Bloomberg BNA

Securities Regulation & Law Report™

WHISTLEBLOWERS

Don't Tread on Whistleblowers: Mitigating and Managing Retaliation Risks

BY WILLIAM MCLUCAS, LAURA WERTHEIMER, AND ARIAN JUNE

As the Securities and Exchange Commission's Whistleblower Program gains traction, reporting of compliance concerns is likely to increase. That Program, which has attracted a great deal of attention, authorizes payment of bounties to qualified whistleblowers who report ''original information'' regarding possible violations of the federal securities laws to the Securities and Exchange Commission (''SEC'').[1] We have written previously on the variety of factors that are likely to increase the number of whistleblower complaints over the next few years.[2] Less attention has been focused on the broad protections against retaliation for ''whistleblowers'' contained in Dodd-Frank Wall Street Reform and Consumer Protection Act. Data shows that retaliation claims are on the rise across the U.S.: the Equal Employment Opportunity Commission (''EEOC'') reports that retaliation charges filed with the EEOC under all statutes which it enforces amounted to 38.1 percent of the total charges filed for FY 2012,[3] and the Occupational Health and Safety Administration (''OSHA''), which receives and investigates whistle-

William McLucas, chair of WilmerHale's Securities Department, is a partner resident in the firm's Washington, DC, office. Laura Wertheimer is a partner resident in WilmerHale's Washington, DC office and a member of its Securities Department. Arian June is a counsel resident in WilmerHale's Washington, DC, office and a member of the Securities Department. Mr. McLucas may be reached at (202) 663-6622 or william.mclucas@wilmerhale.com. Ms. Wertheimer may be reached at (202) 663-6450 or laura.wertheimer@wilmerhale.com. Ms. June may be reached at (202) 663-6213 or arian.june@wilmerhale.com.

[1] 15 U.S.C. § 78u-6(a)(6). Dodd-Frank Wall Street Reform and Consumer Protection Act also authorizes bounty payments to qualifying whistleblowers who provide original information relating to a possible violation of the federal commodities laws (including any rules or regulations) that has occurred, is ongoing, or is about to occur.

[2] *See* William McLucas, Laura Wertheimer & Arian June, *Year Three of the SEC Whistleblower Program: Will it Turbocharge SEC Enforcement*, 45 BLOOMBERG BNA SEC. REG. & L. REP. 890 (May 13, 2013).

[3] U.S. EQUAL OPPORTUNITY EMP'T COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

 ISSN 0037-0665

blower retaliation claims under more than 20 federal laws, including the Sarbanes-Oxley Act (''SOX''), reports that the total number of whistleblower retaliation claims increased in FY 2012 as did SOX retaliation claims.[4]

As the number of individuals reporting potential misconduct, both internally and externally, increases, it is likely that many of those individuals will have a heightened sensitivity to conduct in the workplace that they perceive as retaliatory. In Part I of this Article, we review recent developments in SOX administrative and federal court case law that lower the pleading standards for retaliation claims and broaden the definition of prohibited retaliation, both of which may make it easier for claimants to make out a prima facie case of Section 806 retaliation under SOX. In Part II, we outline the scope of Dodd-Frank's expansion of existing anti-retaliation protections in SOX. Next, in Part III, we discuss the conflict between recent federal district court decisions and a decision from the U.S. Court of Appeals for the Fifth Circuit over the applicability of the Dodd-Frank whistleblower protection rules to individuals who report information relating to a possible violation of the securities laws internally, and not to the SEC.

In Part IV of this Article, which will be published in the next edition, we evaluate the extent to which the anti-retaliation protections in Dodd-Frank apply to whistleblowers located outside of the U.S., another potential source of claimants. Last, in Part V, we recommend a number of measures for organizations to consider that may reduce the threat of retaliation claims and may position them to better defend themselves if such claims are filed.

I. Recent Administrative and Judicial Rulings Broaden Scope of Activity Protected Under SOX

In the aftermath of the Enron Corp. scandal, Congressional hearings produced testimony from an individual who claimed that she informed Enron's chief executive officer, in an anonymous letter and at an in-person meeting, about her concerns that Enron manipulated its finances to create the illusion of value.[5] Congress learned that Enron sought legal advice on whether this individual could be fired after reporting accounting fraud and the letter from outside counsel reported that neither Texas law (where Enron was headquartered) nor federal statutes provided the whistleblower with any protection from retaliatory discharge.[6] The Senate Report on Sarbanes Oxley noted that ''In a variety of instances when corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud,. . . they were discouraged at nearly every turn.''[7] The Senate concluded that ''corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. . . . There is no way we could have known about [how a scandal works] without that kind of a whistleblower.''[8] To encourage ''corporate insiders'' to speak up and report fraud, Congress adopted Section 806 of SOX which it expected would provide ''meaningful protections'' for employees from any adverse employment consequences of blowing the whistle.[9] Section 806 protects any employee of a publicly traded company from discharge or other discriminatory conduct by his or her employer because of ''any lawful act done by the employee (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation'' of the federal securities laws or any federal statute relating to fraud against shareholders or any SEC rule or regulation ''when the information or assistance is provided to or the investigation is conducted by (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) 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).''[10] By its express terms, SOX does not condition protection from retaliatory conduct upon the external reporting of information to the SEC, another federal regulator, or to Congress.

Congress expressly delegated authority to enforce Section 806 through formal administrative adjudications to the Secretary of Labor[11] who, in turn, delegated such authority to the U.S. Department of Labor Administrative Review Board (''ARB'').[12] The ARB consists of a maximum of five members, all of whom are appointed by the Secretary of Labor to serve a term of two years or less.[13] A private sector employee who believes that he or she has suffered unlawful retaliation must file a complaint with the Department of Labor within a fairly short period of time after the alleged unlawful practice occurred.[14] In the event the Department of Labor does not issue a final decision within 180 days of receipt of a

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[4] Occupational Safety & Health Admin., Cases Received: FY2005 – FY2012, *available at* http://www.whistleblowers.gov/wb_data_FY05-12.pdf.

[5] *See The Financial Collapse of Enron-Part 3: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 107th Cong. 14-66 (2002) (testimony of Sherron Watkins).

[6] S. Rep. No. 107-146, at 5 (2002), discussing Email from Carl Jordan, Attorney, Vinson & Elkins L.L.P., to Sharon Butcher, Assistant Gen. Counsel, Enron (Aug 24, 2001, 7:02 PM), *available at* http://www.justice.gov/enron/exhibit/03-15/BBC-0001/Images/9810.001.PDF.

[7] S. Rep. No. 107-146, at 4-5.

[8] *See* S. Rep. No. 107-146, at 10 (2002) (noting that corporate whistleblowers ''are the only people who can testify as to 'who knew what, and when,' crucial questions . . . in all complex securities fraud investigations.''); 148 Cong. Rec. 12,318 (''When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why.'').

[9] 148 Cong. Rec. 14,447 (2002) (statement of Sen. Patrick Leahy) (''[W]e include meaningful protections for corporate whistleblowers. . . . We learned 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.'')

[10] 18 U.S.C. § 1514A(a).

[11] 18 U.S.C. § 1514A(b)(1); 18 U.S.C. § 1514A(b)(2)(A) (2006) (providing that Section 806 claims will be governed by the procedural rules set out at 49 U.S.C. § 42121(b) (2006) which explains the Department of Labor's adjudicatory power).

[12] *See* 67 Fed. Reg. 64,272–73 (Oct. 17, 2002) (Secretary's Order 5-2002).

[13] Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 75 Fed. Reg. 3924 (Jan. 25, 2010).

[14] SOX provided that a complainant had 90 days in which to file a retaliation complaint with the Department of Labor which was enlarged by Dodd-Frank to 180 days. 18 U.S.C. § 1514A(b)(2)(D).

