ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

KATHY J. SYLVESTER	*	
	*	
and	*	
	*	
THERESA NEUSCHAFER,	*	
	*	
Complainants	*	ARB Case No. 07-123
	*	
v.	*	ALJ Case Nos. 2007-SOX-39 and
	*	2007-SOX-42
PAREXEL INTERNATIONAL, LLC,	*	
	*	
Respondent	*	
	*	

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

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

JONATHAN T. REES
MEGAN E. GUENTHER
Counsels

EDWARD D. SIEGER
Senior Attorney
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., N.W.
Rm. N-2716
Washington, D.C. 20210
Sieger.edward@dol.gov
(202) 693-5771

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes, regulations and rules:

Miscellaneous:

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

KATHY J. SYLVESTER	*	
	*	
and	*	
	*	
THERESA NEUSCHAFER,	*	
	*	
Complainants	*	ARB Case No. 07-123
	*	
v.	*	ALJ Case Nos. 2007-SOX-39 and
	*	2007-SOX-42
PAREXEL INTERNATIONAL, LLC,	*	
	*	
Respondent	*	
	*	

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

Introduction

Pursuant to 29 C.F.R. 1980.108(a)(1) and the Administrative Review Board's (Board's) November 12, 2010 Order, the Assistant Secretary for the Occupational Safety and Health Administration (OSHA), through counsel, submits this brief as amicus curiae. The Assistant Secretary responds to the questions in the Board's November 12 Order as follows:

(1) Whether the pleading requirements of the Federal Rules of Civil Procedure, particularly Rules 8(a), 9(b), 12(b) and 15(a), and interpretive case law apply to administrative whistleblower complaints filed with the Department of Labor pursuant to Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A? Answer: The pleading requirements and interpretive case law do not apply to the extent they would require SOX

complaints to comply with the Rule 8(a) and 9(b) pleading requirements and permit dismissal of complaints on that basis under Rule 12(b) or require amendments of complaints under Rule 15(a). See Argument I, *infra*.

(2) Whether 29 C.F.R. § 18.40 provides the exclusive means available to the parties for seeking pre-hearing dismissal by an administrative law judge (ALJ) of SOX claims? Answer: Section 18.40 is the exclusive means for seeking dismissal of complaints but not for adjudicating affirmative defenses such as timeliness. See Argument II, *infra*.

(3) To what extent, if at all, is the complaint filed with OSHA pursuant to 29 C.F.R. § 1980.103 relevant to subsequent proceedings before an ALJ upon the filing of a hearing request? Answer: The OSHA complaint may be relevant, for example, to helping to define the issues before the ALJ and to provide a basis for the parties to develop facts in the ALJ proceedings. See Argument III, *infra*.

(4) What must a claimant establish, whether at the pre-hearing stage or at hearing on the merits, to sustain a claim of having engaged in protected activity under Section 806 of SOX?

(a) whether the claimant must establish that the protected activity definitively and specifically relates to a violation of one or more of the laws listed in Section 806 of SOX? Answer: Yes, insofar as "definitively and specifically" simply requires sufficient specificity to alert the employer to the claimant's concerns. The claimant is not required to identify the specific law at issue or use the word "fraud" to have engaged in protected activity. See Argument IV.A, *infra*.

(b) what must a complainant show to meet the requirement that the complainant reasonably believe that the employer's conduct violated one or more of those laws? Under the subjective test? Under the objective test? Answer: The primary focus is on objective reasonableness, which involves a fact-specific inquiry based on the knowledge available to a reasonable person in the same factual circumstances and with the same training and experience as the complainant. Under the subjective test, a complainant's actual belief is generally presumed unless the employer establishes the absence of such a belief. See Argument IV.B, *infra*.

(c) whether the claimant must establish that the asserted violation of those laws involves or relates to fraud against shareholders? Answer: No. The plain language and legislative history of SOX Section 806 show that fraud need not be against shareholders. The Board should reconsider its contrary conclusion in *Platone v. FLYI, Inc.*, No. 04-154, 2006 WL 3246910 (ARB Sept. 29, 2006), *aff'd on other grounds*, 548 F.3d 322 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 622 (2009). See Argument IV.C, *infra*.

(d) whether the claimant must establish the various elements of fraud? Answer: No. The complainant must establish only a reasonable belief that activities could involve fraud. The elements of fraud, when required by laws referenced in SOX Section 806, may provide guidance in assessing the reasonableness of a claimant's belief, but a claimant need not establish each element. See Argument IV.D, *infra*.

(e) Notwithstanding that many of the laws listed in Section 806 of SOX contain materiality requirements, should Section 806 be interpreted to independently impose a materiality requirement on communications and/or actions that a claimant contends are

protected activity? Answer: No. The text of the statute imposes no such requirement. See Argument IV.E, *infra*.

