congress's silence on the issue of extraterritoriality in Dodd-Frank Section 929A and the other contemporaneous amendments to Section 806 at Sections 922(b) and (c) of Dodd-Frank is significant. Congress explicitly addressed *Morrison*, the presumption against extraterritoriality, and the "conduct or effects" test in Dodd-Frank Section 929P, which applies to securities enforcement actions brought by the SEC or DOJ, but chose not to do so in the amendments to SOX Section 806.[11] The silence as to the extraterritoriality of Section 806 is notable because when Congress enacted the amendments in 2010, it was presumably aware of the First Circuit's 2006 decision in *Carnero*. Had Congress intended to overrule *Carnero* and express a clear intent to provide SOX Section 806 with extraterritorial reach, it could have done so as part of the amendments. It did

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that lack of jurisdiction "is a consequence of Ahluwalia's status as a foreign national working in a foreign country for a foreign company, not the subsidiary status" of his employer).

[11] Section 929P(b) provides that district courts have jurisdiction over securities enforcement actions brought by the SEC or DOJ involving "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Pub. L. No. 111-203, 124 Stat. 1376, 1862-65 (2010). The legislative history for Section 929P states that the amendment is intended to rebut the presumption against extraterritoriality by "clearly indicating that Congress intends extraterritorial application" in specified actions brought by the SEC or DOJ. 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

not. Accordingly, Dodd-Frank Section 929A's clarifying amendment has no effect on the issue of whether SOX Section 806 applies extraterritorially.

D. Application to the Present Case

For all of the reasons discussed above, SOX Section 806 does not apply extraterritorially and the ALJ properly dismissed Villanueva's complaint. In order for a case to involve a permissible territorial application of Section 806, the retaliation generally must occur within the United States.[12] Based on the facts presented in the ALJ's decision, Villanueva does not seek such a territorial application.

Villanueva is a Colombian national who lived and worked exclusively in Colombia for a Colombian company. Villanueva alleges that the underlying tax fraud that he reported was directed by policymakers in Houston, but the alleged tax scheme itself was carried out in Colombia by a Colombian company in

[12] This is not to say that a retaliatory decision communicated to an employee abroad can never give rise to a proper claim under SOX Section 806. Each whistleblower complaint must necessarily be evaluated on its own set of facts. In *Carnero*, for example, the First Circuit left open the possibility that an employee based in the United States but temporarily on detail to a foreign nation could be protected by SOX Section 806. *See* 433 F.3d at 18 n.17. The Supreme Court in *Morrison* instructed courts to look to the focus of congressional concern, which for SOX Section 806 is domestic retaliation. In rare instances, where application of SOX Section 806 is consistent with this focus, an employee may state a claim under SOX Section 806 notwithstanding that the termination or other adverse action may have been effectuated abroad.

violation of Colombian law. Most significantly, although Villanueva alleges that the decision to discharge him was made by company officials in Houston, that decision was communicated to him in Colombia, the act of termination was completed in Colombia, and its impact upon the terms and conditions of his employment were exclusively felt in Colombia. Because SOX Section 806 does not have extraterritorial reach over alleged acts of employer retaliation occurring in a foreign nation, its provisions do not apply to the instant case.

CONCLUSION

The Assistant Secretary respectfully requests the Board to rule that the ALJ properly dismissed Villanueva's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Brief for the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae have been served this 23rd day of August, 2011, via express mail, upon the following:

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