   ISSN 0037-0665

retaliation complaint, SOX contains a ''kick out'' provision which permits the claimant to bring a de novo action in federal court, provided that there has been no showing that the delay was due to the bad faith of the claimant.[15]

While a claimant must plead and prove that he or she engaged in conduct protected under Section 806 to make out a prima facie retaliation case, the statute does not define with specificity what conduct is protected. That lack of clarity has given rise to a significant volume of litigation over the appropriate standard. In 2006, the ARB concluded that a SOX retaliation claimant must show that his or her communication or activity ''definitively and specifically relate[d]'' to one of Section 806's enumerated laws or regulations in order to qualify as protected under that Section.[16] This standard was adopted by a significant number of federal courts in subsequent years, even though Section 806 contained no such express requirement.[17]

In 2009 and 2010, two independent audits of the administration of whistleblower retaliation claims by the Government Accountability Office (''GAO'') found that OSHA investigators often lacked training to investigate retaliation claims brought by whistleblowers in complex cases (At that time, OSHA investigators were responsible for investigating whistleblower retaliation claims brought under 21 statutes[18]). The GAO Reports noted that OSHA investigators cited SOX as the Act they most often needed help understanding because of its complexity, different burden of proof, and the different types of activities protected by Section 806.[19] In 2010, the GAO concluded, ''OSHA's lack of focus on training may jeopardize the quality and consistency of [whistleblower retaliation] investigations.''[20] In 2010, the Department of Labor Inspector General reached similar conclusions,[21] specifically finding that SOX's complexity created a stumbling block for investigators who lacked ''access to subject matter experts for technical guidance.''[22] Several months after Assistant Secretary of Labor David Michaels was confirmed by the Senate, he issued a ''vision statement'' in which he stressed the importance of giving workers ''voice'' through whistleblower protection and identified OSHA's Whistleblower Protection Program (''WPP'') as a program that did not work.[23] He directed OSHA to conduct a top-to-bottom review of its WPP and the findings of that review mirrored the problems identified in the prior audits.[24] To address the identified weaknesses, Assistant Secretary Michaels promised more resources for the WPP and better training for OSHA investigators and a revised Whistleblower Investigation Manual to assist investigators the conduct of their investigations.[25]

At the same time that Assistant Secretary Michaels was overseeing improvements to the administration of the WPP, Secretary of Labor Hilda Solis appointed five new members to replace the five ARB members whose terms were expiring.[26] In May 2011, an ARB consisting of members appointed entirely by Secretary Solis revisited whether Section 806 required a reporting employee to ''definitively and specifically'' identify a violation of one of the statutes enumerated in it before protection

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[15] 18 U.S.C. § 1514A(b)(1)(B). For a recent example of a complaint filed in federal district court when an administrative decision was not reached in 180 days, *see Wiest v. Lynch,* No. 10-cv-3288, (E.D. Pa. 2010), complaint dismissed, 2011 BL 189761, 2011 U.S. Dist. LEXIS 79283, 2011 WL 2923860 (E.D. Pa. July 21, 2011), *reversed on appeal*, 710 F.3d 121 (3d Cir. 2013).

[16] *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006).

[17] *See, e.g., Nance v. Time Warner Cable, Inc.*, 433 Fed. Appx. 502, 503 (9th Cir. 2011) (''employee's communications must definitively and specifically relate to [one] of the listed categories of fraud or securities violations [in] 18 U.S.C. § 1514A(a)(1)) (not for publication); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996-97 (9th Cir. 2009) (employee's communications must ''definitely and specifically'' relate to one of the categories of fraud or securities violations listed under section 1514A(a)(1)); *Day v. Staples, Inc.*, 555 F.3d 42, 54-55 (1st Cir. 2009) (employee complaints about the company's protocols of processing merchandise returns did not constitute activity protected under Section 806 because employee failed to show ''that his communications to the employer specifically related to one of the laws listed in § 1514A''); *Welch v. Cardinal Bankshares Corp.*, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 31, 2007), *aff'd*, *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008) (finding that former chief financial officer failed to explain how the issues he had raised—the company's misreporting of $195,000 as income and allowing non-accountants to make accounting ledger entries—could have reasonably constituted a violation of the anti-fraud laws enumerated in Section 806); *Getman v. Admin. Review Bd.*, 265 Fed. Appx. 317 (5th Cir. 2008) (no protected activity because plaintiff had never conveyed her belief that upgrading rating would violate a securities law); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476-77 (5th Cir. 2008) (''employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A'').

[18] *See Occupational Safety & Health Admin., The Whistleblower Protection Program,* http://www.whistleblowers.gov/statutespage.html (listing statutes).

[19] *See* U.S. Gov't Accountability Office, GAO-10-722, Whistleblower Protection: Sustained Management Attention Needed to Address Long-Standing Program Weaknesses 16-17, 21-22, 25 (2010) , *available at* http://www.gao.gov/assets/310/308767.pdf; U.S. Gov't Accountability Office, GAO-09-106, Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency 2-3, 5-6, 19-20,39 (2009), *available at* http://www.gao.gov/assets/290/285189.pdf.

[20] U.S. Gov't Accountability Office, GAO-10-722, Whistleblower Protection: Sustained Management Attention Needed to Address Long-Standing Program Weaknesses 25 (2010), *available at* http://www.gao.gov/assets/310/308767.pdf.

[21] Office of Inspector Gen. Office of Audit, U.S. Dep't of Labor, Rep. No. 02-10-202-10-105, Complainants did not Always Receive Appropriate Investigations under the whistleblower Protection Program 2-5 (2010), *available at* http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf.

[22] *Id*. at 2.

[23] *See* David Michaels, *OSHA at Forty: New Challenges and New Directions*, OSHA (July 19, 2010), *available at* http://www.osha.gov/as/opa/Michaels-vision.html.

[24] Rita Lucero et al., U.S. Dep't of Labor, OSHA's Whistleblower Protection Program Review: Findings and Recommendations 37 (2010), *available at* http://www.whistleblowers.gov/topbottom report.pdf.

[25] Press Release, Occupational Safety & Health Admin., U.S. Department of Labor's OSHA Announces Measures to Improve Whistleblower Protection Program, (Aug. 1, 2011) *available at* http://www.osha.gov/pls/oshaweb/owadisp.showdocument?ptable=NEWSRELEASES&pid=20394.

[26] *See* ARB Board Members, U.S. Dep't Of Labor, *available at* http://www.dol.gov/arb/members.htm.

attached to the disclosure.[27] In *Sylvester v. Parexel International,* the ARB repudiated the ''definitive and specific'' standard.[28] It explained that the restrictive standard had been borrowed from case law interpreting a catch-all whistleblower provision of the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1)(F) that was significantly different from Section 806.[29] The ARB held that importation of the ''definitively and specifically'' standard conflicted with Section 806's prohibition of discriminating against any employee who reports information about conduct the employee ''reasonably believes'' to constitute unlawful behavior identified in that Section. For activity to be protected under Section 806, the ARB ruled that an employee need only demonstrate an objective and subjective reasonable belief, even if mistaken, at the time he or she engaged in the activity or made the communication that one of the violations identified in Section 806 had occurred or was threatened to occur.[30] As a result, activity can be protected under Section 806 ''even if [the employee] fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation.''[31]

ARB decisions subsequent to *Sylvester* have followed its holding.[32] Because *Sylvester* is a fairly recent ARB decision, its impact on federal district and appellate court interpretations of Section 806 has been fairly modest.[33] However, in March 2013, the U.S. Court of Appeals for the Third Circuit, in an opinion designated as precedential, determined that the ARB's *Sylvester* decision was entitled to *Chevron* deference, approved each prong of the ARB's holding and reversed the district court's dismissal of plaintiff's retaliation complaint.[34] In *Wiest v. Lynch*, the plaintiff sued his former employer under Section 806 in federal court after the ARB failed to issue a decision in 180 days, alleging that he was placed on leave and then terminated in retaliation for regularly raising concerns and questions about

[27] *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, at 18-19 (ARB May 23, 2011).

