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Recent Developments in Whistleblower Protections: Legal Analysis and Practical Implications

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I. An Alphabet Soup of Whistleblower Protections

The Sarbanes-Oxley Act of 2002 ("**SOX**"), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("**Dodd-Frank**") and the Consumer Financial Protection Act ("**CFPA**") impose overlapping anti-retaliation provisions that generally prohibit retaliation against corporate "whistleblowers." Recent headlines of whistleblower awards granted to individuals, especially under Dodd-Frank, underscore the fact that, even if a company's economic exposure arising from the alleged violation of these provisions may be relatively circumscribed – generally limited to amounts based on the compensation of the employee who is allegedly retaliated against – the "real world" exposure, in the form of reputational and regulatory risk, can be significantly greater.

The Securities and Exchange Commission ("**SEC**") and the Consumer Financial Protection Bureau ("**CFPB**") have made it clear that they are focused on retaliation claims.[1] The consequences of perceived retaliatory conduct in the context of ongoing investigations may thus far exceed the statutory economic exposure in a civil claim by an individual whistleblower. This is particularly so after the Supreme Court's recent confirmation of the broad scope of SOX's anti-retaliation provision in Lawson v. FMR LLC[2], ruling that the anti-retaliation provision extends not only to publicly listed companies but also to the private contractors and subcontractors of public companies.

Although a law prohibiting retaliation on the basis of whistleblowing could appear in principle uncontroversial, in practice, challenging questions and situations arise, including:

- Avoiding retaliation claims when terminating employees;
- Determining what actions, if any, can permissibly be taken against an employee:
  - Where the employee is determined to be the basis of allegations in the context of a government investigation or a civil lawsuit, possibly in violation of his or her obligations to the company;

[1] With respect to the enforcement of the Dodd-Frank "whistleblower" reporting provisions by the SEC generally, between July 2012 and March 2014, the SEC published 15 "orders," or final dispositions of applications for rewards under Dodd-Frank's reporting provisions. Five of those orders provided monetary awards for reported information; ten denied such awards. The SEC received approximately 3,000 tips under Dodd-Frank's reporting provisions in fiscal year 2012, and awarded a total of approximately $170,000. The SEC received approximately 3,300 tips in fiscal year 2013. In October 2013, the SEC made a record award of approximately $14 million to one "whistleblower" (http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.U41CTaPD_qU), and the SEC's Director of the Office of the Whistleblower has stated publicly that more "big numbers" payments are likely in the future. On June 3, 2014, the SEC announced its first whistleblower award in 2014, of more than $875,000, after denying two applications for whistleblower awards in March on the basis that the "whistleblowers" failed to provide original information. In total, the SEC has granted eight awards under the Dodd-Frank "whistleblower" reporting provisions since the award program began in late 2011. http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541980219#.U5B1SvldW51

The CFTC has reported smaller numbers of "whistleblower" claims filed thus far, although the number expanded from approximately 60 claims in fiscal year 2012 to approximately 140 claims in fiscal year 2013. The CFTC announced on May 20, 2014 that it would issue its first monetary award on a "whistleblower" claim, of approximately $240,000. http://www.cftc.gov/PressRoom/PressReleases/pr6933-14 According to the Director of the CFTC's Whistleblower Office, the CFTC "now has $300 million set aside in a special fund" for whistleblower awards. http://www.forbes.com/sites/erikakelton/2014/02/19/cftc-enforcement-efforts-will-get-a-boost-in-2014/. However, the Director of the CFTC's Whistleblower Office, stated in October 2013 that CFTC does not plan to enforce anti-retaliation provisions of Dodd-Frank. http://blogs.wsj.com/riskandcompliance/2013/10/18/qa-christopher-ehrman-director-cftcs-whistleblower-office/.

[2] No. 12-3, 2014 U.S. LEXIS 1783 (Mar. 4, 2014).

- Where the employee's ordinary course job responsibilities include investigating or reporting on inaccuracies in company financial reporting or accounting (e.g., internal audit or compliance function); or
- Where an employee who has not yet "blown the whistle" threatens to do so unless he is given a personal benefit, such as a raise or promotion.

- If termination is not an option, how can the company protect itself from potential breaches of its employment policies, such as the disclosure of confidential information, or other misconduct?

In this memorandum, we examine these overlapping laws that are intended to protect whistleblowers, focusing on the scope of protected whistleblowing activity, the scope of covered entities and the procedure and practice of enforcement action. We then discuss practical considerations for organizations subject to these anti-retaliation provisions.

