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Issue Date: 23 March 2009

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In the Matter of:

Joseph Walters,
Complainant,
v.

CASE NO.: 2008 SOX 70

Deutsche Bank AG; Taunus Corporation; Deutsche Bank Trust Company Americas; all other Deutsche Bank AG United States and foreign subsidiaries that comprise the business units "Deutsche Bank Asset Management" and "Deutsche Bank Insurance Asset Management," including but not limited to Deutsche Asset Management Schweiz; Deutsche Fund Management, Inc., Bankers Trust Company, Deutsche Bank Alex, Brown, Inc.; Deutsche Asset Management, Inc.; Deutsche Asset Management Investment Services, Ltd; Deutsche Investment Management Americas Inc.; DB Absolute Returns Strategies Ltd.; and DWS Investment Schweiz; Dr. Joseph Ackermann, Chairman of the Management Board and Group Executive Committee, Deutsche Bank AG; Kevin Parker, Managing Director, Deutsche Bank AG; and Randy Brown, Managing Director, Deutsche Bank Trust Company Americas

Respondents.
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Summary Decision

This case arises under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A, enacted on July 30, 2002. The Act prohibits any company with a class of securities registered under §12 of the Securities Exchange Act of 1934, or required to file reports under §15(d) of that Act, from discharging, harassing, or in any other manner discriminating against an employee who reported alleged violations of any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders. Complainant Joseph Walters worked for Deutsche Bank Asset Management Schweiz (hereinafter Schweiz) as the European Head of Insurance Asset Management Relationships for Deutsche Bank AG's Insurance Asset Management Division (hereinafter DIAM). DIAM is a business unit that operates within Schweiz, a Swiss company, and other Deutsche Bank AG subsidiaries around the world. Tr. 4.[1] Schweiz, in turn, is a wholly owned subsidiary of DWS Holding & Service GmbH, which is a wholly owned subsidiary of DB Capital Markets (Deutscheland) GmbH, a wholly owned subsidiary of Deutsche Bank AG, a publicly traded company listed on the New York Stock Exchange. In May, 2008, Complainant was fired from his position.

On July 31, 2008, Walters filed a complaint challenging his dismissal as a violation of the whistleblower protection provisions of Sarbanes-Oxley. He alleged, *inter alia*, that he was fired in May, 2008, because he reported to his supervisors at DIAM, Schweiz, and Deutsche Bank AG that DIAM's tests of its operations in Frankfort, Germany, where large, complex, billion dollar insurance company asset portfolios were managed, indicated a lack of trading compliance and exhibited technological and operational weaknesses which would impede DIAM's ability to provide its clients with the regulatory reports and financial statements they required to meet regulatory requirements. Compl. ¶¶ 10-27, 46. Complainant contends that he warned his supervisors and other Schweiz and Deutsche Bank officials about DIAM's infrastructure weaknesses and lack of ability to service its clients' portfolios even as Deutsche Bank personnel were publicly touting to U.S. investors the growth potential and stability of DIAM and Schweiz. Compl. ¶¶ 29, 55-66. Complainant alleges he was, thereafter, terminated for blowing the whistle on problems in DIAM's Frankfort, Germany, operations. On August 26, 2008, OSHA, noting that Complainant was located in Switzerland when the alleged adverse action took place, dismissed his complaint, because: "adverse employment actions occurring outside the United States are not covered by § 806 of SOX." (*See*, OSHA Decision dated August 26, 2008). Complainant thereafter requested a hearing.

On November 10, 2008, Respondents moved for Summary Decision dismissing the Complaint pursuant to 29 C.F.R. §§ 18.40 and 41. Respondents contend that the whistleblower provisions of Sarbanes-Oxley are not available to Walters because he was not an employee of a publicly traded company, but rather worked for a foreign operating unit of a foreign subsidiary of the publicly traded company, Deutsche Bank AG. As a result, the parent company, Deutsche Bank AG, argued that Complainant's employer was Schweiz, not Deutsche Bank AG, and, consequently, it was not responsible for the adverse employment action. Deutsche Bank and Schweiz argue further that Schweiz is not a publicly traded company and, therefore, it is not

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[1] A hearing on the Motion for Summary Decision convened on December 17, 2008. Hereinafter, references to the hearing transcript shall be cited as "Tr.," along with the applicable page number.

covered by Section 806. Both insist that the circumstances which gave rise to this complaint are, in any event, extraterritorial, and, in accordance with Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006), beyond the jurisdiction of Section 806.

In response, Complainant contends initially, and in the alternative, that he is not seeking extraterritorial application of the Act; but assuming the circumstances require extraterritorial application of the law, Section 806 of Sarbanes-Oxley may be applied extraterritorially. *See*, Compl. Opposition pgs.1-10 and 11-14. On December 17, 2008, Respondents' Motion and Complainant's Opposition to it were addressed at a hearing.

Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. Section 18.40(d) under circumstances in which no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See,* Gillilan v. Tennessee Valley Authority, 91-ERA-31, at 3 (Sec'y, Aug. 28, 1995); Flor v. United States Dept. of Energy, 93-TSC-1, at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. Anderson, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Held v. Held, 137 F.3d 998-99 (7th Cir. 1998). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, (1962); Rogers v. Peabody Coal Co., 342 F.2d 749 (6th Cir. 1965).

When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. Lujan v. Defenders of Wild-life, 504 U.S. 555, 112 Sup. Ct. 2130 (1992); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Evidence submitted by a party opposing summary decision must then be considered in light of its content or substance rather than the form of its submission. Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir. 1994).

Considering the foregoing principles, and for reasons set forth below, Respondents' Motion for Summary Decision Dismissing the Complaint will be denied.

Threshold Issues

Before turning to the extraterritorial question raised by Respondents' motion, the threshold issue is whether Section 806 provides coverage for an employee of Schweiz, a non-publicly traded subsidiary of a company publicly traded in the United States. A number of cases have concluded that employees of such subsidiaries are not covered workers. *See,* Salian v. Reedhycalog UK, 2007 SOX 020 ARB No. 07-080 (ARB, December 31, 2008) (worker

employed by non-publicly traded foreign subsidiary); Talisse v. UBS AG, 2008-SOX-00074 (ALJ, Jan. 8, 2009) (worker employed by non-publicly traded foreign subsidiary); Beck v. Citibank, Citigroup Global Markets Holdings, Inc., 2006 SOX 3 (ALJ, Aug. 1, 2006) (worker employed by non-publicly traded foreign subsidiary); Concone v. Capital One Financial Corp., 2005 SOX 006 (ALJ, Dec. 3, 2004) (worker employed by non-publicly traded foreign subsidiary); Andrews and Barron v. ING North America Insurance Corp., 2005-SOX-50, 2005 SOX 51 (ALJ, Feb. 17, 2006) (worker employed by non-publicly traded foreign subsidiary); Di Giammarino v. Barclays Capital PLC, 2005 SOX 00106 (ALJ, July 7, 2006) (worker employed by non-publicly traded foreign subsidiary).

In Carnero, the Court noted that the complainant was an employee of a non-publicly traded foreign subsidiary of a publicly traded company, and: "assumed without deciding that [the complainant] was a covered employee" of the publicly traded parent company. The Court thus concluded that: "… his alleged retaliatory discharge by its subsidiary for reasons forbidden in the Act could (putting aside any question of extraterritoriality application) violate the terms of the whistleblower protection provision of the Sarbanes-Oxley Act." Id at 7. In this proceeding, however, Respondents have raised the issue of whether an employee of a non-publicly traded wholly-owned subsidiary is covered under Section 806. Tr.13. Consequently, the assumption which facilitated the Court's decision in Carnero, that the whistleblower was an employee of the publicly traded parent, is a contested issue in this proceeding. That question will be considered first, since an absence of such coverage for employees who work for a wholly owned subsidiary would obviate the need to address whether Section 806 encompasses employees stationed abroad.

Employees of Non-Publicly Traded Subsidiaries
of Publicly Traded Corporations

Section 806 of Sarbanes-Oxley prohibits publicly traded companies or any officer, employee, contractor, subcontractor, or agent of such company from retaliating against a protected whistleblower who engages in a protected activity. *See*, Section 806(a). In the past seven years since its enactment, however, a number of administrative decisions construing this provision have denied Section 806 protection to employees of non-publicly traded wholly owned subsidiaries of publicly traded companies. These decisions basically theorize that the publicly traded parent is not the whistleblower's employer, and the subsidiaries are not publicly traded; therefore, wholly owned subsidiaries are not subject to Section 806 unless they are "agents" of the parent company for employment matters. *See*, *e.g.,* Carciero v. Sodexho Alliance, S.A. 2008 SOX 012 (ALJ, Feb. 19, 2009); Andrews and Barron v. ING North America Insurance Corp., 2005 SOX 50, 2005 SOX 51 (ALJ, Jan. 8, 2009; Srivastava v. Harris Investment Management, 2007 SOX 00024 (ALJ, Mar. 28, 2008); Burke v. WPP Group, PLC., 2007 SOX 00016, (ALJ, May 8, 2008); Savastano v. WPP Group, PLC, 2007 SOX 00034 (ALJ, July 18, 2007); Stone v. Instrumentation Laboratory SpA, 2007 SOX 00021 (ALJ, Sept. 9, 2007); Guoguang Su v. Alliant Energy Corp., 2008 SOX 034 (ALJ, June 16, 2008); Merten v. Berkshire Hathaway, Inc., 2008 SOX 40 (ALJ, Oct. 21, 2008); Pittman v. Siemens AG, 2007 SOX 0015 (ALJ, July 26, 2007); Goodman v. Decisive Analytical Corp., 2006 SOX 11 (ALJ, Jan. 10, 2006); Gale v. World Financial Group, 2006 SOX 00043, (ALJ, June 9, 2006); Shelton v. Time Warner Cable, 2006 SOX 00076 (ALJ, Aug. 31, 2006); Lowe v. Terminex International Co., 2006 SOX 89 (ALJ, Sept. 15, 2006); Bothwell

v. American Income Life, 2005 SOX 57 at 8 (ALJ, Sept. 19, 2005); Grant v. Dominion East Ohio, 2004 SOX 63 at 32-36 (ALJ, Mar. 10, 2005); Dawkins v. Shell Chemical, LP, 2005 SOX 41 (ALJ, May 16, 2005); Gonzales v. Colonial Bank, Inc., 2004 SOX 39 (ALJ, Aug. 20, 2004); Hughart v. Raymond James & Associates, Inc., 2004 SOX 9 (ALJ, Dec. 17, 2004). *See also*, Rao v. Daimler Chrysler Corp., (E.D. Mich. Case 2:06-cv-13723-NGE-SDP, Document 15 Filed May 14, 2007)(2006 SOX 78); Powers v. Pinnacle Airlines, Inc., 2003 AIR 12 (ALJ, Mar. 5, 2003). This landscape of dismissed Sarbanes-Oxley whistleblower cases is a notable development considering the remedial purposes of the Act,[2] and it warrants closer review.

In denying coverage to corporate whistleblowers, each of these cases absolve a publicly traded parent company of direct and derivative responsibility for adverse action against whistleblowers by their subsidiaries. Several invoke the principles of general corporate law referenced by the Supreme Court in U.S. v. Bestfoods, 524 U.S. 51, 61 (1998) which held that a parent company, generally, is an entity separate from its subsidiaries and, generally, is not responsible for the actions of its subsidiaries. S*ee*, Carciero v. Sodexho Alliance, S.A. 2008 SOX 00012 (ALJ, Feb. 9, 2009); Srivastava v. Harris Investment Management, Inc., 2007 SOX 24 (ALJ, Mar. 28, 2008); Hughart v. Raymond James & Associates, Inc., 2004 SOX 9 (ALJ, Dec. 17, 2004). Others relied upon the Administrative Review Board's (ARB) decision in Klopfenstein v. PCC Flow Technologies Holdings, Inc., 2004 SOX 11, ARB No. 04-149, (ARB, May 31, 2006). *See*, Carciero, *supra*; Savastano, *supra*; Andrews and Barron, *supra*, (only the subsidiary, not the parent, named in the complaint); Stone, *supra*; Goodman, *supra*; Gale, *supra*, (parent will only be liable where it controls the work environment or the termination decision); Shelton *supra*; Lowe *supra*; *see also*, Andrews, s*upra*; Merten, s*upra*. Despite this impressive body of administrative analysis, it remains yet a vexing question still to consider whether the Court's decision in Bestfoods or the Board's decisions in Klopfenstein and Andrews v. ING, ARB No. 06-071 (Aug. 29, 2008) are applicable when assessing the direct responsibility of a publicly traded parent corporation for the termination of a whistleblower who works for one its wholly owned subsidiaries.