[28] *Id*.

[29] *Id*. at 18-19.

[30] *Id*. at 16.

[31] *Id*. at 22.

[32] In decisions issued subsequent to *Sylvester*, the ARB has stated that the ''definitely and specifically'' standard is in conflict with the language of Section 806. *See, e.g., Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, 2012 WL 1102507, at *4 (Dep't of Labor March 28, 2012) (''[T]he 'definitive and specific' standard employed in prior ARB cases is inconsistent with the statutory language of Section 806.''); *Prioleau v. Sikorski Aircraft Corp.*, ARB No. 10-060, 2011 WL 6122422, at *6 (Dep't of Labor Nov. 9, 2011) (''In *Sylvester*, we made clear that the ''definitive and specific'' standard that the ARB had employed in prior ARB cases . . . was inconsistent with Section 806's statutory language.''); *Reamer v. Ford Motor Co.*, ARB No. 09-053, 2011 WL 3307575, at *3 (Dep't of Labor July 21, 2011) (noting that the ARB ''has criticized the use of ''definitively and specifically'' as a standard for an employee's reasonable belief of a violation of the laws listed under Section 806.''); *Inman v. Fannie Mae*, ARB No. 08-060, 2011 WL 2614298, at *6 (Dep't of Labor June 28, 2011) (finding error in the ALJ's use of the ''definitive and specific'' standard because it is inconsistent with the statutory language of Section 806); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, 2011 WL 2614345, at *7 (Dep't of Labor June 28, 2011) (reversing ALJ dismissal of retaliation complaint where ALJ found that complainant's report of accounting irregularities, which did not allege ''fraud,'' failed to qualify as protected activity on the ground that application of ''definitive and specific'' standard was inconsistent with the statutory language of Section 806); *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011) (reversing dismissal by ALJ of retaliation complaint where ALJ found that internal complaint, alleging misuse and abuse of employee credit cards, improper accounting practices, and improper business expense deductions which led to a tax windfall did not relate to one of the statutes enumerated in Section 806 on the ground that complainant need not believe that the reported misconduct gave rise to a violation of law as long as the complainant had a reasonable belief ''that a violation is likely to happen'').

[33] For example, district courts in the Second Circuit have reached different conclusions on whether the ''definitively and specifically'' standard applies. In *Andaya v. Atlas Air, Inc.*, the district court followed a pre-*Sylvester* Second Circuit Court of Appeals decision and applied the ''definitively and specifically'' standard without referring to *Sylvester*. 2012 WL 1871511, at *2 (S.D.N.Y. Apr. 30, 2012). Similarly, in *Nielsen v. AECOM Tech. Corp.*, the district court granted the employer's motion to dismiss on the ground that the internal report of misconduct did not ''definitively and specifically'' relate to one of the laws enumerated in Section 806. 2012 WL 6200613, at *5 (S.D.N.Y. Dec. 11, 2012). However, in *Sharkey v. J.P. Morgan Chase & Co.*, the district court noted that a SOX whistleblower need not recite the code section he believes was violated as long as his communications ''identify the specific conduct that the employee believes to be illegal.'' 805 F. Supp. 2d 45, 56-57 (S.D.N.Y. 2011). The ARB also ruled that protected activity under Section 806 is not limited to those communications that report a fraud against shareholders because shareholder fraud is only one of the 6 categories set forth in Section 806. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 at 19-20 (ARB May 23, 2011). Federal courts were divided on that question before *Sylvester* and continue to be divided. For examples of that split prior to *Sylvester*, *compare O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) (noting that ''[Section 806] clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud''); *Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382 (M.D. Ga. 2007) (''The statute clearly protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company'') and *Livingston v. Wyeth, Inc.*, No. 1:03CV00919, 2006 BL 82816, at *11, 2006 WL 2129794, at *10 (M.D.N.C. July 28, 2006) (''To be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud.''); *Bishop v. PCS Admin. (USA), Inc.*, No. 05 C 5683, 2006 BL 131324, at *9-10, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006) (finding that the phrase ''relating to fraud against shareholder'' must be read as applying to all violations enumerated under section 806). For examples of the split after *Sylvester*, *compare Andaya v. Atlas Air, Inc.*, No. 7:10-cv-07878, 2012 WL 1871511, at *2 (S.D.N.Y. Apr. 30, 2012) (''the employee's allegations of wrongdoing must resemble the allegations of shareholder fraud.'') with *Gladitsch v. Neo@Ogilvy*, No. 1:11-cv-00919, 2012 WL 1003513, at *7 (S.D.N.Y. Mar. 21, 2012) (''an allegation of shareholder fraud is not a necessary component of protected activity under Section 1514A.''); *Barker v. UBS AG*, 888 F. Supp. 2d 291 (D. Conn. 2012) (even where alleged wrongdoing appears to be immaterial to shareholders, courts may still find triable issues of fact sufficient to deny summary judgment); *Atwood v. MJKL Enters., LLC*, No. CV-10-2783, 2012 BL 179184, at *4, 2012 WL 2919406, at *6 (D. Ariz. July 27, 2012) (granting summary judgment for the employer because the plaintiff failed to allege retaliation after he complained of securities law violations).

[34] *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013); sur petition for rehearing with suggestion for rehearing en banc denied, *Wiest v. Lynch*, No. 11-4257, (3d. Cir. April 23, 2013).

   ISSN 0037-0665

expenses that either lacked supporting documentation or appeared to have no business purpose.[35] The district court dismissed the retaliation complaint for three reasons: he failed to allege that his communications ''(a) 'definitively and specifically' related to a statute or rule listed in Section 806; (b) expressed 'an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss;' and (c) 'reflect[ed] a reasonable belief of an existing violation.' ''[36] The Third Circuit reversed on each ground. The appeals court gave deference to the ARB's rejection of the ''definitively and specifically'' standard and held that ''the reasonable belief test is the appropriate standard with which to analyze the communications that [plaintiff] contends constitute ''protected activity'' and that standard requires ''that an employee's communication reflect a subjective and objectively reasonable belief . . . .''[37]Next, it endorsed the ARB's interpretation that ''a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation'' and held that Section 806 does not require the employee's reported information to include the elements of fraud.[38] Last, it held that communications protected under Section 806 include reports of existing violations as well as of violations that have not yet occurred ''as long as the employee reasonably believes that the violation is likely to happen.''[39] The appeals court noted that a communication can qualify as protected under Section 806, regardless of whether the employer had reason to suspect that the communication was protected.[40] Applying these standards, the appeals court found that the plaintiff had sufficiently pled that most of his activities entitled him to Section 806 protection.

The 2011 *Sylvester* ruling and subsequent ARB decisions appear to redefine the scope of protected activity under Section 806. Retaliation claimants in administrative proceedings must no longer show a ''definite and specific'' tie between the information in their disclosures and the kinds of fraud identified in Section 806 nor must they provide sufficient detail to put an employer on notice that a statutory violation either has occurred, is occurring or may occur in the future. These decisions send the clear signal to ALJs that the scope of activity protected under Section 806 is broad which, in turn, will require a determination on the merits of the retaliation claim. The Third Circuit's *Wiest* decision is one of a few federal court decisions addressing the application of the ''definite and specific'' standard post-*Sylvester*. The appeals court's repudiation of that standard and adoption of the more relaxed *Sylvester* standard represents a significant change in the law and broadens the scope of activities protected under Section 806. Under *Wiest*, internal reports of accounting irregularities, improper accounting treatment of expenses, or clinical data that fails to follow drug-testing protocols of the Food and Drug Administration, may constitute protected activity under Section 806, provided the employee reasonably believed that such misconduct violated or could violate one of the statutes identified in Section 806 (even if that employee's belief is mistaken). As the only post-*Sylvester* federal court decision designated as precedential,[41] *Wiest* may be cited as persuasive authority by other district and circuit courts addressing similar issues under Section 806.