STATEMENT

1. Congress enacted the Sarbanes-Oxley Act of 2002 "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws and for other purposes." Pub. L. No. 107-204, 116 Stat. 745 (2002) (preamble). Title VIII of SOX includes Section 806, 116 Stat. at 800. That provision, codified at 18 U.S.C. § 1541A, prohibits discrimination against a covered employee because of any lawful act done by the employee, among other things,

> 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 section 1341, 1343, 1344, or 1348 [18 U.S.C. §§ 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, 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.

18 U.S.C. § 1514A(a)(1).

A person alleging discrimination may seek relief by filing a complaint with the Secretary of Labor (Secretary). 18 U.S.C. § 1514A(b)(1)(A). The procedure and burdens of proof in such an action are governed by the rules of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) whistleblower provision, 49 U.S.C. § 42121(b). 18 U.S.C. § 1514A(b)(2)(A), (C). Under AIR-21, the Secretary

notifies the person named in the complaint of the allegations and substance of the evidence supporting the complaint, after which that person may meet with representatives of the Secretary and present witnesses. 49 U.S.C. § 42121(b)(1) and (2)(A). The Secretary cannot investigate and must dismiss a complaint if the complainant fails to make a prima facie showing that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. *Id*. § 42121(b)(2)(B)(i). Even if the complainant makes this showing, the Secretary cannot investigate and must dismiss the complaint if the employer establishes by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *Id*. § 42121(b)(2)(B)(ii). After investigating, the Secretary issues findings on whether there has been a violation, and either the complainant or the person alleged to have discriminated may file objections to the findings and request a hearing. *Id*. § 42121(b)(2)(A).

2. The Assistant Secretary's regulations at 29 C.F.R. pt. 1980 implement these SOX provisions on complaints and investigations. They provide that "[n]o particular form of a complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." 29 C.F.R. § 1980.103(b). After receiving a complaint and notifying the person named in the complaint, the Secretary considers "[t]he complaint, supplemented as appropriate by interviews of the complainant" in deciding whether to investigate. *Id*. § 1980.104(b)(1). After investigating, the Assistant Secretary issues findings and informs the parties of their right to file objections and to request a hearing, and files a copy of the original complaint and findings with the Chief ALJ. *Id*. § 1980.105. Parties then have 30 days to file objections and a request for a hearing. *Id*. §

1980.105(c). The objections must be in writing and state whether they pertain to the findings or the preliminary order of relief. *Id*. § 1980.106(a).

Upon receipt of an objection and request for a hearing, the Chief ALJ must promptly assign the case to an ALJ who will notify the parties of the day, time, and place of hearing. *Id*. § 1980.107(a). The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. *Id*. ALJs have broad discretion to limit discovery to expedite the hearing. *Id*. The rules of practice and procedure for administrative law judges (ALJs), 29 C.F.R. pt. 18, govern hearings on SOX complaints, except as provided in the Assistant Secretary's SOX rules. 29 C.F.R. § 1980.107.

Under the ALJ rules, a "[c]omplaint" means "any document initiating an adjudicatory proceeding, whether designated a complaint, appeal or an order for proceeding or otherwise." 29 C.F.R. § 18.2(d). The ALJ rules require answers to complaints, *id*. § 18.5(a) and (d), but do not specifically provide for motions to dismiss complaints. Instead, ALJs have general authority to apply the Federal Rules of Civil Procedure, except when "any statute, executive order or regulation" controls. *Id*. § 18.1(a).

After initiation of ALJ proceedings, an ALJ may order parties to file pre-hearing statements of position addressing issues in the proceeding, stipulated facts, facts in dispute, witnesses, applicable law, and the conclusion to be drawn. 29 C.F.R. § 18.7. Upon motion by a party or upon the ALJ's own motion, an ALJ may also direct the parties to participate in a pre-hearing conference. *Id*. § 18.8. At least 20 days before a hearing, any party may move for summary decision on all or any part of the proceeding.

Id. § 18.40(a). An ALJ may enter a summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, or materials officially noticed show that there is no genuine issue of material fact and a party is entitled to summary decision. *Id*. §§ 18.40(d), 18.41. Where a genuine question of material fact is raised, the ALJ sets the case for an evidentiary hearing. *Id*. § 18.41(b).[1]

ARGUMENT

I. SOX Complaints to OSHA are Significantly Different from Federal Court Pleadings and Should Not Be Subject to Federal Court Pleading Standards

A civil action in federal court is commenced by filing a complaint with the court. Fed. R. Civ. P. 3. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2). A party alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). A party may file a motion to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A party may also amend a complaint before trial. Fed. R. Civ. P. 15(a).