The Labor Law Perspective of Section 806

Although Senator Sarbanes was careful to describe the workforce covered by the anonymous internal whistleblower provision in Section 301 as the same workforce covered by Section 806, S*ee*, Hearings Before the Senate Committee On Banking, Housing, and Urban Affairs, 170th Congress, Second Session, On The Legislative History of the Sarbanes-Oxley Act of 2002: *Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies,* Vol. III at 1299, (hereinafter, Senate Banking Committee Legis. History, Vol.), a number of administrative cases have relied upon the "labor law" approach to dismiss whistleblower complaints against both the parent and the subsidiary. Because whistleblower protection provides job security and is administered by the Department of Labor, several

[2] *See*, Richard E. Moberly, *UNFULFILLED EXPECTATIONS: AN EMPIRICAL ANALYSIS OF WHY SARBANES-OXLEY WHISTLEBLOWERS RARELY WIN,* 49 Wm. & Mary L. Rev. 65. Professor Moberly reports the results of an empirical study of all Department of Labor determinations under Sarbanes-Oxley from the date of enactment in 2002 through July, 2006, consisting of over 700 separate decisions. Professor Moberly reported a dismissal rate in excess of 90%, and that administrative decisions: "… misapplied Sarbanes-Oxley's substantive protections to the significant disadvantage of employees." Moberly at 135, fns. 285-290 and accompanying text.

decisions conclude Section 806 must be a labor law. In labor law cases, moreover, the courts employ an "integrated enterprise test" as a "sort of labor-specific veil-piercing test" when parent/subsidiary relationships are involved. *See*, Pearson v. Component Technology Corp., 247 F.3d 471, 485 (3rd Cir. 2001). In Carciero v. Sodexho Alliance, S.A,[3] *supra*, and Merten v. Berhshire Hathaway, *supra*, for example, the "integrated enterprise test" was adopted and whistleblower coverage was denied. In their application of the labor law, these decisions essentially adopted the arguments set forth in OSHA's brief to the ARB in Ambrose v. U.S. Foodservice, Inc., 2005 SOX 105 (settled on appeal, ARB, Sept. 28, 2007). The labor law test, according to Merten, is simply another method of establishing derivative, rather than direct, liability upon a corporate parent for the action of its subsidiaries.[4]

Support for this approach has been gleaned from the Court's decision in English v. General Elec. Co., 496 U.S. 72 (1990). In English, the issue was whether an employee's state law claim for intentional infliction of emotional distress was preempted by Section 210 of the Energy Reorganization Act (ERA). In deciding against pre-emption, the Court noted the Department of Labor's role as the administering agency and expressed an "inclination" to agree with a District Court observation that the "paramount purpose" of the whistleblower provision in Section 210 of the Energy Reorganization Act (ERA) "was the protection of employees." *See*, English at 83 and fn.6. The Court's "inclination" in English has been embraced by OSHA as the "tradition" supporting its position that all whistleblower provisions are labor laws.[5] Section 806, however, is not predominantly a labor law, and the publicly traded company's compliance responsibility is direct, not derivative.

Klopfenstein v. Flow Technologies

In Klopfenstein v. Flow Technologies, *supra*, the Board addressed the labor law circumstances in which a non-publicly traded subsidiary could be held liable as an agent under Section 806. Although the issue was not before the Board, a number of decisions have interpreted the Klopfenstein opinion as a discussion of a parent company's derivative liability. *See*, Andrews and Barron, (ALJ Decision) *supra*; *see also*, Srivastava, *supra*; Guogang Su, *supra* (to hold the parent responsible, it must be determined "whether a subsidiary or other entity was acting as an agent of the publicly traded company in employment actions relating to the whistleblower."). Others view Klopfenstein even more broadly as a holding which absolves publicly traded parent companies of direct responsibility for actions against whistleblowers by their subsidiaries. Merten, *supra.* According to these decisions, Klopfenstein authoritatively

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[3] *See, e.g.*, Carciero, *supra* at fn. 18.

[4] *See, e.g.*, Carciero, *supra* at fn. 18. According to OSHA: "there is no legal basis to conclude that subsidiaries of publicly traded companies are automatically covered under section 806," since Congress
surely "would have signaled that resolve somehow in the legislative history." OSHA Br. in Ambrose, *supra* at 10-11. For signals of the legislative resolve that OSHA was unable to detect, *see*, text at Pages 18-23, and 27-29 of this decision.

[5] OSHA's brief to the ARB in Ambrose, *supra*, urged the rejection of a Sarbanes-Oxley whistleblower complaint, arguing that: "Whistleblower laws like this one have traditionally been regarded as employment related." Other than the Court's comment in English, a preemption case, however, OSHA cited not one other whistleblower case decided under any of the many other whistleblower statutes administered by the Department of Labor over the past 35 years in which the parent/subsidiary labor law issue was addressed or applied.

contradicts the notion that a corporate parent can be directly liable under Sarbanes-Oxley for the discriminatory action against a whistleblower by one of its wholly owned subsidiaries. *See*, Merten at 4; Burke v. WPP Group, 2007 SOX 16 (ALJ, May 8, 2008) (to hold the parent responsible, the "non-public subsidiary must act as an agent of the publicly held parent, and the agency must relate to employment matters."); Srivastava, *supra*, (A parent may only be liable "where it controlled or influenced" … the termination decision.); Savastano, *supra,* (holding the named publicly traded company responsible for the acts of the wholly owned subsidiary "is inconsistent with the ARB's holding in Klopfenstein…"); Gale, *supra,* (The parent will only be liable where it controlled or influenced the termination decision); and Lowe, *supra,* (finding it significant that the Board did not, but: "could have held" (apparently notwithstanding the fact that parent was not a party to the complaint) "that the agency issue was rendered moot by the subsidiary's legal unity with the parent under the Act."). Each of these decisions summarily denied direct or derivative liability of a corporate parent for the acts of its subsidiaries and, citing Klopfenstein, dismissed a whistleblower's complaint. Yet each of these decisions misconstrued Klopfenstein because the decision dealt exclusively with direct liability of the *subsidiary*, not direct or derivative liability of a parent company.

The Board in Klopfenstein specifically noted that publicly traded parent was not involved in the proceeding before it, and left it: "to the ALJ to determine whether to grant Klopfenstein's motion to add PCC [the publicly traded parent] as a party" on remand. Klopfenstein at 16.[6] Since the publicly traded parent was not a party to the complaint, the Board sought to make clear, although apparently not sufficiently clear in some quarters, that its decision was limited to the circumstances in which the non-publicly traded subsidiary, acting as an agent, could itself be directly liable as a covered employer under the Act.[7] The Board was not called upon to address the parent company's liability. Id. Nothing in its holding is, therefore, inconsistent with direct parent company liability for adverse actions against a whistleblower by one of its wholly owned subsidiaries.

Agent for What Purpose

Although this decision is not predicated derivative agency liability between Deutsche Bank AG and Schweiz, the labor law approach to Section 806 is questionable from yet another perspective. Treating Section 806 as a labor law rather than an antifraud measure is significant not only for purposes of assessing whether a violation is domestic or extraterritorial, but also in terms of what whistleblowers must prove to establish the agency relationship referenced in Section 806. For example, if Section 806 were construed as an antifraud provision, it would seem sufficient to establish an agency for purposes of producing accounting or financial information which is consolidated into the parent's financial reports, or that an agent or contractor facilitated fraud like the subsidiaries, off-the-books special purpose entities (SPEs), and the accounting firm that helped precipitate the financial collapse of Enron, the key corporate

[6] On remand, the publicly traded parent was not joined as a party to the proceedings. *See*, Klopfenstein, *supra*, (ALJ, Oct. 13, 2006, Decision on Remand at fn.2).

[7] The Board's decision in ING, *supra*, was also limited to the agency issue as it related to direct liability of a subsidiary because, like Klopfenstein, the publicly traded parent was not a party to the ING complaint.

figure in the legislative history of Sarbanes-Oxley. The labor law, however, tacks in a different direction.

As a result, the administrative decisions addressing the issue have all concluded that a personnel management nexus governs derivative liability coverage under Section 806. Rather than focus, for coverage purposes, on the agent's role in preparing financial data or its participation in fraud or deception, the labor law focuses on the ability of the whistleblowers to show that the subsidiary, agent, contractor, or subcontractor for which they worked was the parent company's agent or contractor for personnel matters. As a consequence, the labor law test would, for example, deny protection to a whistleblower working for a contractor or agent like the accounting firm Arthur Andersen which helped shred Enron documents. *See*, Judiciary Committee Report 107-146, May 6, 2002, at 4. Indeed, no evidence was uncovered that the accounting firm was Enron's agent for personnel or employment matters, or that Enron controlled Arthur Andersen's employment practices related to whistleblowers within Arthur Anderson's ranks. Yet, Congress was clearly concerned about whistleblowers in such situations because it knew Enron was an important client of Arthur Anderson and a significant source of its revenue when the accounting firm: "removed a partner from the Enron account when he expressed reservations about the firm's financial practices in 2000." *See*, Senate Judiciary Committee Report No. 107-146, May 6, 2002, at 5.

The legislative history of Sarbanes-Oxley would seem to confirm that Section 806 was meant to include an agent or contractor like the accounting firm of Arthur Andersen, not because there was any evidence that Andersen implemented Enron's personnel actions, but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud Arthur Andersen helped to conceal. Yet, application of the labor agency test probably would have been fatal to the claim of an Andersen whistleblower, and has been fatal to claims of whistleblowers in wholly owned subsidiaries, because the labor law simply does not deem it especially relevant if a non-publicly traded subsidiary, agent, or contractor that allegedly caused or facilitated fraud or misrepresentation were to fire a whistleblower for its own reasons; for example, to keep the business of an important client or to keep damaging financial disclosures from coming to light. Under such circumstances, simply to state the labor law test in the context of Sarbanes-Oxley seems sufficient to refute it, because it leaves essentially unchanged conditions Congress passionately wanted to reform.

Thus, proof of agency for financial reporting purposes or even for the commission of fraud that may wipe out the equity of public shareholders has not been factored into the administrative labor law decisions denying Section 806 coverage. *See*, Carciero; *supra*; Savastano, supra; ING North America Insurance Corp., (ALJ, Feb. 17, 2006), *supra*; Stone, *supra*; Gale, *supra*; Lowe, *supra*; and Merten, *supra*. Instead, whistleblowers have been required to prove that they worked for a subsidiary that acted as an agent on behalf of the principal parent for personnel matters or employment matters related to the whistleblower; and the burden erected a formidable, if not in most instances an insurmountable, obstacle to coverage.[8]

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[8] In Kalkunte v. DVI Financial Services, Inc., 2004 SOX 56 (ARB, Feb. 27, 2009), the Board concluded that a company that took over an employer's operations after the employer filed for bankruptcy sufficiently controlled the whistleblower's employment practices to hold it liable under Section 806. Apparently the labor test is satisfied when the agent or contractor completely takes over the employer's business operations. *Accord*, Platone v. Atlantic Coast Airlines, 2003 SOX 27, (ALJ, Apr. 30, 2004) (subsidiary was the alter ego or instrumentality of parent company). In contrast, in Merten, *supra,* dozens of personnel links and

If Congress wanted to encourage corporate insiders to monitor and report financial fraud and deception, and clearly it did, very little in cases that apply the labor law test and deny that protection seems consistent with that goal.[9] To the contrary, any employee of a subsidiary familiar with the labor test case law might still find it difficult to ignore the advice of the attorney who advised Enron of the minimal risk associated with the terminating a whistleblower.[10] Yet even more important, the burdens and hurdles associated with proof of agency for labor law purposes seem misdirected and unnecessary not only because Section 806 imposes direct responsibility on the publicly traded company, but also because Section 806 is fundamentally an antifraud law, not a labor law. This, moreover, is not an isolated fringe assessment foundering about in a sea of contrary opinion; it is the unanimous consensus of every Senator who commented on the issue. About this, the legislative history is crystal clear.

The Congressional Perspective of Section 806
As an Antifraud Measure

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. Senator Leahy revealed that Enron operated through a veil of

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management personnel controls imposed by the parent on the subsidiary were rejected as insufficient to establish that the parent was the whistleblower's employer or that the subsidiary was the parent's agent for labor purposes. Similarly, in Guoguang Su v. Alliant Energy Corp. and RMT, Inc., *supra*, the parent's own designation of the whistleblower as an employee who participated in a stock option plan offered to employees was deemed insufficient to satisfy the labor law test. *See also*, Talisse v. UBS AG, UBS Securities LLC, and UBS Securities Japan LTD, 2008 SOX 00074, (ALJ, January 8, 2009) (Employer's statement to the Social Security Administration confirming that a complainant was directly employed by a U.S. corporation insufficient to establish a U.S. company as the employer). Talisse at 8. Whether the subsidiary "agent" may have committed, assisted, or fostered fraud was not, in determining coverage, a focus of these adjudications.

[9] The burden of establishing agency for purposes of implementing whistleblower personnel matters is so steep, it has essentially proven insurmountable to all be a very few employees. *See, e.g,*. Kalkunte, *supra*; Platone, *supra*; Neuer v. Bessellieu, 2006 SOX 132, 4 (ALJ Dec. 5, 2006), and Robinson v. Morgan Stanley, 2005-SOX-44 (ALJ, Mar. 26, 2007). *But see*, ING North America Insurance Corp., *supra*;Srivastava, *supra;* Burke, *supra;* Savastano, *supra;* Stone, *supra;* Guoguang Su, *supra;*; Merten, *supra;* Pittman, 2007-SOX-0015 (ALJ, July 26, 2007); Goodman, *supra;* Gale, *supra;* Shelton, *supra;* Lowe, *supra;* Bothwell, *supra;* Grant, *supra;* Dawkins, 2005 SOX 41 (ALJ, May 16, 2005); Hughart, 2004
SOX 009 (ALJ, Dec. 17, 2004). Powers, 2003 AIR 12 (ALJ, March 5, 2003); Flake, 2003 SOX 18 (ALJ, July 7, 2003). *See also*, Rao v. Daimler Chrysler Corp., (E,D. Mich. Case 2:06-cv-13723-NGE-SDP, Document 15 Filed 05/14/2007) (2006 SOX 78); *but see*, Smith v. Corning Inc., (W.D.N.Y, 6-CV-6516 CJS) (2006 SOX 113). Indeed, nothing has changed since July, 2006, when Professor Moberly completed his study, to alter his conclusion that the results of his detailed analysis: "demonstrate that administrative decision makers … in some cases misapplied, Sarbanes-Oxley's substantive protections to the significant disadvantage of employees." Moberly, *supra* at 135.