The ARB has also expanded the types of ''adverse action'' that may constitute ''retaliation'' and/or discrimination under Section 806. In a 2006 decision, the U.S. Supreme Court held, in *Burlington Northern & Santa Fe Railway Co. v. White*, that retaliation claims under Title VII of the Civil Rights Act of 1964, which forbids ''discriminat[ion] against'' an employee or job applicant who ''made a charge, testified, assisted, or participated in'' a Title VII proceeding or investigation,[42] could be

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[35] *Wiest v. Lynch*, 710 F.3d at 125.

[36] *Id.* at 125-26, quoting district court opinion *Wiest v. Lynch*, No. 10-3288, 2011 BL 189761, at *5, 2011 WL 2923860, at *4 (E.D. Pa. 2011).

[37] *Id.* at 137. Section 806 protects an employee who ''reasonably believes'' the information he or she reports constitutes a violation of the enumerated statutes, rules and regulations but does not define ''reasonable belief.'' Courts interpreting this standard have concluded, consistent with other anti-retaliation statutes, that both subjective and objective components must be satisfied. *E.g.*, *Nance v. Time Warner Cable, Inc.*, 433 Fed. Appx. 502 (9th Cir. 2011); *Fraser v. Fiduciary Trust Co. Int'l*, 396 Fed. Appx. 734 (2d Cir. 2010); *Pearl v. DST Sys., Inc.*, 359 Fed. Appx. 680 (8th Cir. 2010); *Gale v. U.S. Dep't of Labor*, 384 Fed. Appx. 926 (11th Cir. 2010); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722 (7th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Nielsen v. AECOM Tech. Corp.*, No. 1:12-cv-05163, 2012 WL 6200613 (S.D.N.Y. 2012); *Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461, 2012 BL 168929, 2012 WL 2708517 (N.D. Cal. July 6, 2012); *Klopfenstein v. PCC Flow Techs. Holdings*, ARB 04-149 (ARB May 31, 2006). The Eleventh Circuit has explained that the subjective component of the ''reasonable belief'' standard means that the employee ''actually believed the conduct complained of constituted a violation of pertinent law''; where a complainant merely felt ''really uncomfortable'' and ''uneasy,'' those feelings did not satisfy the subjective component. *Gale v. U.S. Dep't of Labor*, 384 Fed. Appx. 926 (11th Cir. 2010). Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same circumstances with the same training and experience as the complainant.

[38] *Wiest v. Lynch*, 710 F.3d at 133.

[39] *Id.* at 133. *See also Zulfer v. Playboy Enters., Inc.*, No. 2:12-cv-08263, 2012 WL 6763314 (C.D. Cal. Dec. 12, 2012) (finding that plaintiff's disclosures regarding failure of internal controls were protected under Section 806 because plaintiff reasonably believed that such failure could lead to a future securities law violation). *Cf. Livingston v. Wyeth Inc.*, 520 F.3d 344, 352 (4th Cir. 2008), that an employee's communications will not be protected under Section 806 if he or she complains of a future violation of law.

[40] *Wiest v. Lynch*, 710 F.3d at 134.

[41] In an unpublished opinion in *Riddle v. First Tenn. Bank, N.A.*, the Sixth Circuit ruled that alleged violations of the Bank Bribery Act reported by employee do not constitute protected activity under Section 806 because allegations do not ''definitively and specifically relate to one of the six enumerated categories found in 18 U.S.C. § 1514A: mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.'' (internal citations omitted). 497 Fed. Appx. 588, 595 (6th Cir. 2012); *Barker v. UBS AG & UBS Secs. LLC*, 888 F. Supp. 2d 291, 296-297 (D. Conn. May 2, 2012) (finding that the facts satisfy the ''definitively and specifically'' standard adopted by the Second Circuit but noting that the ARB recently broadened the test); *Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461, 2012 BL 168929, at *13, 2012 U.S. Dist. LEXIS 93883, at *44-52 (N.D. Cal. 2012) (applying stricter ''definitively and specifically'' standard in determining whether the complainant engaged in ''protected activity'').

[42] 548 U.S. 53 (2006)

based upon any employer action that a reasonable employee in the plaintiff's circumstances would have found to be materially adverse, without regard for whether the action results in a loss of compensation, benefits, or title.[43] In the Court's view, materially adverse actions include oral or written reprimands, reassignment of duties, and other actions that ''might well have dissuaded a reasonable person from making or supporting a claim'' or otherwise engaging in protected conduct.[44] Following *Burlington Northern*, a number of federal courts and an Administrative Law Judge applied the *Burlington Northern* definition of ''adverse action'' to Section 806 SOX retaliation claims.[45] As a result, post-2006 retaliation claims have alleged a wide spectrum of specific ''adverse action'' ranging from termination to increased scrutiny in the workplace.[46]

In a recent decision, the ARB determined that the SOX anti-retaliation protection was even broader than the Title VII protection at issue in *Burlington Northern* and the ''difference in statutory construction convinces us that adverse action under SOX . . . must be more expansively construed than that under Title VII.''[47] In *Menendez v. Halliburton*, the ARB explained that Section 806, which provides that an employer may not ''discharge, demote, suspend, threaten, harass, *or in any other manner discriminate* against an employee in the terms and conditions of employment because of any lawful act done by the employee'' (italics added), ''explicitly proscrib[es] non-tangible activity'' and ''bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers.''[48] Finding that the SOX anti-retaliation provision was substantially similar to a provision in the Aviation Investment and Reform Act for the 21 Century (''AIR 21''), the ARB held that the standard it developed for ''adverse action'' in AIR 21 retaliation cases should be applied to SOX retaliation claims.[49] The ARB explained that the term ''adverse action'' under this standard ''refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.''[50] It found that the language ''in the terms and conditions of employment'' did not limit the scope of SOX's ''intended protection to economic or employment-related actions''[51] and that adverse action is ''simply something unfavorable to an employee, not necessarily retaliatory or illegal.''[52] It remains to be seen whether federal courts will follow the expanded scope of ''adverse action'' adopted by the ARB in *Menendez*.[53]

The ARB's recent decisions in *Sylvester* and *Menendez*, which expand the scope of activity protected under Section 806 and the array of conduct considered ''adverse action,'' potentially change the landscape for administrative adjudication of retaliation claims. In roughly the six year period between the ARB decision in *Platone* and *Sylvester*, 1,271 determinations were reached by the Department of Labor in Section 806 retaliation claims, of which plaintiff-employees prevailed in 8, or .63 percent, and the employers prevailed in 847, or 66.64 percent.[54] For FY 2012, the only period for which post-*Sylvester* data is publicly available, 157 determinations were reached by the Department of Labor in Section 806 retaliation claims, of which plaintiff-employees prevailed in 2, or 1.27 percent, and the employers prevailed in 89, or 56.68 percent.[55] Even if the changed standards do not produce additional administrative filings of Section 806 retaliation claims, it is highly likely that fewer claims will be dismissed on a prehearing motion. Apart from the Third Circuit, federal courts have not settled on the standard for activity protected under Section 806.

While the Third Circuit determined that the ARB's *Sylvester* decision was entitled to Chevron deference and affirmed the ARB's ruling, other federal courts have split with the Department of Labor over different elements in the scope of Section 806 protections. For

[43] *Id.* at 63.

[44] *Id.* at 63.