For approximately 50 years, a complaint was sufficient under Rule 8(a) and could not be dismissed under Rule 12(b)(6) unless it "appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Recently, the Supreme Court "retired" the "no set of facts" standard and replaced it with a more stringent "plausibility" standard that requires a complaint to "contain sufficient factual matter, accepted as true, to state a

[1] In the instant case, OSHA investigated the complaints but found no credible evidence to confirm that the complainants engaged in protected activity. The ALJ dismissed the complaints under Fed. R. Civ. P. 12(b)(1) and (6) for failure to allege protected activity. *Sylvester v. Parexel Int'l LLC*, Case Nos. 2007 SOX 39 and 2007 SOX 42, 2007 WL 7135793 (ALJ Aug. 31, 2007).

claim to relief that is plausible on its face." See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks and citation omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, the application of Rule 9(b) has become more demanding in recent years, additional pleading requirements have been imposed in certain private cases alleging securities fraud, and uncertainty has arisen as to which averments count as "fraud" under Rule 9(b). See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319-24 (2007) (discussing securities fraud pleading requirements); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1297, at 162-175 (3d ed. 2004) (discussing more demanding pleading requirements and lack of clarity on which averments count as fraud).

These federal court pleading requirements do not apply to SOX complaints filed with OSHA. The "plain and short statement" requirement for a federal court complaint gives notice of a claim so the defendant may mount a defense. See *Twombly*, 550 U.S. at 555. A SOX complaint filed with OSHA is intended to enlist the assistance of a federal agency to investigate the complainant's allegations. See 29 C.F.R. § 1980.104. A SOX complaint therefore does not have to be in a particular form and only has to state fully the acts and omission, with pertinent dates, which are believed to constitute the violations, to assist OSHA in determining whether evidence of discrimination exists. See *id*. § 1980.103(b); 69 Fed. Reg. 52,104, 52,106 (Aug. 24, 2004).

Moreover, the Assistant Secretary's regulations also do not limit the complainant to the allegations in his or her complaint but instead explicitly permit the complaint to be "supplemented as appropriate by interviews of the complainant." 29 C.F.R. § 1980.104; 69 Fed. Reg. at 52,106. This framework differs from the framework applicable to

complaints in federal court, where litigants are generally confined to matters in the pleadings on a motion to dismiss for failure to state a claim. See *Tellabs*, 551 U.S. at 323.

The ALJ rules also establish that federal court pleading requirements do not apply to SOX complaints filed with OSHA. As discussed above, the ALJ rules define "[c]omplaint" as "any document initiating an adjudicatory proceeding, whether designated a complaint, appeal or an order for proceeding or otherwise." 29 C.F.R. § 18.2(d). A complaint filed with OSHA to initiate an investigation does not initiate an adjudicatory proceeding with the ALJ; rather, an objection to findings initiates such a proceeding. See 29 C.F.R. §§ 1980.105(c), 1980.106(a).[2] Because a complaint to OSHA is not a complaint as defined in the ALJ rules, the ALJ rules requiring answers to complaints and service of complaints do not apply. See 29 C.F.R. §§ 18.3(d), 18.5(a) and (d)(2). Indeed, answers and service are completely unnecessary because the issues have already been framed by the Assistant Secretary's findings and the parties' objections, and the SOX regulations provide for service of these materials. See 29 C.F.R. §§ 1980.105(b), 1980.106(a). The ALJs' general authority in 29 C.F.R. § 18.1 to apply the Federal Rules of Civil Procedure also does not authorize ALJs to impose pleading requirements on SOX complaints or entertain motions to dismiss them for failure to state a claim. That authority is subject to other controlling rules, including the SOX rules, see 29 C.F.R. §§ 18.1, 1980.107, and here the SOX rules are controlling.

[2] Such objections certainly do not implicate federal court pleading requirements; the regulations prescribe only that they specify whether they pertain to OSHA's findings or preliminary order.