[10] Senator Leahy reported that in: "a shocking e-mail from Enron's outside lawyers to an Enron official," Enron was counseled that: "Texas law does not currently protect corporate whistleblowers. The [Texas] supreme court has twice declined to create a cause of action for whistleblowers who are discharged.…" Senate Judiciary Committee Report, *supra* at 10.

subsidiaries and entities including Ponderosa, Jedi Capital, Big Doe, Sundance, Little River, Yosemite, OB-1 Holdings, Pregrine, Kenobe, Braveheart, Mojave, Chewco, and Condor, Osprey, Zenith, Egrit, Cactus, Big River, Whitwing, and Raptor, among others, and observed that without an inside whistleblower: "There is no way we could have known about this… If you look at that, [the Enron corporate structure] you do not know these entities belong to Enron." Id.[11]

Thus, 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. And these are not isolated comments.

Congress learned from the Chairman of American Institute of Certified Public Accountants that auditors should: "find out what is going on inside the company," and should "speak to people outside the financial organization because *the more people you talk to and the more questions you ask, the more likely it is that you will come across some information that will start you down the trail*." Senate Banking Committee Legis. History, Vol. II, at 840. (emphasis added). Senator Durbin observed that the Senate Amendment "creates protections for corporate whistleblowers. We need them. If insiders don't come forward, many times you don't know what is happening in large corporations," (*see*, Senate Banking Committee Legis. History, Vol. III, at 1294), and Senator Leahy concurred: "We learn from Sherron Watkins of Enron that these

[11] In Platone, *supra*, the subsidiary was found to be the "alter ego" of the parent. Yet, it would not stray too deeply into the domain of conjecture to suggest that Enron, the corporate emblem of financial finagling, was not about to "hold-out" as its "alter ego" or conspicuously place its corporate logo or identity all over many of its off-the-books entities where Senator Leahy discovered it was "hiding the money." Consequently, it runs contrary to the legislative history, the spirit, and the intent of Sarbanes-Oxley to deny protection to a whistleblower in a subsidiary or other entity like JEDI, Chewco, Osprey, or Raptor merely because the entity that employed the whistleblower, while an agent that may have helped the parent defraud the stockholders, was not an alter ego or agent of the parent for the implementation of personnel matters. *See*, Senate Banking Committee Legis. History, Vol. III. at 1301.

corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court." Id. at 1632.[12]

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).[13] Clearly, the

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[12] Apparently, neither Ms. Watkins' situation as a whistleblower nor the Enron experience was unique. *See, e.g.,* The Road to Reform; A White Paper From The Public Oversight Review Board, S. Hrg. 107-938, Vol. II, at 1040. The Senate Judiciary Committee Report noted that: "According to media accounts, this (Watkins) was not an isolated example of whistleblowing associated with the Enron case**….** A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships…. These examples further expose a culture, supported by law, that discourages employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied." Senate Judiciary Committee Report, *supra,* at 4-5.

[13] Senate Judiciary Committee Report No. 107-146, May 6, 2002 at 10.

worker protection aspect of the whistleblower protection afforded by Section 806 is secondary to one of Sarbanes-Oxley's most important antifraud components: the whistleblower's disclosures.[14]

Section 806: An Antifraud Reform

While the predominant purpose of Section 210 of the ERA, as construed in English, is employee protection, Section 806 of Sarbanes-Oxley is predominantly an antifraud law. 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

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[14] While the Court in English, *supra,* was inclined to view employee protection as the paramount purpose of Section 210 of the ERA, the legislative history of Sarbanes-Oxley demonstrates that the paramount purpose of Section 806 is to encourage corporate insiders to report fraud and financial misrepresentation in the interest of protecting shareholders and investors. The job protection Section 806 provides the whistleblower is simply one method, among others, Congress crafted to accomplish that paramount purpose. Moreover, in providing Section 806 whistleblower protection, Congress expressly obviated the issue raised in English. Thus, Section 806 (a)(d) specifically declines to preempt other laws.

antifraud reform designed to protect public investors by creating an environment in which whistleblowers can come forward without fear of losing their jobs.[15]

Under these circumstances, it seems wholly incongruous to revitalize the theories of derivative liability applicable to labor law situations to shield the parent company from the consequences when wholly owned subsidiaries fire whistleblowers. To do so directly compromises the purposes of the Act at a very fundamental level. Nor does Bestfoods hold otherwise.

U.S. v. Bestfoods

In Bestfoods, the Supreme Court observed, in a decision involving a parent company's liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 (CERCLA), that: "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.… Thus it is hornbook law that the exercise of the 'control' which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary." Id. at 62. The Court then discussed the circumstances in which the corporate veil may be pierced and derivative parent liability may be established for a polluted worksite. Most administrative decisions under Sarbanes-Oxley tend to focus on this aspect of the Court's decision, and thus impose a burden on the whistleblower to establish derivative liability and pierce the corporate veil by proving the subsidiary is the "agent" of the parent.

A significant aspect of Bestfoods, though overlooked by a majority of administrative decisions, was the Court's consideration of circumstances in which a parent company may be held directly responsible under CERCLA for its own actions regarding the operations of its polluting subsidiary. Distinguishing "derivative liability" of a parent company for the actions of another corporation, the Court observed that: "CERCLA's 'operator' provision is concerned primarily with direct liability for one's own actions. *See, e.g.*, Sidney S. Arst Co. v. Pipefitters Welfare Ed. Fund, 25 F.3d 417, 420 (C.A.7 1994) ('[T]he direct, personal liability provided by CERCLA is distinct from the derivative liability that results from piercing the corporate veil.') *It is this direct liability that is properly seen as being at issue here*." Id. at 66 (emphasis added). Consequently, Bestfoods did not hold that a parent corporation can only be held responsible for the termination of a whistleblower by its subsidiary if the subsidiary is an agent of the parent, or if the parent controlled or influenced the work environment or the termination decision itself.

[15] The agency which dispenses the reward or incentive should not change character or purpose of the reward. The mechanism Congress adopted to encourage whistleblowing as an antifraud reform was protection of insiders from retaliatory job discrimination, and the Department of Labor has long been the agency Congress has relied upon to deal with issues related to job discrimination in whistleblower cases. *See*, Air 21 (Airline Industry); Energy Reorganization Act of 1974, as amended, Section 211, 42 U.S.C. §5851(Nuclear Industry); Clean Air Act, 42 U.S.C. §7622; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610; the Solid Waste Disposal Act, 42 U.S.C. §6971; the Safe Drinking Water Act, 42 U.S.C. 300j-9; the Federal Water Pollution Control Act, 33 U.S.C. §1367; Surface Transportation Assistance Act, 49 U.S.C. §31105 (Trucking Industry); and the Toxic Substances Control Act, 15 U.S.C. §2622. While the Department of Labor is the administering agency, the goal and predominant purpose of Section 806, nevertheless, is to encourage the protected activity, and the protected activity is whistleblowing.

See, *e.g*., Carciero, *supra*; Srivastava, *supra*; Andrews and Barron, *supra*, (ALJ decision); Guogang Su, *supra*; Gale, *supra;* Lowe, *supra*. To the contrary, Bestfoods was a CERCLA-specific ruling on the issue of direct parent liability as a CERCLA "operator." Bestfoods, therefore, provides guidance in ascertaining the circumstances in which the imposition of direct parent liability is appropriate under Sarbanes-Oxley, but it is not, by parameters set by the Court itself, a Sarbanes-Oxley precedent.

The Court observed: "If the Act (CERCLA) rested liability entirely on ownership of a polluting facility, this opinion might end here; but CERCLA liability may turn on operation as well as ownership, and nothing in the statute's terms bars a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary." Id. at 65. The initial question it would seem prudent to consider, then, is whether Sarbanes-Oxley rests Section 806 liability directly on a publicly traded parent company for adverse action against a whistleblower employed within the ranks of its subsidiaries. If so, it would, as Bestfoods suggests, end the inquiry.

Yet, in order to establish direct responsibility of a publicly traded parent company for the actions of a wholly owned subsidiary that retaliated against an unwelcome whistleblower, Bestfoods requires a clear expression of Congressional intent and purpose. Bestfoods at 53.[16] The Act and its legislative history provide the required insights.

Special Policy Considerations

Initially, it would appear special policy considerations involving the parent/subsidiary relationships embodied in Sarbanes-Oxley distinguish it from the policies which underlie CERCLA and the Court's decision in Bestfoods. The parent in Bestfoods, for example, had a choice whether or not to become an "operator" of its subsidiary and, thereby, expose itself to direct liable under CERCLA. The Sarbanes-Oxley parent has no such option. As a publicly traded parent, it is directly responsible for imposing corporate governance and other reforms on

[16] The Supreme Court has not hesitated to set aside the separate entities principle of corporate law when dealing with parent and subsidiary relationships under circumstances in which the court deems that common law principles inconsistent with the policy focus of a Congressional enactment. In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, (1984), for example, the Court declined to accept as separate entities a parent and its wholly owned subsidiary for purposes of a conspiracy to violate Section 1 of the Sherman Act. In Copperweld, the Court stated that "[i]n any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." Copperweld, 467 U.S. at 769. The Court determined that an alleged conspiracy between a parent and a subsidiary lacks this crucial element, stating:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. Id. at 771.

its subsidiaries. In the contrast with CERCLA, Congress imposed upon Sarbanes-Oxley parent companies a complete unity of interest and purpose with its wholly owned subsidiaries in carrying out its reforms; and like the parent and subsidiary in Copperweld, the responsibilities and objectives of the parent and subsidiary under Sarbanes-Oxley are common, not disparate. Consolidated subsidiaries are, for Sarbanes-Oxley purposes, like appendages on the hand of their publicly traded parent, *see*, Copperweld, *supra;* and ultimately it is the publicly traded parent that is directly responsible if a wholly owned subsidiary ignores, circumvents, or otherwise fails to comply with mandated reforms. *See, e.g*., Section 302 (certification requirements). Section 806 is no exception. *See, e.g*., Senate Judiciary Committee Report No. 107-146 at 10.

Direct Liability
Sarbanes-Oxley Background

In probing whether Congress intended to impose Section 806 direct liability on the corporate parent, like a parent "operator" under CERCLA, very basic, but crucial questions need be considered. From what exactly, it may be asked, did Congress intend "to protect investors," and what role did Congress intend whistleblowers to play in affording that protection? A closer look at the legislative history will reveal the answers.

It may be helpful initially to recall that Sarbanes-Oxley was enacted in a financial environment in which the investment portfolios and retirement accounts of thousands of public shareholders in publicly traded firms like Enron, Global Crossing, and WorldCom were essentially wiped out by financial chicanery and accounting manipulations that allowed fraud to flourish. Former Chairman of the SEC, Richard Breeden, advised the Senate Banking Committee: "The spectacle of corporate insiders plundering their own companies or selling their stock quietly in advance of a looming collapse has awakened a sense of revulsion among investors who were left with worthless stock." S*ee*, Senate Banking Committee Legis. History, Vol. I, at 16.

Although very few administrative decisions reference Enron or the ways it operated, Senator Allard viewed the Enron experience as the financial backdrop against which Sarbanes-Oxley reforms were formulated, remarking: "We have all heard a great deal about the recent meltdowns at Enron, Global Crossing, and other companies…." Id. at 234. The former Comptroller General of the U.S., David Walker, also testified before the Senate Banking Committee. In addressing the types of issues Enron presented, he urged Congress to consider a holistic approach and be: "guided by the fundamental principles of having the right incentives for the key parties to do the right thing, adequate transparency to provide reasonable assurance that the right thing will be done, and full accountability if the right thing is not done." *See*, Senate Banking Committee Legis. History, Vol. II, March 5, 6, 14, 19, 20, 2002, at 551. The Public Oversight Review Board reported to the Committee that: "The collapse of Enron has provided a clarion call for reform. It has exposed gaping holes in the investor protections we rely upon to keep corporate managers honest. Enron is not unique. These same shortcomings apply to all publicly-traded companies. We are fortunate that so many company managers have remained

committed to providing clear, accurate disclosures to investors. But we cannot rely exclusively on their integrity. We need a system that works even when company managers are greedy and overly aggressive. Congress can repair the gaps in the current system. It is of paramount importance that you do so." *See*, *The Road to Reform; A White Paper,* Senate Banking Committee Legis. History, Vol. II, at 1040. SEC Chairman Harvey Pitt informed the Senate: "With Enron's disintegration, innocent investors, employees, and retirees, who made life-altering decisions based upon a stock's perceived value, found themselves locked-in to a rapidly sinking investment that ate up the fruits of years of their hard work. It is these Americans, whose faith fuels our markets, whose interests are, and must be, paramount." *See*, Id. at 1103. Persuaded by the evidence developed by the Committee, Senator Shelby stated: "…I believe we must not only severely punish fraud in our markets, we must also find ways to deter it in the first place." *See*, Senate Banking Committee Legis. History, Vol. I at 234.

Clearly, the accounting manipulation and fraud on stockholders and investors motivated Congress to initiate the actions reflected in Sarbanes-Oxley; but to tailor the reforms to the problems and deter fraud, Congress needed to know how the money was actually hidden and siphoned away from the stockholders. It needed insight into the methods and means used to deceive stockholders and investors, and it dissected Enron's scheme to find the answers. What it uncovered was a web of subsidiaries and other entities that facilitated the fraud, and it is only in the context of the lessons learned by Congress which revealed to it how so many investors and sophisticated analysts could be fooled for so long that the parent/subsidiary relationship under Section 806 may properly be analyzed.

Use of Subsidiaries and Other
Entities to Facilitate Fraud

Senators Sarbanes and Leahy discovered that Enron owned or operated over 4,000 affiliates, off-the-books special purpose entities, and subsidiaries, 1,500 of which operated in the Caribbean, South America, Europe, Asia, and elsewhere; and Senator Leahy unraveled what former SEC Chairman Breeden described as this "camouflage netting" (Id. at 47) to afford the Senate some perspective into how these entities were used. Senator Leahy reported:

> This is what Enron did. Does this look like a company that wants to be transparent in their dealings?...
>
> What were some of the companies they were hiding behind? Here is one named Ponderosa. If you look at that, you do not know it belongs to Enron. Or Jedi Capital or Big Doe – that is not D-O-U-G-H – or Sundance or Little River or Yosemite or OB-1Holdings or Pregrine or Kenobe. I guess Kenobe is a different company than OB-1. And we have Braveheart and Mojave and Chewco, and Condor. It seems the only time they have free time between trying to hide the money was going to the movies, when you look at some of the secret partnerships they created here, Jedi II, OB-1, Kenobe.