[45] E.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468 (5th Cir. 2008) (due to the similarity of the whistleblower protections afforded by both AIR 21 and SOX, the *Burlington Northern* definition of ''adverse employment action'' applies to SOX whistleblower claims); *Schlicksup v. Caterpillar, Inc.*, No. 09-cv-1208, 2010 BL 158966, 2010 WL 2774480 (C.D. Ill. July 13, 2010) (holding that *Burlington Northern*'s definition of ''adverse action'' should apply to SOX retaliation claim); *Bozeman v. Per-Se Techs., Inc.*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006) (applying *Burlington Northern* standard to SOX retaliation claim, but not addressing *Burlington Northern* during its analysis of constructive discharge claim); *Deremer v. Gulfmark Offshore, Inc.*, 200-SOX-2 (ALJ June 29, 2007) (explaining that *Burlington Northern* relaxed the standard for an adverse employment action applied to retaliation cases and that the complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities, but that it had not relaxed the standard that must be applied in whistleblower cases to hostile work environment claims). *See also Hardy v. City of Tupelo*, No. 1:08-CV-28, 2009 BL 236699, 2009 WL 3678262 (N.D. Miss. Nov. 2, 2009); *Miles v. Wal-Mart Stores, Inc.*, No. 06-5162, 2008 BL 14779, 2008 WL 222694 (W.D. Ark. Jan. 25, 2008).

[46] *See, e.g.*, *Gattegno v. Prospect Energy Corp.*, ARB No. 06-118, 2006-SOX-8 (ARB May 29, 2008) (constructive discharge); *Fraser v. Fiduciary Trust Co., Int'l*, No. 04 Civ. 6958, 2009 BL 181767, 2009 WL 2601389 (S.D.N.Y. Aug. 25, 2009) (demotion/reduced responsibilities); *Reines v. Venture Bank and Venture Fin. Grp.*, 2005-SOX-112 (ALJ Mar. 13, 2007) (same); *Levi v. Anheuser Busch Cos., Inc.*, ARB No. 08-086, 2008-SOX-28 (ARB Sept. 25, 2009) (failure to hire); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (hostile work environment); *Allen v. Stewart Enters., Inc.*, ARB No. 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006) (increased scrutiny); *McClendon v. Hewlett Packard, Inc.*, 2006-SOX-29 (ALJ Oct. 5, 2006) (transfer).

[47] *Menendez v. Halliburton, Inc.*, 2011 DOL Ad. Rev. Bd., LEXIS 83 (ARB Nos. 09-002, -003, ALJ No. 2007-SOX-005), at *15 (ARB Sept. 13, 2011) at text accompanying note 101.

[48] *Id.* at *32, text accompanying note 110.

[49] *Id.* at *31, text accompanying note 110. SOX explicitly provides that a retaliation claim shall be governed by ''the rules and procedures set forth'' in AIR 21.'' 18 U.S.C. § 1514A(b)(2)(A).

[50] *Id.* at *37-38, text accompanying note 111.

[51] *Id.* at *42.

[52] *Id.* at *71.

[53] *Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461 CW, 2012 BL 168929, at *16-28, 2012 U.S. Dist. LEXIS 93883, at *44-52 (N.D. Cal. July 6, 2012) (applying *Menendez* standard for ''adverse action'').

[54] *Whistleblower Investigation Data: FY2005-FY2012*, U.S. Dep't of Labor, http://www.whistleblowers.gov/wb_data_FY05-12.pdf. During the same six-year period from FY 2006 through FY 2011, 245 Section 806 claims were settled and 171 were voluntarily withdrawn.

[55] *Id.* During FY 2012, 38 Section 806 claims were settled and 28 were voluntarily withdrawn.

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example, the U.S. Court of Appeals for the First Circuit, in February 2012, held that Section 806 protections only attach to employees of public companies and not employees of a contractor or subcontractor to public companies.[56] Three months later, the ARB expressly rejected the First Circuit's reasoning and concluded that any ''interpretation limiting [Section 806] protection of whistleblowers to those only directly employed by a publicly traded company would sabotage'' Congressional intent in enacting Section 806.[57] The Supreme Court granted certiorari to resolve this conflict in May and the case was argued in November. The Court's ruling later this Term may provide guidance on the deference, if any, that should be given by the federal courts to the Department of Labor's interpretation of other elements of Section 806.

II. Expanded Protections from Retaliatory Conduct Under Dodd-Frank

Section 922 of Dodd-Frank amends SOX's retaliation protections in four key ways, in apparent response to criticisms that limitations included in Section 806 and past interpretations of the statute by the ARB and federal courts had limited employees' ability to have retaliation claims heard on the merits.[58]

■ ***First***, Dodd-Frank clarifies the classes of employees entitled to protection from retaliation. Because SOX applies only to public companies, some federal courts held that its retaliation protections did not extend to employees of private subsidiaries and affiliates of public companies.[59] Dodd-Frank makes clear that SOX protections cover such employees.[60]

■ ***Second***, Dodd-Frank extends SOX whistleblower protections to employees of ''nationally recognized statistical rating organization[s].''[61]

■ ***Third***, Dodd-Frank makes unenforceable any arbitration agreement or other attempt to condition employment on the employee's waiver of his or her rights and remedies under SOX.[62]

■ ***Fourth***, Dodd-Frank purports to invalidate mandatory provisions requiring arbitration of SOX retaliation claims in employment agreements executed *prior* to its passage.[63]

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[56] *See Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012), *cert. granted*, 81 U.S.L.W. 3648 (U.S. May 20, 2013) (No. 123) (argued November 12, 2013).

[57] *Spinner v. David Landau and Assocs., LLC*, ARB Nos. 10-111 and 10-115, ALJ No. 2010-SOX-029 at 12-13 (ARB May 31, 2012).

[58] *See* Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 19–24 (2007); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007); Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 832 (2007) (''[D]espite Sarbanes-Oxley being touted as a new bulwark against corporate fraud, the courts continue to weaken these whistleblower provisions. . . . [W]histleblower protections have not accomplished their intended purpose.''); Jennifer Levitz, *Whistleblowers Are Left Dangling: Technicality Leads Labor Department to Dismiss Cases*, WALL ST. J., Sept. 4, 2008, at A3 (''The government has ruled in favor of whistleblowers 17 times out of 1,273 complaints filed since 2002, according to department records. Another 841 cases have been dismissed.'').

[59] *Compare Klopfenstein v. PCC Flow Technologies, Inc.*, ARB No. 04-149, 2004-SOX-11 (ARB May, 31, 2006) (applying agency theory to find application to subsidiary would be likely on remand to ALJ, *Walters v. Deutsche Bank*, 2008-SOX-70, slip op. at 23 (ALJ Mar. 23, 2009) (finding the structure and purpose of SOX requires application to ''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''), *and Mallory v. Morgan Chase & Co.*, 2009-SOX-29 (ALJ Nov. 20, 2009) (noting that the ARB ''never said the agency had to be 'for employment purposes' nor implied that the parent company had to direct or order decisions about the worker's employment for the subsidiary to be an agent''), *with Hein v. AT&T Operations, Inc.*, No. 09-cv-00291-WYD-CBS, 2010 BL 300098, at *5, 2010 WL 5313526, at *5 (D. Colo. Dec. 17, 2010) (''[I]n light of the corporate law principle that parent companies are not liable for their subsidiaries' actions . . . Plaintiff is not a protected employee under § 1514A.''), *and Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 BL 20378, at *4, 2007 U.S. Dist. LEXIS 34922 (E.D. Mich. May 14, 2007) (''Congress could have specifically included subsidiaries within the purview of § 1514A if they wanted to,'' and, because they did not, ''the general corporate law principle would govern and employees of non-public subsidiaries are not covered under § 1514A.'').

[60] In *Johnson v. Siemens Building Technologies, Inc.*, ARB NO. 08-032, ALJ No. 2005-SOX-15 (ARB Mar. 31, 2011) (en banc), the ARB found that this amendment was simply a ''clarification'' of existing law and need not be given retroactive effect in order for Section 806 to apply to subsidiaries in pre-amendment cases. That ruling is consistent with the Senate Committee Report on Dodd-Frank. S. Rep. No. 111–176 at 114 (2010).