Because a plain reading of the SOX and ALJ rules leads to the conclusion that federal court pleading standards do not apply to OSHA complaints, the Board should decide the first question in the Board's November 12 Order on that basis. To the extent there is ambiguity, however, the Board should give controlling deference to the Assistant Secretary's interpretation of his SOX regulations. See, *e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation controls unless it is plainly erroneous or inconsistent with the language of the regulations); Secretary's Order No. 1-2010, 75 Fed. Reg. 3924, 3925 (Jan. 25, 2010) (Board "shall observe" Department's regulations in its decisions). The heightened pleading standards applicable in federal court litigation impose burdens on complainants and are unnecessary to the adjudication of SOX cases. Such heightened pleading standards are not consistent with the Assistant Secretary's reasonable construction of the SOX regulations governing procedures for complaints and the initiation of ALJ proceedings.[3]

II. Although 29 C.F.R. § 18.40 Is the Exclusive Means for Seeking Dismissal of Complaints on the Merits, ALJs Retain Ample Authority to Expeditiously Dispose of Meritless Cases

The summary decision provisions in 29 C.F.R. § 18.40 are the exclusive means for seeking dismissal of SOX complaints on the merits. That conclusion follows logically from the absence of ALJ rules allowing dismissal of SOX complaints and the inapplicability of Fed. R. Civ. P. 12(b)(6) to SOX complaints. It is also reasonable because ALJs retain sufficient authority to dispose of meritless cases. For example, they

[3] The Assistant Secretary recognizes that the Board has on occasion entertained and granted motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). To the extent that applying federal pleading standards to administrative whistleblower complaints ever was appropriate, it is now particularly ill-suited in light of the pleading standard reflected in *Twombly* and *Iqbal*, and the possibility of more onerous pleading requirements applicable to federal court allegations of fraud.

can require pre-hearing statements of position or hold pre-hearing conferences under 29 C.F.R. §§ 18.7 and 18.8 to narrow issues. They can limit discovery under 29 C.F.R. § 1980.107(a). Thus, ALJs can manage proceedings to focus first on potentially dispositive issues -- such as a failure to engage in protected activity, or an untimely complaint to OSHA or untimely objections to OSHA findings -- and decide those issues expeditiously through motions for summary decision. See 29 C.F.R. § 18.40(a) (motion for summary decision may address all or any part of the proceeding with no time limit for filing provided it is at least 20 days before a hearing).

III. Complaints to OSHA are Relevant to Subsequent ALJ Proceedings Because They May Limit the Issues and Provide a Basis for the Parties to Develop Facts

Although whistleblower complaints to OSHA cannot be dismissed for failure to meet pleading requirements, they may be relevant in several ways. For example, the complaint to OSHA may help to define the issues before the ALJ because complainants must generally raise issues with OSHA either in the complaint or in the course of the investigation if they are to be considered in subsequent proceedings. See, *e.g.*, *Smith v. Psychiatric Solutions, Inc.*, No. 3:08cv3, 2009 WL 903624, at *8 (N.D. Fla. Mar. 31, 2009), *aff'd*, 358 Fed. Appx. 76, 78 n.2 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3293 (2010); *Bridges v. McDonald's Corp.*, No. 09-cv-1880, 2009 WL 5126962, at *2-*3 (N.D. Ill. Dec. 21, 2009). Also, the complaint to OSHA may serve as a basis for a respondent's subsequent requests for discovery or as a basis for factual stipulations between the parties during the ALJ proceeding.

IV. To Sustain a Claim of Having Engaged in Protected Activity, a Complainant Must Establish that He Communicated, based on a Belief that is Reasonable in the Circumstances, that Specific Conduct Violates One or More of the Laws Listed in Section 806, but Does Not Have to Establish Fraud Against Shareholders, the Elements of Fraud, or Independent Materiality

As discussed above, Section 806 of SOX prohibits discrimination against a covered employee because of any lawful act done by the employee to provide information to specific individuals or entities "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [18 U.S.C. §§ 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." 18 U.S.C. § 1514A(a)(1). Recently, a number of courts of appeals, including the Fourth Circuit, which has jurisdiction over an appeal in this case, have addressed what a complainant has to show to establish protected activity under this section. See 49 U.S.C. § 42121(b)(4), made applicable to SOX cases by 18 U.S.C. § 1514A(b)(2); *Sylvester v. Parexel Int'l LLC*, Case Nos. 2007 SOX 39 and 2007 SOX 42, 2007 WL7135793, at *3 (ALJ Aug. 31, 2007) (all pertinent events took place in Maryland). As discussed below, the Assistant Secretary's views are consistent with the legal rules articulated in most of these court of appeals decisions. The Assistant Secretary's views are not consistent with the Board's 2006 conclusion that allegations of mail or wire fraud must "be of a type that would be adverse to investors' interests." *Platone v. FLYI, Inc.*, No. 04-154, 2006 WL 3246910, at *7 (ARB Sept. 29, 2006), *aff'd on other grounds*, 548 F.3d 322 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 622 (2009). See Argument IV.C, *infra*.

