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Board Holds that SOX Section 806 Does Not Apply Extraterritorially.

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On September 18, 2019, the Administrative Review Board (ARB or the Board) issued an important decision in Hu v. PTC, Inc., holding that the Sarbanes-Oxley Act (SOX) whistleblower retaliation provision does not apply to individuals working outside the United States (U.S.). The Board's decision in *Hu* appears to overturn its 2017 decision in Blanchard v. Exelis Sys. Corp.

Hu Li Tao, a Chinese national, worked at a Chinese subsidiary of a U.S.-based company and received job assignments from U.S.-based employees. According to Hu, his managers instructed him to book false orders and false future sales orders to generate illegal income and profit for the company. Hu was fired after reporting the misconduct. Hu argued that his termination violated Section 806 of SOX, codified at 18 U.S.C. § 1514A (Section 806), which prohibits retaliation against employees who report fraud or violations of securities laws. The issue before the ARB was whether Section 806 has extraterritorial reach.

The *Hu* Board used the two-step test in the Supreme Court case Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010), to determine whether Section 806 applied extraterritorially. In *Morrison*, investors filed claims alleging the National Australian Bank was violating U.S. securities laws. The Court provided a two-step framework for analyzing whether a statute reaches extraterritorially. Step one of the *Morrison* test applies the fundamental presumption that "in the absence of evidence to the contrary, Congress intends its legislation to apply domestically and not outside of the U.S." If there is no evidence that Congress intended the statute to apply extraterritorially, then step two of the *Morrison* test asks: what is the essential or primary focus of the statute and where did the challenged activity occur.

The *Hu* Board determined that Section 806 does not meet the test set forth in step one of *Morrison* because the statutory text does not expressly state that Section 806 applies extraterritorially. The Board relied on Carnero v. Boston Sci. Corp., a decision by the U.S. Court of Appeals for the First Circuit, which held that Section 806 does not extend extraterritorially. Carnero was an Argentine citizen who was employed and terminated by a foreign subsidiary of a U.S. parent company. The First Circuit held, that where "a statute is silent as to its territorial reach, and no contrary congressional intent clearly appears, there is generally a presumption against its exterritorial application." Because Congress did not expressly state that SOX applies extraterritorially, the Board applied the second step of the *Morrison* analysis.

The *Hu* Board determined that, considering the primary focus of the statute and where the activity occurred, Section 806 does not apply extraterritorially. While SOX's main purpose is

to protect U.S. markets from fraud, this differs from the purpose of Section 806. The focus of Section 806 is to deter and punish retaliation that affects an employee's terms and conditions of employment. Therefore, the location of the employee's permanent or principal worksite is the key factor to consider. The source of other conduct, including the underlying wrongdoing identified by the employee, becomes less critical and possibly irrelevant for Section 806 purposes. Thus, Hu's argument that U.S. markets would be impacted by the information he discovered and that his termination was conducted by a U.S. company were both rejected by the Board. The Board determined that a complaint involving "an adverse action which affected an employee at a principal worksite abroad does not become territorial because the alleged misconduct . . . [had] effects on U.S. securities markets, or because the alleged retaliatory decision was made in the United States." For those reasons, the Board in *Hu* determined Section 806 does not apply extraterritorially. It further held that the location of the employee's principal workplace is paramount in deciding whether Section 806 is applicable.

Impact on Blanchard

Approximately two years before the *Hu* decision, the ARB in *Blanchard* appeared to hold that Section 806 has extraterritorial reach. Gary Blanchard was a U.S. citizen who worked for a U.S. company that contracted with the U.S. military to perform services on a U.S. base in a foreign country. According to the ARB in *Hu*, the Board in *Blanchard* inappropriately relied on the Supreme Court case, RJR Nabisco v. European Community, 136 S. Ct. 2090 (2016), in its analysis of extraterritoriality. In *RJR Nabisco*, the Court affirmatively found clear indication that Congress intended the federal RICO statute to have an extraterritorial reach. The *Hu* Board noted that the *Blanchard* Board did not point to any such clear direction from Congress in Section 806. Moreover, the Board in *Hu* found that addressing the concerns of foreign employment settings was not required to make a decision in *Blanchard*. In a concurring opinion in *Blanchard* by Chief Judge Igasaki, he stated, "I believe this is a domestic case, involving a U.S. Corporation . . . contracting with the U.S. military on a U.S. base that is [a] U.S. territory for purposes of the law and facts of the case, and employing a U.S. citizen," and for that reason argued that *Blanchard* did not "present[] an opportunity to define the general extraterritoriality of §806[.]" Thus, according to the Board in *Hu*, it was not overturning *Blanchard* because the Board's analysis of extraterritoriality in that case was dicta.

The Board in *Hu* determined that Section 806 does not expressly apply extraterritorially and that future cases involving retaliation against employees outside of the United States will likely turn on the permanent or principal worksite of the employee where the retaliatory acts occur. This restrictive view of SOX's reach will leave many employees of U.S.-based publicly traded companies, including U.S. citizens, without meaningful protections against retaliation while they are working abroad. This is a worrisome development, particularly because many companies' most egregious conduct occurs in locations far removed from the professionalized culture present in their U.S. offices.