[61] 18 U.S.C. § 1514A(a)

[62] Prior to the passage of Dodd-Frank, the Dep't of Labor and federal courts consistently held that Section 806 retaliation claims could be subject to binding arbitration if an employment agreement provided for the arbitration of retaliation claims. *E.g.*, *Guyden v. Aetna, Inc.*, 544 F.3d 376 (2d Cir. 2008) (granting the employer's motion to compel mandatory arbitration of a SOX claim).

[63] 18 U.S.C. § 1514A(e)(2). Federal courts have divided on the enforceability of this retrospective ban on the arbitrability of retaliation claims. *Compare Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011) (upholding retroactive application of arbitration ban on the grounds that an arbitration clause specifies a forum to resolve disputes and does not affect substantive rights and the Dodd-Frank arbitration ban is also only procedural and should be applied to conduct that arose prior to its enactment), *with Blackwell v. Bank of Am. Corp.*, 2012 WL 1229673 (D.S.C. Mar. 22, 2012) (denying employee request to apply Dodd-Frank arbitration ban retroactively on the grounds that such application would impair the parties' contractual rights that were properly exercised when the employment agreement was signed), *Taylor v. Fannie Mae*, 839 F. Supp. 2d 259 (D.D.C. 2012) (refusing to retroactively apply arbitration ban in Dodd-Frank on the grounds that such application would impair the parties' prior substantive rights to contract for the arbitration of whistleblower retaliation claims), *and Henderson v. Masco Framing Corp.*, No. 3:11-CV-00088, 2011 BL 191929, 2011 WL 3022535 (D. Nev. July 22, 2011) (denying retroactive application of Dodd-Frank's arbitration ban on the grounds that an arbitration provision in an employment agreement is contractual in nature and a retroactive ban ''would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' of their earlier agreement''). *See also Holmes v. Air Liquide USA LLC*,No. H-11-2580, 2012 BL 19873, 2012 WL 267194 (S.D. Tex. Jan. 30, 2012) (rejecting former employee's claim

In addition to these amendments and clarifications, Section 922(a) of Dodd-Frank amends the Securities Exchange Act of 1934 to add a new provision, Section 21F, entitled ''Securities Whistleblower Incentives and Protection.''[64] As we have discussed in detail in prior articles, Section 21F(b)(1) of Dodd-Frank permits a bounty program to be paid to ''whistleblowers.'' Section 21F(a)(6) defines a ''whistleblower'' as any individual or group of individuals ''who provide[] . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.'' To protect whistleblowers from retaliation, Section 21F(h)(1)(A)(i-iii) prohibits employers from firing, demoting or discriminating in any other manner against a whistleblower because her or she (1) provides information to the SEC, (2) assists in any SEC investigation or action relating to such information, or (3) makes disclosures that are ''required or protected'' under various securities laws, including SOX.

To enforce this protection, Section 21F(h)(1)(B) creates a private right of action in federal court for individuals alleging unlawful retaliation without first exhausting administrative remedies with the Department of Labor.[65] Dodd-Frank provides a generous limitations period for retaliation claims, authorizing an individual to file suit up to six years after the violation occurs, or three years after material facts were known or reasonably should have been known, provided that the claim is brought within 10 years of the violation,[66] while the SOX limitations period is 180 days. Both Dodd-Frank and SOX permit a successful claimant to recover costs and attorneys' fees. SOX, however, limits damages for retaliation claims to reinstatement and actual back pay while damages under Dodd-Frank can include double back pay.[67]

Sean McKessy, director of the SEC's Office of the Whistleblower (''OWB''), has underscored the importance of the anti-retaliation protections in Dodd-Frank: ''[q]uality information is the lifeblood of the [Whistleblower] program. If people think if they report wrongdoing they get fired or risk other retaliation, that well will dry up quickly.''[68] These anti-retaliation protections can be enforced either by an aggrieved individual or by the SEC.[69] According to Director McKessy, the OWB is looking for retaliation cases for the SEC to bring to send a ''strong message that applies not only to the one company that's involved, but . . . more broadly that this is the kind of conduct that we are not in favor of.''[70]

III. Reach of Anti-Retaliation Protections of Dodd-Frank

An inherent inconsistency exists between the statutory definition of a whistleblower as set forth in Section 21F(a)(6), as an individual who provides information ''related to a violation of the securities laws'' *to the SEC*, and Dodd-Frank's definition of protected conduct by ''whistleblowers,'' contained in Section 21F(h)(1)(A)(i-iii), to include Section 806 SOX disclosures reported *solely within an organization*. Section 240.21F-2 of the SEC's Final Rules, entitled ''Whistleblower status and retaliation protection,'' attempts to harmonize this inconsistency. Part (a), regarding the eligibility for a whistleblower bounty, adopts the statutory definition of whistleblower[71]: pursuant to Section 240.21F-2(a), only individuals who report possible securities law violations to the SEC are eligible for a whistleblower bounty payment. Part (b), regarding the scope of the anti-retaliation protections afforded by Dodd-Frank, contains a broader definition of the term ''whistleblower'': under Section 240.21F-2(b), individuals who report to ''persons or governmental authorities other than the [SEC],''[72] including internal reports under Section 806 of SOX, are entitled to Dodd-Frank's anti-retaliation protections, regardless of whether the individuals have provided the same information to the SEC.

As of this writing, eight federal district courts that have grappled with this tension have reached the same conclusion as the SEC.[73] These courts identified the in-

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that mandatory arbitration provision in employment agreement of all federal statutory claims was rendered void Dodd-Frank's arbitration ban, even though claims arose under the Americans with Disabilities Act, Title VII, and state law and not SOX, on the ground that this ban does not apply to arbitration provisions in arbitration agreements executed prior to passage of Dodd-Frank because a statute may not impair contractual rights that existed at the time the contract was executed).

[64] 15 U.S.C. § 78u-6.

[65] 15 U.S.C. § 78u-6(h)(1)(B)(i) (2010). Individuals bringing Section 806 SOX retaliation claims must first file their claim with the Dep't of Labor. 18 U.S.C. § 1514A(b). In the event that a final administrative determination is not made within 180 days, the individual can remove his or her retaliation claim to federal court.

[66] *Compare* 18 U.S.C. § 1514A, *with* 15 U.S.C. § 78u-6(h).

[67] *Compare* 18 U.S.C. § 1514A(b)-(c), *with* 15 U.S.C. § 78u-6(h).

[68] Cheryl Soltis Martel, *SEC Whistleblower Office Preps for Additional Tips*, NACD Directorship (Aug. 24, 2012), http://www.directorship.com/sec-whistleblower-office-preps-for-additional-tips/.

[69] 17 C.F.R. § 240.21F-2(b)(2).

[70] Yin Wilczek, *In Year Two, SEC Whistleblower Office To Focus on Publicity, Anti-Retaliation Role*, 45 Bloomberg BNA Sec. Reg. & L. Rep. 52 (Jan. 11, 2013); *see* Susan Beck, *SEC's Whistleblower Chief Disappointed in Questions from Corporate America*, The Am Law Litigation Daily (Nov. 26, 2012), *available at* http://www.americanlawyer.com/digestTAL.jsp?id=1202579387875&slreturn=20130212111030.

[71] 17 C.F.R. § 240.21F-2(a) (''Definition of a whistleblower. (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower. (2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.'')

[72] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300-01 (June 13, 2011) (codified at 17 C.F.R. pts. 240-49).