> My point is, do you think if anybody stumbled across one of these companies they would think for even one minute that it belonged to Enron? Of course not. If you were the person who was to protect the pension rights of the employees, do you think if you found Osprey or Zenith or Egrit or Cactus or Big River or Raptor you would think the money that was being tucked away and hidden in there could actually belong to the employees of Enron? Conference Report, Cong. Rec., Volume 148, July 25, 2002 Number 103, pg. 1300-01.

Enron used a network of corporate subsidiaries and other entities to carry out a scheme so obtuse and convoluted it was difficult to sort out which subsidiary or entity was responsible for what fraud. The legislative history of Sarbanes-Oxley thus demonstrated that financial improprieties in publicly traded companies like Enron, WorldCom, Global Crossing, and others wrought financial havoc on their stockholders; and in some instances, the subsidiaries were the vehicles through which the fraud was facilitated or accomplished.[17]

The Senate hearings further exposed the very complexity of Enron's labyrinthian corporate structure itself as part of the problem, and Congress had little difficulty recognizing that no significant change would be possible if it adhered to old rules which shielded the corporate parent from the actions of its subsidiaries. Senator Johnson tellingly observed: "We must not allow these criminals *to hide behind the corporate veil while stealing millions of dollars from hard-working Americans*." *See*, Senate Banking Committee Legis. History, Vol. III at 1461 (emphasis added). Recognizing the depths to which problems related to fraud and misrepresentation could penetrate a corporate structure and involve not simply the parent company, but often subsidiaries and other entities, Congress took steps to increase the accuracy and transparency of financial reporting throughout the entire corporate organization comprising the publicly traded company. *See, e.g*., Sarbanes-Oxley Sections 302, 401, and 402. As Senator Johnson's comment eloquently confirmed, Congress recognized the need to remove corporate veils which posed barriers to the very mechanisms it deemed necessary to protect shareholder value.

Despite unambiguous evidence to the contrary, it has nevertheless been suggested that Congress wanted to preserve corporate veils because: "the legislative history of the Act indicates that Congress did not intend for the Act to view subsidiaries and parent companies as one entity." Bothwell v. American Home Life, *supra.* While statements by Senators Leahy and Johnson suggest otherwise, Bothwell cites as authority a remark by Senator Sarbanes that he: "wished to make very clear that [the Act] applies exclusively to public companies—that is to companies registered with the Securities Exchange Commission." 148 Cong. Rec. S. 7351 (daily ed. July 25, 2002)." Id. This comment has been taken as an indication that: "to include non-publicly traded subsidiaries as a 'company' under the Act … was beyond the intention of Congress." Bothwell, *supra*. In Burke v. WPP Group, *supra*, Bothwell's interpretation of Senator Sarbanes' remark was adopted to deny again a whistleblower's coverage under the Act. Yet

[17] The purpose of this discussion is not to equate Deutsche Bank AG with Enron, but the Enron experience is instructive when considering the implications of decisions that have denied coverage to employees of non-publicly traded wholly owned subsidiaries of publicly traded companies.

Bothwell and Burke both misinterpret Senator Sarbanes' remark and misperceive the context in which he made it.

Senator Sarbanes' comment had nothing to do with the wholly owned, non-publicly traded subsidiaries of publicly listed companies. He was addressing the concerns expressed by several accounting witnesses, and later by then-Chairman Pitt of the SEC, that the accounting reforms Congress was considering not be applied to firms that represent small business. Referred to in the legislative history as the "cascading-down argument," Senator Sarbanes summarized it: "Let me just be clear. We are talking about public companies … because that is where the investor protection issue comes in…. So that the nonpublic company – none of the limitations we are talking about would apply in that circumstance." *See*, Senate Banking Committee Legis. History, Vol. II, pg. 1074. Although apparently overlooked by Bothwell and Burke, it is, of course, clear from Senator Leahy's discussion of the problem with the subsidiaries of Enron and WorldCom and Senator Johnson's comment criticizing corporate veils that Congress was indeed "talking about" imposing corporate parent responsibility for whistleblower reforms applicable to their wholly owned subsidiaries. But I digress.

Senator Sarbanes continued on, clarifying his remark about non-public companies: "I just want to address the cascading-down argument that we are hearing that says, I am a small accounting firm in a small town and I represent small businesses, none of which are publicly listed. They [the small accounting firms] view this with a sense of horror because they think, what is going to happen with respect to the publicly listed company is going to reach them." Id.

Senator Enzi later addressed the same issue: "One of our concerns has been that we not change business so drastically that these small businesses will no longer be able to afford auditors. So we built in protections for small businesses. Our intent with this bill is not to have the same principles apply to the Fortune 500 companies apply to mom-and-pop business…. We have taken a lot of care to be sure we are not cascading the provisions down to small business." Senate Banking Committee Legis. History, Vol. III at 1302 and 1623. Considered in context, Bothwell and Burke seem to misconstrue the subject matter of the discussion they cite and misinterpret Senator Sarbanes' remark. They dutifully report words, but fail to capture the context or meaning.

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With abundant clarity, Congress expressed its concern with the operations of subsidiaries, not as separate entities, but as consolidated assets and liabilities which are susceptible to manipulation on the books of their publicly traded parents. As a result, the overarching mechanism of Sarbanes-Oxley enforcement is through the parent company, not piecemeal through individual subsidiaries. In terms recognized by Bestfoods, Sarbanes-Oxley achieves its corporate governance reforms and ensures implementation of its internal controls and accountability requirements by placing direct responsibility on the publicly traded parent company to enforce its reforms throughout its corporate structure. For Sarbanes-Oxley purposes, the legal form of an operating unit is of little consequence; a wholly owned subsidiary is no more distinct from its parent than a division or operating unit.[18] It is merely an asset or liability,

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[18] Under circumstances in which the corporate law principles which afford parent companies identities distinct from their subsidiaries conflict with the policies or purposes which underlie a

generating profits or losses which are consolidated into the publicly traded company's financial statements;[19] and responsibility for compliance with Sarbanes-Oxley reforms rests directly with the publicly traded corporate parent that files the reports.

Section 806 Protects Investors

As Bestfoods confirmed, the concept of a separate identity between a corporation and its stockholders under general corporate law was designed to limit the shareholders' exposure for torts or other liabilities of their company to the assets of the company. *See*, Bestfoods at 62. Sarbanes-Oxley also seeks: "To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws….," PL 107-204 (HR 3763), 116 Stat.745, July 30, 2002; however, unlike the general principles of corporate law which protect shareholders from third parties, Congress learned that separate corporate identities and the insulation erected by general corporate veil principles were precisely the vehicles which were used to harm shareholders. While it would be remiss not to acknowledge the parent company's investor status in the stock of its subsidiary, the public shareholders of the publicly traded parent entity are the ultimate owners Congress sought to protect.

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congressional enactment, the courts have not hesitated to dispense with concept of separateness and view the parent and subsidiaries as a single corporate entity. For example, a majority of the Circuits have declined to treat parent companies separate and distinct from their subsidiaries for RICO purposes. *See, eg*., NCNB Nat'l Bank of North Carolina v. Tiller, 814 F.2d 931, 936 (4th Cir.1987) (holding that, as a matter of law, defendant bank is not distinct from its holding company, the alleged enterprise, for purposes of §1962(c)), overruled on other grounds by Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir.1990); Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 441 (5th Cir.1987) (no evidence that defendant bank was distinct from its holding company, the enterprise); Nebraska Sec. Bank v. Dain Bosworth Inc., 838 F. Supp. 1362, 1369 (D.Neb.1993) (neither parent nor its wholly owned subsidiary can constitute a §1962(c) enterprise); Tucker Freight Lines, Inc., 789 F. Supp. at 893 (granting motion to dismiss because defendant corporation was not distinct from parent); Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 155 (5th Cir.1997) (hospital and parent corporation "is in reality a 'stand-in,' or another name, for the corporate entity"); Discon, Inc. v NYNEX Corp, 93 F3d 1055, 1062–64 (2d Cir 1996) (three corporate defendants operating "within a unified corporate structure" could not together constitute the enterprise); Bessette v Avco Financial Services, Inc, 230 F3d 439, 448–50 (1st Cir 2000) (holding that parents and subsidiaries are not distinct); Brittingham v Mobil Corp, 943 F2d 297, 300–03 (3d Cir 1991) (finding no distinctiveness when the subsidiary "did no more than conduct the normal affairs of the defendant corporations); Fitzgerald v Chrysler Corp, 116 F3d 225, 226–28 (7th Cir 1997) (finding no distinctiveness where "a large, reputable manufacturer deals with its dealers and other agents in the ordinary way"); Fogie v THORN Americas, Inc, 190 F3d 889, (8th Cir 1999) (declining "[T]o impose liability on a subsidiary for conducting an enterprise composed solely of the parent of the subsidiary and related businesses."); Brannon v Boatmen's First National Bank of Oklahoma, 153 F3d 1144, 1145–50 (10th Cir 1998). In Kushner Promotions, Ltd. v King, 533 U.S. 158 (2001), the Court listed Discon, Inc v Nynex Corp, 93 F3d 1055 (2d Cir 1996), a parent-subsidiary distinctiveness case, as presenting one of the issues the Court was not reaching. Kushner, 533 U.S. at 164.

[19] See, e.g., SEC Form 20-F, Item 4.

Direct parent company responsibility was, therefore, Sarbanes-Oxley's answer to the tangled web of entities used to obfuscate the value of the public shareholders' investments and the answer to protecting public shareholders from financial misrepresentation by their company's own management. In considerable detail, Senator Leahy laid out how public shareholders were defrauded by parent companies through the use and operations of subsidiaries, partnerships, and off-the-book entities. His efforts, however, seem largely lost in a thicket of Section 806 cases which uncritically apply corporate law doctrine. Principles designed to shield investors from financial harm have been transformed by administrative alchemy into a sword against the whistleblower protection Congress crafted as a frontline safeguard against the sort of harm caused by internal corporate fraud. *See, e.g.*, Carciero, *supra*; Burke, *supra*; Savastano, *supra*; and Lowe, *supra*. Yet, a careful reading of the legislative history of Sarbanes-Oxley yields nothing which suggests that Congress was in any mood to entertain the type of notions which protect the corporate parent while leaving exposed a whistleblower whose protection is smothered under a "corporate veil." Such concepts may, in a different setting, be consistent with general corporate law doctrine, but they fall far short of the Congressional vision of Section 806 as a meaningful antifraud measure.

Statutory Provisions
The Title of Section 806

A casual observer might argue, nevertheless, that Sections 302 and 402 of Sarbanes-Oxley specifically refer to subsidiaries, but the title of Section 806 and its text never mention subsidiaries. Several decisions accord these differences considerable interpretive significance. For example, Goodman v. Decisive Analytical Corp., *supra*, dismissed a complaint on the ground that Section 806 is entitled: "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud;" and according to Goodman, employees of wholly owned subsidiaries are not, for Sarbanes-Oxley purposes, employees of the publicly traded parent. Goodman continues: "The caption of the statutory section and the legislative history … are not inconsistent with this interpretation." Id. at 9-10; *see also*, Burke v. WPP Group, *supra*. With a legislative history so rich in examples which contradict that assertion, it seems imprudent to brush aside Congress's intent with such brevity. To be sure, the Court's decision in Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) is cited as authority by Goodman for the weight it accorded to the title of Section 806, but the Court's ruling does not afford the title of a provision such hefty interpretative weight when Congressional intent is demonstrably to the contrary.[20]

The Text of Section 806

It has been suggested that Congress specifically mentioned subsidiaries when it wanted to include them in a regulated class and Section 806 does not mention them. Briefly, Section 302(a)(4)(B) requires the publicly traded company's principal executive officer to confirm that: "… material information relating to the *issuer and its consolidated subsidiaries* is made known to such officers by others within those entities. (emphasis added). Section 402 prohibits any

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[20] *See, e.g.*, Statements by Senator Sarbanes, Senate Banking Committee Legis. History at 1299 (discussing Sections 301 and 806); Senator Leahy, Id. at 1632 (role of insiders); Senator Durbin, Id. at 1294 (role of insiders).

issuer "directly or indirectly, *including through any subsidiary*, to extend or maintain credit … to or for any director or executive officer (or equivalent thereof) of that issuer." (emphasis added). The reference to subsidiaries in these two sections has been construed as an indication that if Congress meant to hold a publicly traded company responsible for the acts of retaliation by its wholly owned subsidiaries, it would have said so, specifically.

In Roa v. Daimler Chrysler, *supra*, for example, the District Court denied coverage, noting that "subsidiaries" were mentioned in some sections of Sarbanes Oxley, but not Section 806. *See*, Roa at 9 (slip opinion). Guoguang Su, 2008 SOX 34 (ALJ) *supra,* also emphasized that: "Reference to subsidiaries in other sections of the Act make it clear that Congress contemplated the difference between publicly traded companies and their subsidiaries as it was drafting Sarbanes-Oxley. Congress could have included subsidiaries within the whistleblower protection section but did not." Id at 8. OSHA's Brief on appeal to the ARB in Ambrose, *supra*, further argued that: "SOX's whistleblower provision omits any reference to subsidiaries, even though other sections of the Act expressly include subsidiaries within the class of regulated entities. *See, e.g.,* Section 302(a)(4)(B) (15 U.S.C. 7241(a)(4)(B)); Section 402 (15 U.S.C. 78m(k)(1))." As OSHA argued, it is well settled that: "[w]here Congress includes particular language in one section of the statute but omits it in another section of the same Act ... Congress acts intentionally and purposely in the disparate inclusion or exclusion." OSHA Br, at 10-11. *See also*, Russello v. U.S., 464 U.S. 16 (1993). Yet the general rule of statutory construction does not necessarily apply in the specific context in which its use has been adopted to interpret Section 806.