A. The "Definitively and Specifically" Requirement Applies but Means Only that a Complaint to an Employer Must Be Sufficiently Factually Specific to Alert the Employer to the Complainant's Concerns

The Board has stated in a number of cases that to constitute protected activity, an employee's complaint to an employer must "definitively and specifically" relate to SOX-covered conduct. See, *e.g.*, *Ryerson v. American Express Fin. Servs., Inc.*, No. 08-064, 2010 WL 3031375, at *5 (ARB July 30, 2010). A number of courts of appeals, including the Fourth Circuit, have reached the same conclusion. See, *e.g.*, *Van Asdale v. International Game Tech.*, 577 F.3d 989, 997 (9th Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009); *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476-77 (5th Cir. 2008); *Vodopia v. Koninklijke Philips Elecs., N.V.*, No. 09-4767-cv, 2010 WL 4186469, at *3 (2d Cir. Oct. 25, 2010) (unpub'd); see also *Fraser v. Fiduciary Trust Co. Int'l*, No. 09-4188-cv, 2010 WL 4009134, at *1 (2d Cir. Oct. 14, 2010) (unpub'd), aff'g No. 04 Civ. 6958, 2009 WL 2601389, at *5 (S.D.N.Y. Aug. 25, 2009) (which had applied the "definitively and specifically" requirement, largely for the reasons stated by the district court); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (communications must "specifically relate[] to one of the laws listed in § 1514A").

The "definitively and specifically" requirement is not based on the text of SOX Section 806. The phrase appears to have originated in an Energy Reorganization Act (ERA) case, *American Nuclear Resources, Inc. v. United States Department of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). The court there concluded that to be a protected safety report under the ERA, "an employee's acts must implicate safety definitively and specifically." *Id.* The court cited *Bechtel Construction Co. v. Secretary of Labor*, 50

F.3d 926, 931 (11th Cir. 1995), for that proposition, but *Bechtel* does not use that phrase. Instead, *Bechtel* distinguishes between particular, repeated concerns about safety procedures that were protected and "general inquiries regarding safety" that were not protected under the ERA. *Id*. The Sixth Circuit's reliance on *Bechtel* shows that the phrase "definitively and specifically" is simply another way of requiring that a communication to an employer be more than a general inquiry. Cf. *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (recognizing employer's legitimate due process concerns that internal communications be sufficient to give notice that a complaint under the Surface Transportation Assistance Act is being filed); *Malmanger v. Air Evac EMS, Inc.*, No. 08-071, 2009 WL 2371239, at *4 (ARB July 2, 2009) (to be protected under AIR-21, information provided to the employer "must be specific in relation to a given practice, condition, directive or event that affects aircraft safety").

In these circumstances, the Board should continue to apply the "definitively and specifically" requirement but clarify that the requirement is simply a means to ensure that an employee's communications to an employer are not generalized inquiries and provide sufficient notice to the employer that the employee is raising concerns about conduct that the employee could reasonably believe violates the laws listed in SOX Section 806. As the Fourth Circuit reasoned,

> This requirement ensures that an employee's communications to his employer are factually specific. An employee need not "cite a code section he believes was violated" in his communications to his employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal.

Welch, 536 F.3d at 276 (citation omitted); see *Van Asdale*, 577 F.3d at 997 (employee need not use terms "fraud" if conduct is identified); *Harp v. Charter Commc'ns, Inc.*, 558

F.3d 722, 725 (7th Cir. 2009) ("the critical focus is on whether the employee reported specific conduct that constituted a violation of federal law, not whether the employee correctly identified that law"); *Day*, 555 F.3d at 55 (employee not required to cite code provision in question or show an actual violation, but general inquiries are not protected).

B. "Reasonably Believes" in SOX Section 806 Means that a Complainant Believes and a Person in the Same Factual Circumstances and With the Same Training and Experience Could Reasonably Believe that the Conduct at Issue Could Violate One of the Laws Listed in SOX Section 806

Courts of appeals and the Board have concluded that a complainant must have a subjective and objectively reasonable belief that conduct violates a law listed in SOX Section 806. See, *e.g., Gale v. United States Dep't of Labor*, No. 08-14232, 2010 WL 2543138, at *3 (11th Cir. June 25, 2010) (agreeing with six other courts of appeals); *Welch*, 536 F.3d at 277 n.4 (agreeing with Board). The Assistant Secretary agrees that the reasonable belief inquiry has both a subjective and an objective component.

Under the subjective test, the complainant ordinarily does not have to do more than assert a belief. That is because the legislative history to Section 806 "makes clear that its protections were 'intended to include all good faith and reasonable reporting of fraud, and [that] there should be no presumption that reporting is otherwise, absent specific evidence.'" *Van Asdale*, 577 F.3d at 1002 (quoting 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002)) (statement of Sen. Leahy); see *Day*, 555 F.3d at 54 & n.9. Thus, absent some showing that a complainant does not actually believe what he or she is asserting, see *Gale*, 2010 WL 2543138, at *1, *4, the complainant's assertion of a belief is sufficient to meet the subjective test.