[73] *See, e.g.*, *Rosenblum v. Thomson Reuters (Mkts.) LLC*, No. 13 Civ. 2219, 2013 BL 296296, 2013 WL 5780775 (S.D.N.Y. Oct. 25, 2013) (denying defendant's motion to dismiss anti-retaliation claim for wrongful termination, finding that the SEC rules do not require a report to the SEC in order to obtain whistleblower protection); *Ellington v. Giacoumakis*, No. 1:13-cv-11791, 2013 BL 288136 at *2-4, 2013 WL 5631046 at *2-3 (D. Mass. Oct. 16, 2013) (denying defendant's motion to dismiss an anti-retaliation claim for wrongful termination brought by a former employee who first reported concerns about misleading investment reports to his employer and its outside compliance firm on the ground that such reports were protected activity under SOX and Dodd-Frank extends anti-retaliation pro-

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consistency between the term ''whistleblower,'' defined in Section 21(F)(a)(6), as limited to individuals who report concerns of possible securities violations to the SEC, and the scope of protected conduct, set forth in Section 21F(h)(1)(A)(iii), to reach employees who made internal reports to their employer under SOX. To harmonize these differences, these courts looked at the legislative history of Dodd-Frank and found that Congress intended to expand statutory protections from retaliation for individuals who reported possible securities laws violations. Consequently, they reasoned that the provision that protects employees who make internal reports of possible securities violations from retaliation—regardless of whether they share the same information with the SEC—must be read as an exception to the Section 21F(a)(6) definition of a whistleblower. These courts found that this third category of protected activity in Section 21F(h)(1)(A)(iii) would be rendered meaningless if it only extended to individuals who qualify as SEC-reporting ''whistleblowers'' under Section 21F(a)(6).

However, the U.S. Court of Appeals for the Fifth Circuit, in *Asadi v. G.E. Energy (USA)*, recently rejected that expansive reading of the statute and held that the ''plain language'' of Section 21F(h)(1)(A) creates a private right of action for unlawful retaliation only for individuals who meet the statutory definition of whistleblower in Section 21F(a)(6).[74] Unlike the district courts that had previously addressed the issue, the Court of Appeals found no conflict between the statutory definition of ''whistleblower'' in Section 21F(a)(6) and the scope of activity protected from retaliation in Section 21F(h)(1)(A)(iii). According to the Fifth Circuit, Congress defined, in Section 21F(a)(6), who is entitled to the incentives and protections of Section 21F: those individuals who provide information relating to a securities law violation to the SEC. The appeals court reasoned that Section 21F(h)(1)(A)(i-iii) defines what actions by such individuals are entitled to protection from retaliation.[75] Based on its determination that the ''plain language and structure'' of Dodd-Frank establishes ''only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC,'' the appeals court found no basis on which to defer to the SEC's implementing rule which ''expands the meaning of a 'whistleblower' beyond the statutory definition'' by ''providing that an individual qualifies as a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity'' in Section 21F(h)(1)(A)(i-iii).[76] It maintained that the contrary position taken by prior district courts improperly expanded the statutorily defined term ''whistleblower.''[77] Last, the appeals court observed that extending Dodd-Frank retaliation protection to individuals who only made SOX internal reports of potential securities law violations would render the SOX anti-retaliation provision and administrative scheme practically moot because claimants would most likely elect to file Dodd-Frank retaliation claims in federal court and take advantage of the longer statute of limitations and greater monetary damages.[78]

Two days after the Fifth Circuit issued its decision, a district court in Colorado ruled that the ''plain language'' of Section 21F ''compels the conclusion'' that only individuals who fall within the definition of whistleblower in Section 21F(a)(6) are entitled to the protections in Section 21F(h)(1)(A)(i-iii).[79] That district court rejected the reasoning of prior district court decisions, including a decision in the same district. Subsequently, two federal district courts considered the same question and reached the opposite conclusion. Both courts declined to give deference to the Fifth Circuit's statutory interpretation because they found that the Fifth Circuit's narrow reading of the statutory definition of whistleblower was in conflict with the antiretaliation provision, which did not condition protection upon a report to the SEC. In view of the ambiguity in the statute,

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tection to SOX protected activity); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914, 2013 BL 134047, at *7-8, 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013) (permitting an anti-retaliation suit brought under Dodd-Frank to survive a motion to dismiss where a former employee alleged that he had been pressured by his supervisors to produce purportedly objective research reports about security products that were false or misleading and repeatedly reported these attempts to influence his published research as a possible SOX violation to his superiors); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1107 (D. Colo. Mar. 25, 2013) (holding that plaintiff's reports of alleged federal securities law violations to corporate management entitled plaintiff to protection from retaliation under Dodd-Frank); *Ott v. Fred Alger Mgmt., Inc.*, No. 1:11-cv-04418, 2012 U.S. Dist. LEXIS 143339, at *2 (S.D.N.Y. Sept. 27, 2012) (holding that plaintiff, who internally reported concerns about employer's trading policy and also reported such concerns to the SEC prior to enactment of Dodd-Frank, could proceed with her retaliation claim even though she would not be entitled to a whistleblower bounty); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424, 2012 BL 249583, at *3-7, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012) (permitting an anti-retaliation suit brought under Dodd-Frank to survive a motion to dismiss where an individual internally reported SOX protected information and subsequently sent a letter to the SEC by regular mail with the same information on the grounds that anti-retaliation protections attach even where an individual does not fit within the statutory definition of ''whistleblower''); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-94 & n.9 (M.D. Tenn. 2012) (noting that Dodd-Frank anti-retaliation protections will in certain circumstances apply to employees who internally report possible violations, but dismissing complaint on the grounds that the employer was not a publicly traded company and, accordingly, was not subject to the SEC's FCPA jurisdiction); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 BL 339160, at *4-5, 2011 WL 1672066, at *4-5 (S.D.N.Y. May 4, 2011) (finding that ''[t]he legislative history of the Act provides little evidence of Congress's purpose,'' court held that ''a literal reading of the definition of the term 'whistleblower' . . . , requiring reporting to the SEC, would effectively invalidate § 78u-6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC. . . . The contradictory provisions . . . are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring disclosure to the SEC as a narrow exception to [the statute's] definition of a whistleblower as one who reports to the SEC.'').

[74] 720 F.3d 620 (5th Cir. 2013).
[75] *Id.* at 630.
[76] *Id.* at 629.
[77] *Id.*
[78] Congress included in the Dodd-Frank Act a minimum cash reward of 10 percent of any monetary sanctions recovered by the government to encourage individuals to take the enormous risk of blowing the whistle in calling attention to fraud.
[79] *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 BL 192227, at *5-6, 2013 WL 3786643, at *5-6 (D. Colo. July 19, 2013).

the courts deferred to the SEC's interpretation of the statutory provision.[80]

At this juncture, the legal landscape on this issue is unsettled. The Fifth Circuit's interpretation of the statutory language of Section 21F is contrary to the more expansive reading of the anti-retaliation provision by the SEC and every district court, save one, to consider the question. It remains to be seen how this statutory interpretation question will be resolved.

In the short term, the Fifth Circuit decision, which restricts the anti-retaliation protections in Dodd-Frank to individuals who report information about possible securities violations to the SEC, will likely be viewed by many employers as a limit on potential retaliation claims. It may well be that the longer term effect of this decision, if adopted by other courts, may act to significantly weaken the effectiveness of internal reporting and compliance systems. Director McKessy recently noted the ''irony'' that ''many of the companies'' which had urged the SEC to impose a mandatory internal reporting requirement in its implementing rules before an individual could qualify for a SEC whistleblower bounty were now arguing that individuals who reported internally would not be entitled to Dodd-Frank protection from retaliation.[81] He speculated that, ''if word gets out that reporting internally means you will be unprotected, that may drive people to report to us'' and bypass internal reporting channels to ensure that they are protected against retaliatory conduct.[82]

In a 2011 national survey by the Ethics Resource Center, more than one in five employees who reported workplace misconduct claimed that they experienced some form of retaliatory behavior, a significant increase from survey results in 2007 and 2009.[83] The Center examined this jump in retaliation rates and found that the largest increase occurred among senior managers, who were more likely to experience traceable forms of retaliation, such as online harassment, harassment at home, decreased responsibilities or compensation, or even physical harm.[84] This reported increase in retaliatory conduct is reflected in a rising number of retaliation claims filed with the EEOC. For FY 1997, retaliation charges filed with the EEOC under all statutes enforced by the EEOC amounted to 22.6 percent of the total charges filed.[85] Fifteen years later, for FY 2012, retaliation charges filed with the EEOC under all statutes enforced by the EEOC amounted to 38.1 percent of the total charges filed.[86]