While it is obviously accurate to note the absence of a specific reference to subsidiaries in Section 806, it is equally accurate to note that subsidiaries are subject to the regulatory reforms required by Sarbanes-Oxley through requirements imposed upon their corporate parent. Thus, subsidiaries are not routinely accorded separate identities under Sarbanes-Oxley; nor are they regulated separately. Rather, Sarbanes-Oxley reforms permeate the subsidiaries through obligations or restrictions imposed on their publicly traded parent to communicate, maintain, and enforce financial and accounting reforms throughout its subsidiaries. Congress, moreover, viewed Section 806 protection as an immediate way to encourage exposure of non-compliance with its reforms from the inside of every entity subject to its reforms. *See*, Senate Judiciary Committee Report, *supra* at 11.

Further, Section 806 is not the only provision which fails to mention subsidiaries specifically, but applies to them nevertheless. Numerous other provisions apply to subsidiaries in exactly the same way. *See, e.g*. Sections 301 (procedures for anonymous whistleblowing); Section 306 (insider trading); 401(j) (reporting off-balance sheet transactions); 403 (disclosure of transactions involving management); 404 (assessment of internal controls); and 406 (code of ethics). Although not, in most instances, mentioned in a particular provision, the subsidiaries comply because the publicly traded parent company is responsible for enforcing their compliance, and it has the authority and the control to enforce its will.[21] Obviously, then, in a statutory context in which the publicly traded entity is the primary vehicle of reform, it would be superfluous to mention its wholly owned subsidiaries each time an obligation is imposed or a prohibition is decreed. Considered in context, the failure of a particular section of Sarbanes-

[21] The penalty for non-compliance with Section 301, for example, is delisting. 17 U.S.C § 78j-1(m)(1)(A).

Oxley to mention any of the various entities within a publicly traded company's corporate structure would not seem nearly as significant an interpretive aid in defining coverage as it might first appear. A comparison of Sections 301 and 806 illustrates the application of this point to the publicly traded company's workforce.

Workforce Covered By
Sections 301 and 806

Section 301 of the Act covers internal, anonymous whistleblowing at all levels of the corporate structure subject to the audit committee's oversight; however, many whistleblowers are not in a position to maintain anonymity. Additional protection was needed when the identity of a whistleblower was compromised. Senator Sarbanes addressed this problem when he commented on the two types of whistleblower provisions embodied in the Act: the anonymous internal whistleblower coverage provided by Section 301 (m)(1)(A)(4)(A) and(B) and Section 806 protection of whistleblowers whose identities become known. He stated:

> The legislation, as reported out of the Banking Committee, requires audit committees to have in place procedures to receive and address complaints regarding accounting and internal controls or auditing issues and to establish *procedures for employees' anonymous submissions* of concerns regarding accounting and auditing matters….
> But Senator Leahy and his colleagues on the Judiciary Committee have moved ahead *to provide 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.* Senate Banking Committee Legis. History, Vol. III at 1299. (emphasis added).

Although Section 301 does not specifically mention subsidiaries, there seems to be no serious dispute that it covers employees throughout the publicly traded company's entire corporate family; and Senator Sarbanes' comments referencing "employees' anonymous submissions" signals no intention to segregate out employees who work for subsidiaries. In the context of his remark, the term "employees" encompasses one workforce employed by the publicly traded company. His comment further reveals that the whistleblower provisions in Sections 301 and 806 apply to the same workforce: to those working at the parent level as well as those who work for consolidated entities. Thus he describes the coverage provided by Section 806, not as protection for a different group of employees, but as "additional protections" for the employees otherwise covered by Section 301 whose identities are known or discovered and who lose the protection anonymity would have afforded them. He does not talk about corporate veils or veil piercing, separate entities or derivative liability.[22] He does not discriminate between

[22] While direct liability of the parent is appropriate for consolidated subsidiaries, agents, contractors, and subcontractors it poses a problem under circumstances in which, for example, a publicly traded parent owns less than 50% of a subsidiary, *See, e.g*., Geraci v. RELS Valuation and Wells Fargo Bank, 2006 SOX 91 (ALJ, Feb. 14, 2007)(49.9% ownership by Wells Fargo). Congress knew that the problem it confronted included the employees of non-consolidated, non-publicly traded subsidiaries and other entities that may not be subject to the publicly traded company's internal controls, or corporate governance rules. Indeed, many of the worst abuses alleged at Enron emanated from off-balance sheet activities. *See, e.g*., Senate Banking Committee

employees of the publicly traded parent and employees of wholly owned subsidiaries. There is no difference between them under Section 301, and his comments indicate there is no difference between them for purposes of the "additional protection" provided by Section 806. Senator Sarbanes' statement confirms that Section 806 applies to employees of wholly owned subsidiaries, not because they work for an agent of the publicly traded company, but because they are employees of the publicly traded parent company for purposes of whistleblower coverage under Section 301 and Section 806 of the Act.[23]

Publicly Traded Company's Responsibility

Based on the legislative history and the language of the Act, the decision in Morefield v. Exelon, 2004 SOX 02 (ALJ, Jan. 28, 2004), cogently reasoned:

> Nothing in the structure, language, or purpose of Sarbanes-Oxley, however, suggests that Congress viewed the publicly traded entity as a free-floating corporate apex. To the contrary, when the value and performance of the publicly traded company is based, in part, on the value and performance of the component entities within its organization, the statute ensures not only that those entities are subject to internal controls applicable throughout the corporate structure, but that they are also subject to the oversight responsibility of the audit committee. A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company and, through it, to its entire corporate organization." Morefield Order at 3.

For all of the foregoing reasons, I conclude that the term "employee of a publicly traded company" in Section 806 is, for parent/wholly owned subsidiary relationships, co-extensive with the employee coverage in Section 301 and includes, within its meaning, all employees of every constituent part of the publicly traded company, including subsidiaries and subsidiaries of subsidiaries which are consolidated on its balance sheets, contribute information to its financial reports, are covered by its internal controls and the oversight of its audit committee, and subject to other Sarbanes-Oxley reforms imposed upon the publicly traded company. *See* Morefield at

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Legis Hist. Vol. II, at 1044. Consequently, entities such as joint ventures, partnerships, and special purpose entities identified in Section 301 (a)(j) may be agents or contractors covered by Section 806 along with independent accounting firms, consultants, and other entities that aid in preparing information for the publicly traded parent's financial statements or that participate in the fraud or deception.

[23] The implementing regulations are entirely consistent with Senator Sarbanes' statement. An "employee" is defined under those regulations as "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. §1801.101. Those who work for wholly owned subsidiaries clearly could be (and often are) affected by decisions made by the corporate parent. *See*, *e.g*., Kalkunte, *supra*.

fn. 1; *see also* Gonzolez v. Colonial Bank, Inc., 2004 SOX 39, at pg. 3 (ALJ, Aug. 8, 2004). In summary, the scope of Sarbanes-Oxley whistleblower protection: “at a minimum, tracks the flow of financial and accounting information throughout the corporate structure and remains as permeable to the internal ‘corporate veils’ as the financial information itself,” *see*, Morefield at 3;[24] and considering the legislative history, specific provisions, special policies, and purposes which anchor Sarbanes-Oxley and Section 806, in particular, Bestfoods supports this conclusion.

As such, I conclude that Complainant is, for Sarbanes-Oxley purposes, an employee of the publicly traded company as that term is used in Section 806, and that the corporate parent, Deutsche Bank AG, is directly responsible for acts of discrimination against a whistleblower working in one of its operating units within a non-publicly traded, consolidated subsidiary of a subsidiary of a subsidiary within Deutsche Banks AG’s corporate family.

Application of Sarbanes-Oxley to
Publicly Traded Multinational Companies

Since Deutsche Bank AG is the whistleblower’s employer and is responsible as the employer for violations perpetrated against whistleblowers within its corporate structure, a claim which arises domestically would be covered by Section 806. Respondents, however, insist that this matter involves a complicating factor because it is not a domestic suit. Citing Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir.), *cert. denied,* 126 S.Ct. 2973 (2006), Respondents believe Walters’ complaint involves an impermissible extraterritorial extension of Section 806 and, therefore, must be dismissed.

In Complainant’s view, Section 806 need not apply extraterritorially to afford him the protection he seeks. He claims he was interviewed for his job and negotiated his salary in New York. While his hiring letter was signed in Switzerland, he alleges he worked both domestically and internationally, reported to supervisors in New York, and received instructions and directions from his New York supervisors. He traveled to New York at least once a month for up to ten days at a time and performed a substantial portion of his duties in New York. Compl. ¶¶ 67, 70; Opp. pg 2.

Walters alleges that, in 2007, he discovered flaws in DIAM’s internal controls and IT infrastructure which rendered DIAM unable effectively and safely to manage large client portfolios on the Frankfurt, Germany, Stock Exchange. These flaws allegedly threatened DIAM’s relationship with two of the Frankfurt office’s major foreign clients, Zurich Financial Services (ZFR) and Royal & SunAlliance (RSA). ZFR comprised 65% of total assets being managed by DIAM, and RSA was projected to grow to 14% of DIAM’s business. Walters assessed the technical defects and lack of internal controls in the Frankfort office as a threat to DIAM and Schweiz’s financial future, which Deutsche Bank AG was publicly touting as stable

[24] Professor Moberly studied every Sarbanes–Oxley administrative decision issued from 2002 through July, 2006, and noted that: “one ALJ has reasoned that: ‘the scope of Sarbanes-Oxley whistleblower protection tracks the flow of financial and accounting information throughout the corporate structure and remains as permeable to the internal ‘corporate veils’ as the financial information itself. Morefield at 3.” *See*, Moberly, *supra*, at 135. “By contrast,” Professor Moberly concluded, “other ALJ decisions and the ARB’s recent opinion requiring the piercing of the corporate veil seem misguided in light of this persuasive reasoning equating whistleblower protection with other corporate reporting reforms enacted by Sarbanes-Oxley.” Id.

and bright to shareholders and investors in the U.S. and elsewhere. Complainant believed the problems in the Frankfurt office jeopardized that future, and he expressed his concerns to Deutsche Bank officials in the U.S., in Europe, and to his U.S.-based supervisors. Compl. ¶¶ 10, 14-16, 18-23, 33-36, 42, 44-46, 48-50, 67; Opposition to Motion at 3-4. He claims further that, as a consequence of his protected activities, he was reprimanded in New York, the decision to terminate him allegedly was made in New York by Respondents' New York officials, and the termination decision was communicated to him by his New York-based supervisor. Compl. ¶¶ 55-56, 63; Opposition to Motion at 4. Based on these key domestic events, and relying on O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506 (S.D.N.Y. 2008); Penesso v. LCC International, Inc., 2005 SOX 16 (ALJ, March 4, 2005), Walters denies his complaint implicates extraterritorial application of the law.

In reply, Respondents note that Complainant was stationed in Zurich; worked mainly in Europe; and on May 30, 2008, received a letter of termination based on poor performance at his office in Zurich, Switzerland. Pursuant to Swiss law, he was provided "Garden Leave." He retained Swiss counsel who asserted that he was a Swiss employee and was entitled to his rights under Swiss law. Under these circumstances, Respondents dismiss each of Complainant's U.S. contacts, alone and in combination, as insufficient to establish that he is protected by the domestic application of Section 806. To the contrary, Respondents emphasize that very similar domestic contacts, employment relationships, supervision, and alleged domestic financial impact were all considered by the First Circuit Court of Appeals in Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006), and by the decision in Beck v. Citigroup, 2006 SOX 0003 (ALJ, Aug. 1, 2006); and both decisions rejected such circumstances as sufficient to establish jurisdiction under Section 806. *See*, Tr. 69-72. In Respondents' view: "If you're employed by a foreign subsidiary, your employment relationship is foreign…," and Sarbanes-Oxley does not apply. Tr. 69; *see also,* Tr. 70-72. The parties thus raise several important issues that warrant closer scrutiny.

Labor Law v. Securities Law

To determine whether any consequences visit a multinational company for firing a whistleblower employed overseas, it is necessary again to return to the contention that Section 806 is predominantly a labor law, not a law intended primarily to prevent securities fraud. In Carnero, the Court stated: "that if [the plaintiff's] whistleblowing had occurred in this country relative to similar alleged domestic misconduct by domestic subsidiaries, [the plaintiff] might well have a potential claim under [Section 806]." Id. at 6. Because it seemingly considered Section 806 principally a labor law, the location of employment in Carnero was a key factor. Since Carnero was employed overseas, "employment relationships in foreign nations" were involved, and the discriminatory termination was deemed beyond the reach of Section 806. *See*, Carnero at 10 and 16. In contrast, the Court in O'Mahony distinguished Carnero and applied a different test to determine extraterritoriality. It focused less on the location of employment than the location of the misconduct. O'Mahony at 512.[25] The analytical methodologies it employed

[25] The court in O'Mahony considered the fact that the complainant was employed in the U.S. until 1992 and compensated by a U.S. company until 2004. However, at the time of the protected activity and the retaliation, she was working abroad for a French subsidiary of a publicly traded company. *See*, O'Mahony at 508, 512.

thus illustrate the distinction between the treatment of Section 806 as a labor law rather than an antifraud securities law, and the difference is significant.