Under the objective test, reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Allen*, 514 F.3d at 477 (citing Board decisions); see *Harp*, 558 F.3d at 723; *Welch*, 536 F.3d at 277 n.4. Ordinarily, objective reasonableness cannot be decided as a matter of law "[i]f reasonable minds could disagree on this issue." *Allen*, 514 F.3d at 477 (internal quotation marks and citations omitted); see *Welch*, 536 F.3d at 277 n.4. This factual circumstances test is similar to the test for Title VII retaliation, see *Allen*, 514 F.3d at 477, and should be construed the way that other reasonable person standards are construed. See S. Rep. No. 107-146, at 19 (2002) (the "normal reasonable person standard used and interpreted in a wide variety of contexts" is to apply under SOX Section 806) (citing *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993)); 69 Fed. Reg. at 52,105.

The Fourth Circuit has concluded that the reasonable belief must concern a violation that has occurred or is in progress rather than a violation that is about to happen upon some future contingency. *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (2008). This formulation, although not literally incorrect, requires further explanation, as the dissent in *Livingston* recognized. In particular, an employee does not have to prove that a violation is complete, but "has a claim if he was retaliated against for reporting his reasonable belief that a violation 'was taking shape,' that 'a plan was in motion' to violate the law, or that a violation was 'likely to occur,'" as is the case under Title VII. *Id*. at 361 (Michael, J., dissenting) (citation omitted). That conclusion follows from the nature of the laws referenced in SOX Section 806, which require a scheme to violate those laws

rather than a completed violation. See *Neder v. United States*, 527 U.S. 1, 25 (1999) (noting that the mail, wire, and bank fraud statutes, 18 U.S.C. 1341, 1343, 1344, prohibit "the 'scheme to defraud,' rather than the completed fraud"); 15 U.S.C. 78j(b) (prohibiting "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities); 17 C.F.R. 240.10b-5 (unlawful "[t]o employ any device, scheme, or artifice to defraud," to make untrue statements of material fact or omit material facts, or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" in connection with the purchase or sale or any security). The conclusion is also a matter of common sense. As the Ninth Circuit explained in holding that employees need only believe that there could be fraud and that a further investigation is necessary to determine whether a fraud had in fact occurred, the alternative of "[r]equiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure." *Van Asdale*, 577 F.3d at 1002.

C. A Complainant Does Not Have to Establish that a Violation Involves Fraud Against Shareholders in All Cases

SOX Section 806 prohibits retaliation against employees who report conduct they reasonably believe "constitutes a violation of section 1341, 1343, 1344, or 1348 [18 U.S.C. §§ 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." 18 U.S.C. § 1514A(a)(1). The plain language of Section 806 covers six different laws or classes of laws: mail fraud (18 U.S.C. § 1341), fraud by wire, radio, or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), securities fraud (18 U.S.C. § 1348), any rule or regulation of the SEC, and any provision of federal law relating to

fraud against shareholders. Mail fraud, fraud by wire, radio, or television, and bank fraud on their face are not limited to frauds against shareholders. See 18 U.S.C. §§ 1341, 1343 (both applying to "[w]hoever, having devised or intending to devise any scheme or artifice to defraud"); *id.* § 1344 (applying to "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution . . ."). If Congress had wanted to limit Section 806 to frauds against shareholders, it would have so specified. As a district court recently explained,

> By listing certain specific fraud statutes to which § 1514A applies, and then separately, as indicated by the disjunctive 'or,' extending the reach of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders, § 1514A 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.

O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008); see *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382-83 (M.D. Ga. 2007) (rejecting contrary district court and ALJ authority based on the plain language of Section 806); but cf. *Vodopia*, 2010 WL 4186469, at *3 (affirming dismissal of SOX complaint that "fails to allege that [the complainant] reasonably believed that he was reporting potential securities fraud as opposed to patent-related malfeasance," without stating which laws in Section 806 were allegedly violated).