Assuming that the number of whistleblower complaints will continue to increase, it is reasonable to expect that retaliation claims, both by individuals who submit complaints to the SEC and by individuals who report internally, will also rise. To be sure, the number of SOX retaliation claims filed with the Department of Labor fell from 291 claims in FY2005 to 168 claims in FY 2012.[87] In view of the 2011 survey results from the Ethics Resource Center, it is unlikely that improvements in workplace behavior drove the reduced volume of SOX retaliation claims. More likely, the reduction in filings was driven by the recognition that SOX retaliation claimants fared poorly in the administrative process since the vast majority were either dismissed or withdrawn.[88] The expanded scope of protected activity and of prohibited adverse action under Section 806 announced in recent ARB decisions may make the administrative forum more attractive for SOX retaliation claimants. Since the passage of Dodd-Frank in 2010, a number of district court actions were brought by claimants alleging retaliation in violation of Dodd-Frank after making internal reports of SOX protected disclosures.[89] Until the federal courts resolve whether the

[80] *Rosenblum*, 2013 BL 296296 at *5, 2013 WL 5780775 at *5; *Ellington*, 2013 BL 288136 at *3, 2013 WL 5631046 at *2-3.

[81] Max Stendahl, ''*5 Questions For SEC Whistleblower Chief Sean McKessy*,'' Law 360 (August 19, 2013), *available at* http://www.law360.com/articles/465613/5-questions-for-sec-whistleblower-chief-sean-mckessy. *See also Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 95, May 25, 2011, *available at* http://www.sec.gov/rules/final/2011/34-64545.pdf.

[82] Stendahl, *supra* note 81.

[83] *2011 National Business Ethics Survey, Workplace Ethics in Transition*, Ethics Resource Center (2012), *available at* http://www.ethics.org/nbes/files/FinalNBES-web.pdf; *2011 National Business Ethics Survey Supplemental Research Report, Retaliation: When Whistleblowers Become Victims*, Ethics Resource Center (2012), *available at* http://www.ethics.org/nbes/files/RetaliationFinal.pdf.

[84] *Retaliation: When Whistleblowers Become Victims*, *supra* note 83.

[85] U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1997 Through FY 2012*, *available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[86] *Id.*

[87] Occupational Health and Safety Administration, U.S. Department of Labor, *Whistleblower Investigation Data FY 2005 Through FY 2012*, *available at* http://www.whistleblowers.gov/wb_data_FY05-12.pdf. For example, in FY 2006, 234 new SOX retaliation claims were filed and a determination was made for 261 SOX retaliation claims Of the 261 claims for which a determination was made, none was resolved on the merits, 186 were dismissed and 30 were withdrawn. For FY 2012, 168 new SOX retaliation claims were filed and a determination was made for 158 retaliation claims. Of the 158 claims for which a determination was made, 2 were resolved on the merits, 89 were dismissed, 18 were withdrawn, and 10 were ''kicked out'' because the Department of Labor failed to act within the statutory time period and the complainant filed an action for de novo review in federal district court.

[88] In May 2010, then-newly appointed Assistant Secretary of Labor David Michaels recognized that OSHA investigators found merit in only 3 percent of all whistleblower retaliation claims filed with OSHA for FY 2009, which he attributed to ''a series of institutional, administrative and legislative barriers that stand between many whistleblowers and justice'' and OSHA's ''failure to protect legitimate whistleblowers.'' David Michaels, Assistant Sec'y of Labor For Occupational Safety and Health, Whistleblowers and OSHA: Strengthening Professional Integrity, Address Before the Professionals for the Public Interest (May 11, 2010), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2206.

[89] *See, e.g.*, Complaint and Jury Demand, *Vioni v. Cerberus Capital Mgmt. L.P.*, No. 13-2276 (S.D.N.Y. Apr. 5, 2013) (alleging unlawful termination in retaliation for reporting fraud to supervisors); Complaint and Jury Demand, *Silverstein v. Wordlogic Corp.*, No. 13-2181 (S.D.N.Y. Apr. 2, 2013) (alleging improper retaliation after discovering and objecting to fraud being perpetrated against the company by its former CEO); Complaint and Jury Demand, *Orlandi v. Citibank, N.A.*, No. 12-6057 (E.D.N.Y. Dec. 10, 2012) (alleging unlawful termination in retaliation for reporting fraudulent conduct to supervisors); Complaint and Jury Demand, *Murray v. UBS Securities, LLC*, No. 12-5914 (S.D.N.Y. Aug. 2, 2012) (alleging unlawful termination for making SOX-protected disclosures); Complaint and Jury Demand, *Jagodzinski v. Morgan Stanley Smith Barney, LLC*, No. 12-5891 (S.D.N.Y. Aug. 1, 2012) (alleging un-

   ISSN 0037-0665

scope of the anti-retaliation protections in Dodd-Frank extend to such individuals, complaints alleging retaliation in violation of Dodd-Frank based on SOX internal reports are likely to continue to be filed.

When Dodd-Frank was signed into law, a number of observers predicted that its bounty provisions could stimulate a significant number of whistleblower tips to the SEC from individuals outside the U.S.[90] During the first full year of operation of the SEC's whistleblower program, the SEC received a total of 3,001 tips from whistleblowers, of which 324, or 10.8 percent, were from whistleblowers working outside the U.S.[91] Undoubtedly, other employees working outside the U.S. reported concerns about potential violations of the securities laws only to their employers and did not provide the same information to the SEC. As the number of individuals reporting potential misconduct—both internally and externally—increases, many of those individuals will have a heightened sensitivity to conduct in the workplace that they perceive as retaliatory. Neither Dodd-Frank nor SOX specify whether the statutory protections against retaliation extend to employees working outside the U.S. who report potential wrongdoing internally or to the SEC. In the second part of this Article, to be published next week, we evaluate the extent to which the anti-retaliation provisions of these statutes protect employees outside the U.S. who report alleged misconduct—either to their employer or to the SEC. In the current climate where retaliation claims are on the rise, an increased understanding by employees (and their counsel) of the statutory protections in SOX and Dodd-Frank against retaliation will likely contribute to a surge of retaliation claims that may be tougher and more expensive to defend and may yield unforeseen collateral consequences. It is critical for organizations to consider a number of complimentary practical strategies to prevent retaliatory conduct and to address complaints of retaliation when they arise. The second part of this Article discusses a number of recommended strategies for organizations to consider that may reduce retaliatory conduct and resolve retaliation complaints internally and may mitigate the reputational risks to the organization in the event retaliation claims are filed.

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lawful termination for reporting violations of federal laws and SEC regulations to supervisors); Complaint, *Jones v. Southpeak Interactive Corp. of Delaware*, No. 12-443 (E.D. Va. June 18, 2012) (alleging unlawful termination for providing information related to alleged violations of anti-fraud securities laws internally and to the SEC); Complaint, *Newman v. Met. Life Ins. Co.*, No. 12-10078 (D. Mass. Jan. 12, 2012) (alleging unlawful termination and improper denial of disability benefits in retaliation for reporting securities violations internally and to the SEC); Complaint and Jury Demand, *Roganti v. Metro. Life Ins. Co.*, No. 12-0161 (S.D.N.Y. Jan. 9, 2012) (alleging improper retaliation for reporting allegedly unlawful business practices internally and to the SEC).

[90] Dodd-Frank makes clear that any tip to the SEC from a qualified whistleblower working outside the US that results in a successful enforcement action with a sanction of more than $1 million will make that whistleblower eligible for a whistleblower bounty.

[91] U.S. Securities and Exchange Commission, *Annual Report on the Dodd-Frank Whistleblower Program Fiscal Year 2012* (November 2012), Appendices A and B, *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.