Congress, traditionally, has respected the principle that each nation determines the labor standards and conditions applicable to the workers within its borders, and as a result, the courts have tended to avoid intrusion on employment relationships involving jobs and workers in other lands. Implementing this policy, the Courts have invoked a presumption against the extraterritorial application of numerous labor and employment statutes. S*ee*, New York Cent. R. Co. v. Chisolm, 268 U.S. 29, 31 (1925) (Federal Employees Liability Act); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (National Labor Relations Act); Asplundh Tree Expert Co. v. NLRB, 365 F.3d 168, 175-76 (3d. Cir. 2004) (National Labor Relations Act); Reyes-Gaona v. North Carolina Growers Assoc., Inc., 250 F.3d 861, 866 (4th Cir.), cert. denied, 534 U.S. 995 (2001) (ADEA); Pfeiffer v. W.M. Wrigley Jr. Co., 755 F.2d 554, 557 (7th Cir. 1985) (Pre-1984 ADEA amendments case); 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) (Railway Labor Act). Deutsche Bank, embracing this labor law approach, emphasizes that the location of Complainant's employment was Switzerland; the employment relationship was foreign; and since Section 806 is a labor law, the presumption against its extraterritorial application must be invoked. *See*, E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248, (1991); Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

Administrative Interpretations

Respondents' arguments accurately reflect the prevailing administrative wisdom on the subject. OSHA, as it did in its brief in Ambrose, *supra*, urging limitations on the reach of Section 806 to employees of subsidiaries, also urged limitations on the reach of Section 806 as it applies to whistleblowers employed overseas by multinational companies. Although OSHA declined to address the issue in response to public comments on its proposed rules implementing Section 806, its brief in Ede, v. Swatch Group, reflects no such hesitation: "Section 806 is not," OSHA insisted, "a securities law provision…, but an employment law provision…." *See*, OSHA's brief on appeal in Ede, *supra,* at 8.[26] Although the Board in Ede did not specifically address whether Section 806 is a labor law or securities law,[27] every other administrative case dealing, to date, with whistleblowers who work overseas for multinational companies has construed Section 806 as a labor law. *See*, Talisse v. UBS AG, 2008 SOX 00074 (ALJ, Jan. 8, 2009 ("…the Act should not be applied to situations in which the employment relationship is more properly regulated by

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[26] OSHA's briefs before the ARB on appeal in Ambrose v. U.S. Foodservice, Inc., *supra*, and Ede v. Swatch Group, *supra*, urged the rejection of Sarbanes-Oxley whistleblower complaints arguing that: "Whistleblower laws like this one have traditionally been regarded as employment related." Although deference is ordinarily accorded to the statutory interpretations rendered by the agency charged with administering a statute, *see*, U.S. v. Mead Corp., 533 U.S. 218 (2001); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944), agency interpretations which appear for the first time in a litigation brief have been accorded "near indifference." *See, e.g.,* Mead, *supra,* citing, Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-13 (1988) (interpretation advanced for the first time in a litigation brief). Diminished deference is further warranted when an agency's interpretation is inconsistent with a statute's legislative history.

[27] Ede v. The Swatch Group LTD, 2004 SOX 068 and 069 (ARB, June 27, 2007), the Board decided that the facts before it implicated the extraterritorial application of Section 806, and the Board: "saw no reason to depart from the First Circuit's Carnero decision." Ede at 5.

foreign law than by U.S. law."); Beck v. Citigroup, Inc., 2006 SOX 003 (ALJ, Aug. 1, 2006) ("…the essential nature of the employment relationship concerned here, which was a foreign employment relationship, based in Germany… allegations of misconduct being reported to parent company officials in the U.S. or the possible participation by U.S.-based company officials in the decision to terminate … do not alter the foreign nature of the employment."); Salian v. ReedHycalog UK, 2007 SOX 020 (ARB, Dec. 31, 2008) (coverage denied for a foreign national working abroad for a foreign subsidiary of a U.S. company), affirmed on other grounds, (ARB, Dec. 31, 2008); Pik v. Goldman Sachs Group, Inc., 2007 SOX 92 (ALJ, Feb. 21, 2008) (Sarbanes-Oxley applies only to employees working within the U.S.); DiGiammarino v. Barclays Capital PLC, 2005 SOX 106 (ALJ, July 7, 2006) (coverage denied because although Complainant was a citizen of the United States, he worked in Respondent's London offices and was discharged in London); Concone v. Capital One Financial Corp., 2005 SOX 6 (ALJ, Dec. 3, 2004) (whistleblower protection does not extend to persons who are employed wholly outside the U.S.); Ahluwalia v. ABB, Inc., ABB Transmission & Distribution, LTD., 2007 SOX 44 (ALJ, Sept. 24, 2007) ("The lack of jurisdiction was a consequence of the overseas location of the employment…"). None of these decisions apply Section 806 from the perspective of a domestic violation of a securities law.

Congressional Intent

I will not here repeat the previously cited manifestations of Congressional intent which contradict decisions construing, and thus constricting, Section 806 as a labor law, save only to mention that virtually every Senator who commented on the issue described Section 806 as a measure predominantly designed and intended to increase transparency, encourage disclosures of incipient and actual fraud, and protect investors.[28] We can thus take them at their word as legislators, or take them less seriously and interpret them away, but the legislative history, in fact, contains not a single example of a reference to Section 806 which describes it as primarily a labor law. 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.[29] Considering the language of the statute and its legislative history, there would appear to be no reason to refrain from construing Section 806 as an antifraud fraud securities measure.

Determining Whether an Extraterritorial Application is Required

Thus the Court in O'Mahony viewed Section 806 as an antifraud measure and treated it as such by invoking precedents in securities fraud cases to determine, in the first instance, whether the application of Section 806 raised an extraterritorial question under specific fact circumstances alleged in the complaint. It was observed in O'Mahony that "Carnero offers

[28] *See*, Statements by Senator Leahy, Senate Banking Committee Hearings, *supra* at 1231-33; 1300-1, 1498, 1632; Statement by Senator Durbin, Id. at 1294; Statement by Senator Corzine, Id. at 1273; Statement by Senator Sarbanes, Id. at 1299; Statement by Senator Johnson, Id. at 1461; Statement by Senator Daschle, Id. at 1226; Statement by Senator Graham, Id. at 1461; and Statement by Senator Boxer, Id. at 1526; *see also*, Senate Judiciary Committee Report No. 107-146, May 6, 2002 at 10.

[29] *See*, text pages 11-14, *supra, see also,* Senate Judiciary Committee Report*, supra* at 4.

limited guidance" in addressing that issue. O'Mahony at 512. Equally unhelpful are the administrative contributions to the analysis.

The Court in O'Mahony applied two tests, the "effects test" and the "conduct test," adopted by the courts in securities fraud cases with extraterritorial implications. *See*, O'Mahony at 513, citing Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir.1983); Robinson v. TCI/US W. Communications, Inc., 117 F.3d 900, 905-06 (5th Cir. 1997). Although different circuits apply different standards in determining whether an alleged nexus to the United States is sufficient to support jurisdiction, *see, e.g.,* In re Royal Ahold N.V. Securities & ERISA Litig., 351 F. Supp.2d 334, 358 (D. Md. 2004); and Robinson, 117 F.3d at 905-06, a complainant need only satisfy the "conduct" or the "effects" test to support a finding of subject matter jurisdiction, Id. at 513; *see also,* Psimenos. However: "[t]he two tests need not be applied 'separately and distinctly,' and 'an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.'" Cromer Finance Ltd. v. Berger, WL 21436164, (S.D.N.Y. July 23, 2003) (quoting Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 128, & n.13 (2d Cir. 1998)); s*ee also,* Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995). The Second Circuit, it appears, invokes: "jurisdiction over a predominantly foreign securities transaction under the conduct test when, in addition to communications with or meetings in the United States, there has also been a transaction in a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress." SEC v. Berger, 322 F.3d 187, 194 (2d Cir. 2003).

The "Conduct Test"

Applying the "conduct test," the Court in O'Mahony outlined a number of factors indicative of the existence of subject matter jurisdiction, including: "(l) the elements of the wrongful conduct in question as pled in plaintiff's theory of fraud in relation to the specific acts to which the statute apply; (2) the location of domestic conduct and contacts associated with the transaction in relation to those located in foreign states; (3) the timeline identifying when and where the relevant domestic and foreign acts occurred; (4) the materiality/substantiality of the domestic conduct relative to the particular fraudulent transaction the pleadings describe; (5) the causal connection between the domestic conduct and the alleged financial losses resulting from the alleged fraudulent transaction; and (6) an overarching measure of reasonableness gauged by the intent of congressional policy and principles of fairness in the circumstances surrounding the particular case." O'Mahony at 513-4. Each factor will be considered below, seriatim.

1.
Wrongful Conduct

Assessing first, the elements of the wrongful conduct in relation to the specific acts to which the statute applies, Section 806 renders unlawful the "discharge" of an employee who advises: "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)" about financial wrongdoing, lapses in internal controls, or conduct that would amount to securities or

other fraud or an SEC rule violation. *See*, Section 806 (a) and (a)(1)(C). The wrongful acts alleged in Walters' Complaint, retaliation against a whistleblower for engaging in protected activity, constitute the specific acts to which Section 806 applies. Accordingly, it is next necessary to examine the location of the wrongful conduct, focusing on the "essential core" or "center of gravity of the wrongdoing," and thus where the predominant activities of the wrongful acts took place. *See* Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 8 (2d Cir.1979).

2.
Domestic Effects

The court in O'Mahony, at this point, noted the underlying fraudulent scheme to defraud French social security was hatched by defendants in the U.S. In this instance, the underlying conduct Walters disclosed involved trading irregularities, technical flaws, and lapses in internal controls in Respondents' Frankfurt, Germany offices. There is, moreover, no indication that the underlying problems in Frankfurt were, in any way, caused or directed by officials or employees in the United States. Consequently, it appears the situation in DIAM's Frankfurt offices involved extraterritorial conduct and customers; however, Walters alleges that the problems in Frankfurt were misrepresented to American investors by Deutsche Bank officials. Consequently, while the underlying circumstances in Frankfurt were extraterritorial, Deutshe Bank AG is publicly traded in the U.S.; and the alleged ripple effects were reaching, and potentially misleading, U.S. shareholders and investors.

While I am, therefore, mindful that DIAM's alleged financial instability originated in Frankfurt, Germany, it appears that the adverse effects crossed the pond when Deutsche Bank AG allegedly conveyed to American investors misleading information about its Schweiz subsidiary and DIAM. *See*, Berger, *supra*. This is precisely the type of situation Sarbanes-Oxley was intended to address and Section 806 was intended to forestall. Congress was well aware that the off-shore activities of publicly traded companies had been a significant part of the problem it was confronting, and it pursued them vigorously using incentives to whistleblowing as one of the weapons in its arsenal. *See, e.g.*, Senate Banking Committee Legis. History, Vol. I at 39; Vol III at 1632; Senate Judiciary Committee Report, *supra,* at 4.

3.
Domestic Conduct

Moreover, Complainant's protected activity took place not only in Europe, but also in the U.S. In accordance with Section 806 (a)(1)(c), Walters allegedly advised his supervisor, and others in New York, of his concerns about the Frankfurt office. As a result, not only did activity protected by Section 806 occur in New York, conduct prohibited by Section 806 also took place in New York when Complainant's New York supervisor, allegedly in retaliation for the protected activity, decided to terminate him. To be sure, Walters was employed primarily in Zurich, Switzerland; however, weighing the location of his employment against the fact that protected activity occurred in the U.S., and the further fact that the decision to terminate was apparently made and communicated orally to Walters on May 7, 2008, by Randy Brown, his New York

supervisor,[30] it appears that the center of gravity of both the protected activity and the alleged misconduct covered by Section 806, the retaliation, were located within the United States. Considering further the timeline of the relevant acts under Section 806, it appears that Walters has sufficiently pled a causal nexus between the underlying extraterritorial problems in the Frankfurt office, his domestic protected activity, and the domestic termination of his employment. *See*, O'Mahony at 515.

4 & 5.
Materiality/Substantiality of Domestic Conduct

Turning to the fourth and fifth factors, the "conduct test" considers the materiality/substantiality of the domestic conduct relative to the violation of Section 806. The allegedly protected activity and the retaliation against Complainant occurred in the United States, and both elements are material to Section 806 enforcement. Further, the termination of a whistleblower constitutes substantial misconduct under Sarbanes-Oxley. As the legislative history of Section 806 amply demonstrates, whistleblower protection was one of a handful of provisions designated by the Senate Judiciary Committee as a crucial antifraud reform.[31] Consequently, termination of a whistleblower who allegedly reveals financial or accounting misconduct by foreign entities, the assets and liabilities of which are consolidated into the financial statements of publicly traded companies, constitutes substantial misconduct.

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[30] Respondents contend that Complainant was terminated in Switzerland, not the U.S. *See*, Motion at 15, fn.6. Complainant was terminated orally on May 7, 2008, by Mr. Brown. Approximately three weeks later, he received a termination letter dated May 30, 2008, signed, apparently in Zurich, by Beat Widmer and Dorie Massumi. *See*, Respondents' Memorandum of Law at 4. While notification of adverse action is the event which triggers commencement of the statutory period for filing a complaint, the time and place of notification are not, themselves, the time and place of the wrong proscribed by Section 806. The Board in Overall v. Tennessee Valley Authority, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), thus recognized that: "Claim accrual is the date a statute of limitations begins to run, *i.e.*, the date a complainant discovers he or she has been injured. Accrual may differ from the date the respondent decides to inflict injury which may pre-date a complainant's discovery of the injury." *See also*, Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159 (9th Cir. 1984). In Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991), the court similarly concluded: "Accrual [of a claim] is the date on which the statute of limitations begins to run. *It is not the date on which the wrong that injures the plaintiff occurs*, but the date -- often the same, but sometimes later -- on which the plaintiff discovers that he has been injured." (emphasis added).