Congress's purposes in enacting the Sarbanes-Oxley Act support this plain reading of Section 806. Congress enacted the law "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, *and for other purposes*." Preamble to Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (emphasis added). Among those other purposes were provisions

enhancing criminal penalties for white-collar criminal offenses, including mail and wire fraud and violations of the Employee Retirement Income Security Act, *id*. Title IX, § 901, 116 Stat. at 804, and a new criminal prohibition against "[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense." *Id*. § 1107 (adding 18 U.S.C. § 1513(e)). These provisions are not limited to frauds relating to shareholders. See also *id*. § 307, 116 Stat. at 784 (requiring reporting by certain attorneys of material violations of securities laws "or breach of fiduciary duty or similar violation by the company and any agent thereof"); 17 C.F.R. § 205.2(d) (defining breach of fiduciary duty to include any breach under federal, state, or common law). Similarly, provisions in Title VIII of the Act, the Title containing Section 806, are not limited to frauds against shareholders. See Pub. L. No 107-204, § 802, 116 Stat. at 800 (adding 18 U.S.C. § 1519, prohibiting destruction, alteration, or falsification of records in federal investigations and bankruptcy, as well as destruction of corporate audit records). And even provisions of the Act designed to enhance financial disclosures are not limited to disclosures themselves but include enhanced conflict of interest provisions and a required code of ethics for senior financial officers. Pub. L. No. 107-204, §§ 402, 406, 116 Stat. at 787, 789.

The legislative history also supports giving effect to the plain meaning of Section 806. The provision was included in a free-standing bill, the Corporate and Criminal Fraud Accountability Act of 2002, that became Title VIII of the Sarbanes-Oxley Act. See 148 Cong. Rec. S7357-S7358 (daily ed. July 25, 2002) (statement of Sen. Leahy).

The general purpose of this Act was to "restor[e] trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. No. 107-146, at 2 (2002). Section 806's purpose was "to protect whistleblowers who report fraud." *Id*. The provision was a response not just to actions against whistleblowers at Enron and Arthur Andersen, but to a "culture, supported by law, that discourage[s] employees from reporting fraudulent behavior," a "'corporate code of silence'" that "hampers investigations . . . [and] creates a climate where ongoing wrongdoing can occur with virtual impunity." *Id*. at 5. Legislators believed that this code of silence had to be remedied because it generally had "serious and adverse" consequences for investors and for the stock market, *id*., but they described Section 806 as addressing "fraud," without limiting the intended coverage to "fraud against shareholders." See *id*. at 10, 13, 18-19; 148 Cong. Rec. S7418, S7420 (daily ed. July 26, 2002) (section by section analysis).

Protecting employees who report mail fraud, wire, radio or television fraud, and bank fraud whether or not the misconduct adversely affects shareholders effectuates these purposes. The frauds covered by these laws are serious and include conduct long considered unacceptable by companies even if they may not directly affect shareholders. See, *e.g.*, *Carpenter v. United States*, 484 U.S. 19, 24 (1987) (Court is evenly divided on whether use of company's confidential information violates securities laws but upholds convictions for mail and wire fraud); *United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (payment of bribes to employees of another company to obtain material and information violate mail and wire fraud statutes). Protecting employees who report such perceived misconduct effectuates Congress's goal of changing a

corporate culture that discourages reporting of fraud, imposes a code of silence and hampers investigations. The "concern that innocent business behavior will become the subject of a Sarbanes-Oxley complaint is addressed by the statutory requirement that an employee 'reasonably believe' that his or her disclosure is related to fraud or a violation of a Securities and Exchange Commission rule or regulation." 69 Fed. Reg. at 52,105. The Board should therefore reconsider its conclusion in *Platone* that Section 806 protects only allegations of mail or wire fraud "that would be adverse to investors' interests." 2006 WL 3246910, at *7.

D. A Complainant Need Not Establish the Various Elements of Fraud But Must Establish a Reasonable Basis for Believing that Reported Conduct Could Involve Fraud

Because an employee only needs a reasonable belief that conduct could violate one of the laws listed in SOX Section 806, an employee does not have to establish actual violations. See, *e.g.*, *Allen*, 514 F.3d at 477 (a "reasonable but mistaken belief" is protected); *Van Asdale*, 577 F.3d at 1001 (same). It is also sufficient if an employee reasonably believes that conduct could amount to fraud because the laws listed in SOX Section 806 prohibit schemes or artifices to defraud even if they are not actual completed frauds, see *supra*, pp. 16-17, and "[r]equiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress's goal of encouraging disclosure." *Van Asdale*, 577 F.3d at 1002.

Determining whether an employee's belief is objectively reasonable may require some consideration of the elements needed to establish an actual violation, however. See 18 U.S.C. § 1514A(a)(1) (employee must reasonably believe the conduct "constitutes" a

violation). That is consistent with the law under Title VII, where the legal requirements for a violation are used to assess the reasonableness of an employee's belief that conduct violates Title VII. See, *e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001). Courts of appeals have adopted a similar approach in Section 806 cases. See *Day*, 555 F.3d at 55 (in a case alleging shareholder fraud, "the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud"); *Van Asdale*, 577 F.3d at 1001 (agreeing with *Day*).

Requiring an employee's theory of fraud to "approximate" the basic elements of the claim is not a test in itself but simply a tool to determine whether the employee's belief is reasonable. As discussed above, objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Allen*, 514 F.3d at 477 (citing Board decisions); see also *Harp*, 558 F.3d at 723; *Welch*, 536 F.3d at 277 n.4. Whether an employee's theory of fraud approximates the elements of the claim should take these factual circumstances into consideration, but does not require an assessment of each element individually if the circumstances as a whole suggest possible fraud and a need for further investigation. See *Van Asdale*, 577 F.3d at 1001 (concluding that employees' theory that company A's failure to disclose information affecting the validity of a patent before merging with Company B approximated a securities fraud claim because of the potential importance of the information, the top management positions in Company B held by former officials in Company A, and their alleged financial motives favoring nondisclosure); *id*. at 1003 (employee protected despite acknowledging that she had not reached a conclusion on whether fraud occurred but saw a need to investigate).

E. Section 806 Imposes No Independent Materiality Requirement

In *Welch*, the Fourth Circuit rejected an employer's argument that Section 806 "only protects communications relating to *material* violations of a listed law." 536 F.3d at 276 (court's emphasis). The court reasoned that, "[a]lthough many of the laws listed in § 1514A of the Sarbanes-Oxley Act contain materiality requirements, nothing in § 1514A (nor in *Livingston*) indicates that § 1514A contains an *independent* materiality requirement." *Id*. (court's emphasis). That holding is controlling in this case, which is subject to review in the Fourth Circuit. See *Sylvester*, 2007 WL 7135793, at *3 (all pertinent events took place in Maryland).

The Fourth Circuit's conclusion is also correct. The Supreme Court has construed the term "fraud" to include a materiality requirement under the mail fraud, wire fraud, and bank fraud statutes because the well-settled meaning of fraud at common law included a materiality requirement and the Court presumed that Congress intended to incorporate that common law meaning into those statutes. *Neder*, 527 U.S. at 22-23. That presumption does not apply to SOX Section 806 because a complainant does not have to establish actual fraud but only a reasonable belief that conduct could involve fraud, and Congress intended the reasonableness inquiry to be the "normal reasonable person standard" used under laws such as the Clean Water Act whistleblower provision at issue in *Passaic Valley*. S. Rep. No. 107-146, *supra*, at 19. Such laws do not have an independent materiality requirement. See *Passaic Valley*, 992 F.2d at 478-79.

Similar to the analysis under Argument IV.D, *supra*, materiality may be relevant in assessing the reasonableness of an employee's belief. Under the mail, wire, and bank fraud statutes, for example, material means either that "a reasonable man would attach

importance to its existence or nonexistence in determining his choice of action in the transaction in question," or that "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Neder*, 527 U.S. at 22 n.5 (internal quotation marks and citation omitted). Under securities laws, material means that a reasonable investor would have viewed the information "as having significantly altered the total mix of information made available." *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (internal quotation marks and citation omitted). It should be emphasized that the SEC has concluded that although a numerical threshold may be used as an initial step in assessing materiality under securities laws, "it cannot appropriately be used as a substitute for a full analysis of all relevant considerations." SEC, Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999). Courts of appeals have agreed with the SEC. See *United States v. Nacchio*, 519 F.3d 1140, 1162 (10th Cir. 2008), *vacated in part on other grounds*, 555 F.3d 1234, 1236 (10th Cir.) (en banc), cert. denied, 130 S. Ct. 54 (2009); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162-64 (2d Cir. 2000).

CONCLUSION

The Assistant Secretary respectfully requests the Board to apply the answers to the Board's questions as set forth in this brief.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

JONATHAN T. REES
MEGAN E. GUENTHER
Counsels

/s/ EDWARD D. SIEGER
EDWARD D. SIEGER
Senior Attorney
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., N.W.
Rm. N-2716
Washington, D.C. 20210
Sieger.edward@dol.gov
(202) 693-5771

DECEMBER 2010

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Brief for the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae have been served this 30th day of December, 2010, by first-class mail, postage prepaid, upon the following:

E. Patrick McDermott, Esq.
2666 Ogleton Road
Annapolis, MD 02451

Joseph Schuler, Esq.
Matthew F. Nieman, Esq.
Jackson and Lewis LLP
10701 Parkridge Blvd., Suite 300
Reston, VA 20191

David C. Weaver, Esq.
Ethridge, Quinn, McAuliffe,
Rowan and Hartinger
100 N. Court Street
Frederick, MD 21701

John Avery
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

/s/ EDWARD D. SIEGER
EDWARD D. SIEGER
Senior Attorney