It should be noted that the oral communication Complainant received from his supervisor may provide the notice of the adverse action. S*ee*, McGarvey v. EG & G Idaho, Inc., 87 ERA 31 (Sec'y Sept. 10, 1990). The letter which followed was confirmation of the action. However, when and where Complainant received notification, and presumably he received the call at his office in Zurich, are not the time and place of the wrong that injured him. The wrong occurred in New York when the decision to terminate him in retaliation for his protected activity allegedly was made by officials in New York. *See generally*, Mackowiak; Cada; and Overall.

[31] Senate Judiciary Committee Report, *supra* at 10.

6.
Congressional Intent Regarding Domestic
Violations Involving Employees Working Abroad

The next issue the Court in O'Mahony addressed was whether extending jurisdiction is reasonable and in accordance with Congressional policy. In analyzing this factor, the courts assess what vital U. S. interest would be served by providing a U.S. forum and giving effect to American laws to adjudicate foreign claims. As in O'Mahony, however, Walters' Complaint does not allege a predominately foreign violation which would necessitate an inquiry into the extraterritorial reach of Section 806. His Complaint involves allegations of market-related technical and financial problems in Germany with alleged domestic effects, and each element of the alleged violation of Section 806 is itself domestic. The Enron experience Congress uncovered and the legislative history of Sarbanes-Oxley indicate Congress wanted corporate insiders to address questionable accounting and financial practices of publicly traded multinational firms under such circumstances, and the architecture of the Act confirms as much.

A.
Structure of Reforms Applicable to Foreign Operations
of Multinational Publicly Traded Companies

The Court in Carnero noted that Sarbanes-Oxley contains several provisions which expressly provide for extraterritorial application, thereby demonstrating that Congress was well able to call for extraterritorial application when it so desired. Id at 9. These and other provisions are reviewed here not for the purpose of analyzing the extraterritorial reach of Section 806, but simply to establish that the existence of foreign implications involved in a domestic, in contrast with extraterritorial, violation of Section 806 does not vitiate its coverage.

Thus, Sarbanes-Oxley contains three provisions in which Congress specifically referred to foreign entities or individuals, including: Section 106, which applies to foreign accounting firms when they audit publicly traded companies; Section 307, which applies to foreign attorneys who appear and practice before the SEC; and Section 1107, which provides extraterritorial reach to criminal sanctions for retaliation against anyone giving truthful information to law enforcement officials. A fourth provision, Section 301, requires audit committees of issuers to implement internal controls and does not specifically mention foreign entities, but the Court noted that the term "issuer" includes foreign issuers. Carnero at 10; *see also*, Beck, *supra,* and Concone, *supra*.[32] It has thus been suggested that references to foreign application in these

[32] The court had previously noted that under Section 2(a)(7) of the Act, the: "Definition of 'issuer' is slightly broader than the definition of companies subject to the whistleblower protection provision, since 'issuer' includes any company that has not yet become listed on a U.S. securities exchange." Carnero at fn. 6. It appears that an issuer may not always be a publicly traded company; however, a publicly traded company is an issuer. Thus, the rationale for applying the internal control requirements of Section 301 extraterritorially because they apply to issuers, which includes foreign issuers, would seem to apply equally to Section 806 because it applies to publicly traded companies which are also issuers, which include foreign issuers.

sections, but not in Section 806, limit Section 806 to workers employed wholly within the United States.

To be sure, Sections 106, 307, and 1107 mention foreign entities; but those sections, unlike several others, apply to entities that may be external to the publicly traded company, including foreign accounting firms, foreign attorneys, and foreign informants who do not work for a publicly traded company. The Sarbanes-Oxley reforms addressed to the publicly traded company, in contrast, need not, and in most instances do not, specifically mention a foreign application because they acquire domestic and extraterritorial reach through obligations they impose on publicly traded multinational companies, and through them to their entire worldwide organizations. Several provisions illustrate this point.

A number of sections of Sarbanes-Oxley have been accorded extraterritorial application without express references to foreign entities or foreign application in the language of their texts. Section 301, as mentioned, is one example.[33] Section 302 is another. It requires a company's principal executive officer and principal financial officers to certify the material completeness and accuracy of SEC filings. It 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. Section 306 deals with insider trades during pension fund black-out periods and does not specifically reference directors or executive officers of foreign private issuers. But Section 306 has been accorded extraterritorial reach by Regulation BTR, 17 C.F.R. §245.100, subject to a limitation based upon a percentage of plan participants in the U.S. affected by a trading restriction, and a percentage of U.S. plan participants compared with the number of the issuers worldwide employees. *See*, 17 C.F.R. §245.100(b)(2)(i),(ii)(A), and (B).

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[33] The Court in Carnero further distinguished the whistleblower provision in Section 301(m)(1)(B)(3)(C)(4), from the whistleblower protection in Section 806, on the ground that Section 301 does not purport to confer enforceable rights upon employees and "hence does not implicate the foreign

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sovereignty and other concerns." Id at 11. While Section 301 may not directly confer enforceable rights upon employees, it would appear that the implementation of Section 301 does implicate foreign sovereignty and other concerns, and it has, nevertheless, been accorded extraterritorial application with exceptions. The foreign sovereignty concerns were discussed by the SEC and EU's Article 29 Working Party, an independent European advisory body on data protection and privacy. *See, e.g*., Working Party Opinion Letter dated February 1, 2006, published at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf, And letters to the SEC from the Chairman of the Article 29 Working Party, dated February 16, 2006, published at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/others/2006-16-02-whistleblowing_en.pdf, and July 3, 2006, published at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/others/2006-07-03-reply_whistleblowing.pdf., and the SEC staff responses dated June 8, 2006, published at: http://www.sec.gov/about/offices/oia/oia_rulemaking/schaar_letter_060806.pdf, and September 29, 2006, published at: http://www.sec.gov/about/offices/oia/oia_rulemaking/schaar_letter_092906.pdf.

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. Section 406(a) requires implementation of a code of ethics for senior 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).

It seems fairly clear that Sarbanes-Oxley's financial, accounting, and corporate governance reforms are bounded not by borders, but by the scope of operations contributing to the publicly traded multinational company's consolidated financial reports. The significance of this is not here to question the lack of extraterritorial reach of Section 806 as measured by Carnero, but rather to suggest that the absence of a specific reference in Section 806 to foreign entities or employees working abroad is not necessarily an accurate indication of congressional intent to exclude from coverage employees who work abroad. Like the coverage of subsidiaries, a comparison of Sarbanes-Oxley provisions such as 806 and 1107, for example, which include or exclude specific references to foreign application may, as an interpretive device, lead to erroneous conclusions which are contrary to the legislative intent and purpose of Section 806.

B.
Intent to Include Domestic Violations
Involving Workers Stationed Abroad

The Court in Carnero next reviewed the legislative history of Section 806 and concluded that it: "gives no indication that Congress meant to apply its civil whistleblower protections extraterritorially." Carnero at 12. Quoting at length from a statement by Senator Leahy in the Senate Judiciary Committee Report, and briefly from eight other senators, who focused on Enron employee Sherron Watkins, the Court construed the legislative history as indicating that Section 806 was intended to: "focus on problems within the United States." Id at 13. The court reasoned that the legislative history: "thus suggests that Congress was concerned about providing

whistleblower protection for corporate employees in the various states." Reflecting again a labor law emphasis, the Court continued: "Nowhere in the legislative history is there any indication that [Section 806] was drafted with the purpose of extending to foreign employees working in foreign nations outside of the United States the right to seek administrative and judicial civil relief under the Act." Id at 14. But again, the issue here is distinguishable from Carnero since the question is not whether an extraterritorial violation of Section 806 can be adjudicated domestically, but whether Congress intended to cover a domestic violation of Section 806 against a whistleblower working abroad for a publicly traded multinational company.

(1)
Congressional Intent

Close examination of the legislative history as a whole and in the fine details which address the intent and purpose of Section 806, yields more than a mere indication that Congress intended domestic violations of Section 806 to cover a publicly traded company's employees who work overseas. Thus Senator Bayh noted, in general, that:

> 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. Our standards must be consistent with those abroad if we are going to do business with our trading partners. 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." See*, Senate Banking Committee Legis. History Vol. I, at 101 (emphasis added).

Focusing on the specifics, Congress learned that the activities of WorldCom, Global Crossing, and Enron were not restricted to the U.S., and the legislative history of Sarbanes-Oxley, considered in context, shows Congress's concerns were not limited to the U.S. operations of multinational companies.[34]

To the contrary, Senator Enzi specifically noted: "In 1997, the SEC granted an exemption for the Investment Company Act to Enron and the exemption allowed Enron to shift debt off of the books of its foreign operations." *See*, Senate Banking Committee Legis. History Vol. I at 39. These foreign operations later became part of the web of corporate infrastructure that Senator

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[34] According to OSHA's analysis of the legislative history in its brief to the ARB in Ede:

> [T]he 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 the 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 whistleblower 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.'). OSHA Br. at 5-6.

It seems a bit of a stretch to represent this as Senator Leahy's defining statement on the focus, purpose, and limits of Section 806. The legislative history is not quite that "sparse."

Leahy described as decipherable only by an inside whistleblower. *See*, Senate Banking Committee Legis. History Vol. III at 1632. While Sherron Watkins' experience in Texas provided a vivid and concrete example of the risk and hostility whistleblowers confront, it also highlighted the need to encourage whistleblowers, wherever they were located, to function as a deterrent to fraud in the reform regime Sarbanes-Oxley contemplated; and Senator Leahy recognized that. Id.

Senator Leahy emphasized that the types of problems inside whistleblowers were uniquely equipped to address were not purely domestic in scope. He revealed that Enron operated through thousands of entities domestically and around the world. It used foreign entities to facilitate fraud, and a cover-up of its activities occurred abroad. The Judiciary Committee, which Senator Leahy chaired, reported that:

> The systematic destruction of records apparently extended beyond paper records and *included efforts to* '*purge the computer hard drives and E-mail system of Enron related files' not only [domestically] but in Anderson offices in ... London, England*. *See*, Senate Judiciary Committee Report, *supra*, at 4. (emphasis added).

The Judiciary Committee Report thus made it clear that Congress welcomed the opportunity to protect, and thereby encourage, whistleblowing among insiders who "knew what and when," with no indication of a constraint on where, in a publicly traded company's organization, they physically had to be located. Id. at 10.

To be sure, Senator Leahy commented that Section 806: "does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies." *See*, Senate Judiciary Committee Report at 20. Yet, this reference to a "national floor," was not intended as a proscriptive limitation to domestic application alone. *See*, Carnero at 13. Clear indications exist that Congress intended the Act to apply to foreign and domestic publicly traded companies and set a national floor for all of the corporate reforms it legislated. In a discussion with Sir David Tweedie, Chairman of the International Accounting Standards Board, involving accounting standards, but applicable to most of Sarbanes-Oxley's reforms in light of their general extraterritorial reach, Senator Sarbanes stated:

> Let me be very candid about it. *I am just trying to knock out of the box an argument that says, we should not do something here in the United States right now because we really ought to be trying to harmonize with the international standards, and that is what we should focus on.* I am trying to establish the point that if we correct it here, now, or in the near future, under our own national standard setting, that this is not only not inconsistent with the international harmonization, but also actually is conducive to it, because we then move to a better standard. *See*, Senate Banking Committee Legis. History Vol. I, at 139. (emphasis added)

Senator Graham expressed similar concerns, but from a slightly different perspective. He highlighted the potential consequences if Sarbanes-Oxley requirements were not applied evenhandedly to all publicly traded companies, foreign and domestic. Senator Graham stated:

> My first area of concern involves companies that have chosen to move their headquarters overseas. This legislation requires that CEO's and CFO's sign a statement saying that the financial documents they have filed are fair and accurate. This is consistent with an order issued by the Securities and Exchange Commission, SEC, that requires CEO's and CFO's to attest to the accuracy of their company's most recent financial statement.
>
> But there is a glaring omission to this recent SEC order. Only companies that are U.S.-based would be required to send in these signed documents. If a company once based in the U.S. has fled our shores and gone overseas for tax reasons, they now just received a reward for leaving our Nation. Those CEOs and CFOs would not have to sign financial documents and attest to their accuracy.
>
> *The SEC has also overlooked the accuracy of future financial documents by non-U.S. based companies.* Under a proposed rule, that is in the 'open comment period,' foreign based companies are again enjoying a lesser standard of accountability. This is wrong, and unfair to American companies.
>
> In the proposed rule, the SEC does invite comments on how to cover overseas-based companies. However, this could be a case of 'too-little-too-late.' *If companies are being publicly traded in the United States, regardless of where their headquarters are located, they ought to be required to meet the same level of accountability for everyone else in this legislation.*
>
> Let's not give U.S.-based companies one more reason to leave our Nation and incorporate someplace else. *We need to hold all companies in our markets to the same high standard* – there should be no reward of a lower standard if your company leaves the U.S. for a new overseas headquarters…. We want it to be clear in the statute that no matter where your company is based, you must comply with this obligation. *See*, Senate Banking Committee Legis. History Vol. III at 1458-9 (emphasis added).

It has been suggested that Senator Graham's remarks were limited to the certification of financial reports pursuant to Section 302. *See*, Carnero at 15. At the time, the SEC had proposed a rule that did not require foreign CEO certification, and Senator Graham objected to the disparate treatment favoring foreign over domestic issuers. His comments, however, are broader

than the requirements of Section 302 and address "the accuracy of future financial documents by non-U.S. based companies." Thus Senator Graham urged that Sarbanes-Oxley reforms be applied to: "all companies in our markets." *See*, Senate Banking Committee Legis. History Vol. III at 1459.

In response, some members of Congress expressed concern about the application of some of the Act's provisions to foreign entities, and one urged caution when imposing U.S. corporate reforms on countries with adequate or superior corporate governance regimes. *See*, Carnero at 15. Senator Enzi addressed the subject, commenting:

> I believe we need to be clear with respect to the area of foreign issuers and their coverage under the bill's broad definitions. While foreign issuers can be listed and traded in the U.S. if they agree to conform to GAAP and New York Stock Exchange rules, the SEC historically has permitted the home country of the issuer to implement corporate governance standards. Foreign issuers are not part of the current problems being seen in the U.S. capital markets, and I do not believe it was the intent of the conferees to export U.S. standards disregarding the sovereignty of other countries as well as their regulators….
>
> Under the conference report, section 3(a) [which was enacted] gives the SEC wide authority to enact implementing regulations that are 'necessary or appropriate in the public interest.' I believe it is the intent of the conferees to permit the *Commission wide latitude in using their rulemaking authority to deal with technical matters such as the scope of the definitions and their applicability to foreign issuers. I would encourage the SEC to use its authority to make the act as workable as possible consistent with longstanding SEC interpretations.* *See*, Senate Banking Committee Legis. History Vol. III, at 1627 (emphasis added).

Senator Enzi's statement, and particularly the last sentence, seems to capture, in scope and meaning, his acknowledgment of the extraterritorial reach of Sarbanes-Oxley's reforms and his urging of the SEC to exercise its discretion wisely when applying the provisions to publicly traded foreign companies. Yet, his cautionary remarks have been interpreted not merely as an indication of Congressional concern about the problems of applying securities reforms to entities in foreign countries, but as an indication that Congress's silence regarding the reach of a reform provision, and Section 806 in particular, provides a significant signal that Congress did not intend to apply the provision to whistleblowers stationed abroad. *See*, Carnero at 15-6. Considered in full, however, it does not appear that Senator Enzi was attempting either to limit the extraterritorial application of Sarbanes-Oxley reforms or to withhold Section 806 protection from whistleblowers stationed abroad who are subject to domestic violations of Section 806. To the contrary, he acknowledged that Sarbanes-Oxley reforms would actually reach beyond U.S.

borders, but he expressed the hope that they would, when appropriate, be subject to specific, regulatory exemptions or accommodations.[35]

Section 806, of course, is not administered by the SEC, but the Department of Labor specifically considered, and declined to exempt under its rules implementing Section 806, employees who work abroad for multinational publicly traded companies.[36] The Department, therefore, has not exempted, in whole or in part, Section 806 coverage, in instances in which an employee works abroad for a company publicly traded in the U.S., the protected activity occurs in the U.S., the discriminatory retaliation allegedly occurs in the U.S., and financial problems disclosed by the whistleblower allegedly affect U.S. investors. Nor would Senator Enzi's comments indicate an intent to withhold coverage in such circumstances.

The Judiciary Committee recognized: "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." *See*, Judiciary Committee Report, *supra*, at 19. It made this statement in the context of the domestic and foreign financial abuses it uncovered and consistent with the concerns it articulated that insiders may be the only ones capable of revealing problems in a publicly traded multinational company's far-reaching operations. Foreign operations were an important element of the Enron experience Congress spent so much time sorting out; and there is no basis in the legislative history to conclude Congress intended to exclude them from whistleblower scrutiny. Under these circumstances, I find an abundance of indications that Congress intended to cover domestic violations of Section 806 involving whistleblowers stationed abroad who address accounting and financial problems within an entity, in the U.S. or abroad, which contributes information to the financial reports of a publicly traded company. As Senator Graham urged, foreign and domestic operations should be treated evenhandedly.

Other Factors

There are, of course, a number of potential complications associated with domestic violations of Section 806 by multinational firms, including the scope of the Department of Labor's investigatory power, its limited resources, the brevity of the statutory time period within

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[35] As previously discussed, several, but not all, have been subject to specific exemptions, limited exemptions, or accommodations granted by the SEC, as Senator Enzi urged. *See*, pages 40-2, *supra*.

[36] OSHA received comments regarding the extraterritorial application of the proposed rule implementing Section 806 of Sarbanes-Oxley. One commentator argued the definition of "company" should exclude foreign issuers. Another commented that the rule should be revised so as not to apply to employees employed outside of the United States by United States corporations or their subsidiaries; nor should it apply to foreign corporations that have no United States employees. OSHA responded that: "The purpose of this rule is to provide procedures for the handling of Sarbanes-Oxley discrimination complaints; this rule is not intended to provide statutory interpretations. Because the regulatory definition of 'company' simply applies the language used in the statute, OSHA does not believe any changes to the definition are necessary." 69 F.R. No. 163 August 24, 2004, at 2103-2117.

which investigations must be completed, and findings issued, and the potential surge in the number of cases if employees of multinational publicly traded companies were covered by the Act. *See, e.g.*, Carnero at 16-19; Ede v. The Swatch Group LTD, 04 SOX 68 and 69 (ARB, June 27, 2007); Salian v. Reedhycalog UK, 2007 SOX 020 ARB No. 07-080 (ARB, Dec. 31, 2008); Beck v. Citibank, Citigroup, 2006 SOX 3 (ALJ, Aug. 1, 2006); Concone v. Capital One Financial Corp.; 2005 SOX 006 (ALJ, Dec. 3, 2004). Each of these factors is considered below.

Department of Labor Processes

It has been suggested that, in dealing with the activities of multinational corporations, the Department of Labor is handicapped by its limited investigatory power and by the fact that it is given only 60 days to complete its entire investigation of a complaint and issue findings under procedures mandated by 49 U.S.C. §42121(b)(2)(A). *See, e.g.*, Carnero at 16-17. Sarbanes-Oxley actually affords the Department of Labor only 180 days to investigate, adjudicate, and decide an appeal before allowing the whistleblower to move the matter to Federal District Court. *See*, Section 806(b)(1)(B). Yet the lack of investigatory power and the short time frames Congress granted the Department to accomplish its mission are not necessarily indicative of an inability to deal with domestic violations of Section 806 by multinational firms.

The Department's investigatory powers are quite limited. Most of the whistleblower statutes the Department administers, including Sarbanes-Oxley, contain no third-party subpoena or investigatory power, foreign or domestic. *See, e.g.,* Malpass v. Gen. Elec. Co., 1985 ERA 38 & 39 (Sec'y Mar. 1, 1994); Bobreski v. U.S. Environmental Protection Agency, Civil Action No. 02-0732 (D.D.C., Sept. 30, 2003). The Department is therefore limited, for the most part, to an inquiry addressed to the parties and those over whom the parties exercise control, such as officers and employees. The reach of its investigation is, accordingly, limited to the ability of a complainant or respondent to produce the information sought; and the same limitations apply in its administrative adjudications. *See*, Bobreski, *supra*.[37] As a result, whether a publicly traded multinational respondent conducts its business domestically or overseas, the Department's investigatory power is the same. It does not, in either situation, extend much beyond requesting the company to respond to the allegations in the complaint and make available pertinent documents and officials or employees familiar with the circumstances addressed in the complaint. Third parties are available to it only to the extent they voluntarily come forward.

Nor are the short time frames especially telling as a means of ascertaining congressional intent. To be sure, the time frames in Sarbanes-Oxley are unrealistic if the Department is expected to conduct investigations involving overseas activities implicated in domestic violations of Section 806, but they are equally unrealistic when applied strictly to domestic matters. Except for those complaints which are settled, dismissed in summary fashion by OSHA, or summarily dismissed later in adjudication, very few domestic whistleblower investigations are completed in 60 days. Moreover, in the 30 years the Department of Labor has been administering whistleblower statutes, very few complaints have been investigated and, thereafter, considered

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[37] Discovery involving the parties is available in administrative adjudication, and provision is made for defenses against the production of information protected from disclosure by law or by judicially recognized privileges. *See*, 29 C.F.R. §§18.14(c); 18.15; 18.46 (a) and (b); and 18.56.

on the merits through the administrative processes of discovery, adjudication, and appeal in 180 days.[38] More often than not, the parties simply waive unrealistically short time frames that due process can not accommodate, or, in the case of Sarbanes-Oxley, either waive the deadline or move the matter to District Court where the deadlines are no longer a factor. *See*, Section 806(b)(1)(B); 49 U.S.C. §42121(b)(6); *see also,* Carnero at 17-8.[39]

It has also been suggested that the type of coverage applied here will unreasonably increase the number of whistleblower complaints and place excessive demands on the Department of Labor's resources. While Complainant worked overseas for a multinational employer, the violation of Section 806 occurred domestically, and there is no basis beyond speculation to conclude that coverage of such domestic violations would unduly tax investigatory or adjudicatory resources.

Foreign Friction

Respondents similarly contend in their Memorandum in Support of the Motion for Summary Decision that application of Section 806 to individuals employed overseas could result in conflicts with foreign law and thus cause unnecessary rifts in foreign relations. Respondents state, for example: "a German labor court in Dusseldorf held that a company policy designed to allow anonymous employee complaints [under Section 301(4)(B)] is invalid under German law unless the competent German Works Council separately agrees to the policy. *See,* Landesarbeitsgericht Dusseldorf (Dusseldorf Regional Labor Court), Nov. 14, 2005, 10 TaBV 46/05, Zeitschrift fur Wirtschaftrecht 2006, pp. 436-442 (438). Similarly, the French data protection agency, Commission Nationale de l'Informatique et des Libertes ("CNIL"), has invalidated, as inconsistent with French law, a code of ethics designed to comply with SOX." *See*, Resp. Memo In Support of Motion for Sum Dec. at 13, fn 4.[40] The EU's Article 29 Working Party expressed similar concerns to the SEC about due process, privacy data, and the anonymous whistleblower provisions in the context of its consideration of the internal whistleblower requirements in Section 301. *See*, EU Article 29 Working Party letters dated February 1, 2006, and July 3, 2006, *supra*. Senators Sarbanes, Graham, and Enzi, however, anticipated these types of differences, but did not retreat from their views that the reforms needed to apply both

[38] All administrative adjudicative decisions in whistleblower matters are available at http://www.oalj.dol.gov/LIBWHIST.HTM

[39] In this instance, it would appear that the appropriate venue would reside in the place where the violation occurred; apparently in the Southern District of New York. *See*, 49 U.S.C. § 42121(b)(6).

[40] *See*, Respondents' Motion at fn. 4. The website citation in footnote 4 opens to an article on the website of The World Law Group entitled: "Blowing the Whistle on Sarbanes-Oxley: Anonymous Hotlines and the Historical Stigma of Denunciation in Modern Germany," by Judith Rauhofer. At footnote 50 of the article it states that: "The Working Party's recommendations bear close resemblance to a set of Guidelines issued by the French data protection authority, CNIL, in November 2005 which provided a 'pragmatic and practical approach, allowing US and other companies operating in France a specific framework for dual compliance' (see Schreiber et.al. (2006), p. V-9."

domestically and to the foreign operations of publicly traded issuers, with accommodations where needed.

As previously mentioned, but it seems worth repeating, that the Department of Labor considered and declined to exempt employees working abroad when it promulgated rules implementing Section 806. Nevertheless, Respondents note that the EU's Article 29 Working Party and the Dusseldorf Regional Labor Court have expressed displeasure with the anonymous whistleblower provisions in Section 301 of the Act. I am mindful that Respondents citations are illustrative of the type of concerns foreign forums have expressed regarding the anonymous whistleblower provisions in Section 301, and do not address Section 806, specifically, although the Article 29 working party did take note of Section 806.

Section 806, unlike Section 301, however, does not protect anonymous whistleblowers. As a result, cultural concerns about anonymous whistleblowing based on European experience dating back to the 1930's and 1940's would seem significantly mitigated. The identities of employees covered by Section 806 are known to their employers. Indeed, Section 806 protects only those whistleblowers who engage in protected activity and have been identified and targeted for discriminatory treatment by their employers. Evidence demonstrating the employer's awareness of the identity of the whistleblower who engaged in protected conduct is thus a required element of a *prima facie* case under Section 806. *See, e.g.,* Dartey v. Zack Company of Chicago, 82 ERA 2 (April 25, 1983); and Sherrod v. AAA Tire & Wheel, 85 CAA 3, (Nov. 23, 1987); *See also,* Lopez v. West Texas Utilities, 86 ERA 25 (July 26, 1988); Francis v. Bogen, Inc., 86 ERA 8 (April 1, 1988). Further, the Working Party expressed concern about the lack of due process and confidentiality when complaints are lodged anonymously; however, due process in Section 806 proceedings is ensured for all parties by 5 U.S.C. §§ 554, et. seq., and to the extent that a whistleblower's complaint or a respondent's defense against a complaint involves sensitive personal or other data, procedures are available to protect its confidentiality. *See*, 29 C.F.R. §§18.46 and 18.56; *see also* 5 U.S.C. 552(b)(4) and (6).

Finally, Respondents disclose that Walters has retained Swiss counsel to assert his rights as a Swiss employee pursuant to the Swiss Code of Obligations. Resp. Motion at 11. As previously discussed, Section 806 is an antifraud provision, not a labor law. Consequently, the fact that Complainant may assert his rights under Swiss labor law as a Swiss employee is not inconsistent with his right to assert whistleblower coverage for a violation of Section 806 which occurred in the United States. Section 806(d) further provides a solid indication Congress did not intend Section 806 as an exclusive remedy for terminated whistleblowers.

Conclusion

Here, as in O'Mahony, the Complainant does not ask for the intervention of American law in a dispute between foreigners that occurred abroad. His employer is publicly traded in the U.S., and all elements essential to establishing a prima facie violation of Section 806 allegedly occurred in the United States. Walters, moreover, does not seek enforcement of American law in Germany or Switzerland; he seeks application of American law for the damages he suffered as a consequence of the violation of Section 806 that occurred in the United States. *See*, Compl. at 22-3. For all of the foregoing reasons, I conclude that adjudication of the charges in the

Complaint does not require extraterritorial application of American law. Accordingly, Complainant is entitled to have his case heard on the merits. Therefore;

ORDER

IT IS ORDERED that Respondents' Motion for Summary Decision Dismissing the Complaint be, and it hereby is, denied.

A
Stuart A. Levin
Administrative Law Judge