II. The Statutes

A. Starting with SOX

SOX was enacted largely in response to the Enron and WorldCom scandals, to protect shareholders against fraudulent financial reporting and accounting practices. The anti-retaliation provision at Section 806 of SOX, which prevents an employer from discharging or retaliating against an employee for engaging in a protected activity, was included in an effort to avoid repeating the circumstances of Enron, where Congress perceived that employees with knowledge of improper financial reporting and accounting practices were discouraged from reporting. In particular, the Senate report on SOX found 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."[3] The Senate report notes that, when a senior Enron employee attempted to report accounting irregularities, Enron sought legal advice regarding her potential termination, and outside counsel opined that "Texas law does not currently protect corporate whistleblowers. The Supreme Court has twice declined to create a cause of action for whistleblowers who are discharged . . ."[4]

SOX's anti-retaliation protection extends to employees providing information or assisting in a federal, Congressional or internal company investigation, or filing or assisting in a proceeding related to alleged mail, wire or securities fraud, violations of SEC rules and regulations, or Federal law related to fraud against shareholders.

The legislative history of SOX thus reflects an explicit attempt to prevent a recurrence of the "corporate code of silence" that the Senate investigation found had existed at Enron and which the Senate investigation found had discouraged employee reporting both to authorities and internally, with "serious and adverse" consequences for "investors in publicly traded companies, in particular, and for the stock market, in general . . ."[5]

[3] S. REP. NO. 107-146, at 4-5 (2002).

[4] S. REP. NO. 107-146, at 5 (2002).

[5] S. REP. NO. 107-146, at 4-5 (2002).

B. Other Regimes: Dodd-Frank and the Consumer Financial Protection Act

In 2010, Section 922 of Dodd-Frank significantly amended SOX's anti-retaliation provision, by (i) expanding the time to report violations (i.e., allegedly retaliatory conduct) from 90 to 180 days after occurrence, (ii) clarifying that the provision applied to public companies' private subsidiaries, and (iii) prohibiting employee waivers of anti-retaliation protection or pre-dispute arbitration agreements regarding anti-retaliation.

Dodd-Frank also enacted a separate whistleblower reward program with its own accompanying anti-retaliation provision. The Dodd-Frank whistleblower reward program provides for the payment of financial awards to "any individual who provides, or 2 or more individuals acting jointly 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."[6] The information (i) must be "original," derived from the independent knowledge or analysis of the reporting individual and not known to the SEC from another source, and (ii) must lead to the "successful enforcement" of a judicial or administrative action resulting in monetary sanctions exceeding $1 million.[7] The "whistleblower" reward program includes an anti-retaliation provision protecting "whistleblowers" from employer retaliation, discussed in more detail below.

The CFPA, enacted in 2010 as Section 1057 of Dodd-Frank, also includes an anti-retaliation provision protecting employees performing tasks related to the offering or provision of consumer financial products or services[8] from retaliatory conduct for reporting violations of consumer financial protection laws.[9] On April 2, 2014, the Department of Labor ("**DOL**") promulgated an interim final rule on enforcement of the CFPA anti-retaliation provision, closely mirroring the procedures and standards applied in the SOX anti-retaliation context.

C. Statutorily Protected Conduct

The SOX anti-retaliation provision extends broadly, prohibiting any company with a class of securities registered under Section 12 or subject to the reporting requirements under Section 15(d) of the Securities Exchange Act of 1934 from retaliating against an employee that has engaged in protected activity.

Protected activity generally includes two categories: providing information to an investigation into alleged fraud or violations of SEC rules and regulations, or providing assistance to a proceeding related to the same types of alleged conduct. Specifically, protected activity encompasses:

- Providing information, causing information to be provided, or assisting in an investigation by a federal regulatory or law enforcement agency, a Member or committee of Congress, or an internal company investigation relating to alleged mail fraud, wire fraud, bank fraud, securities fraud, violation of any SEC rule or regulation, or violation of any provision of Federal law relating to fraud against shareholders; or

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[6] 15 U.S.C. § 78u-6(a).

[7] 15 U.S.C. § 78(u-6), 15 U.S.C. § 78(a).

[8] The term "consumer financial product or service" is defined in the CFPA to mean any financial product or service that is "offered or provided for use by consumers primarily for personal, family, or household purposes." 12 U.S.C. § 5481(4). The statute defines financial products or services to include, *inter alia*, extending credit and servicing loans, engaging in deposit-taking activities or otherwise acting as a custodian of funds or any financial instrument on behalf of a consumer, providing financial advisory services to consumers on individual financial matters, providing credit counseling, and collecting debt related to any consumer financial product or service.

[9] 12 U.S.C. § 5567(b).

- Filing, causing to be filed, participating in or assisting a proceeding related to alleged mail fraud, wire fraud, bank fraud, securities fraud, violation of any SEC rule or regulation, or violation of any provision of Federal law relating to fraud against shareholders. [10]

The chart below sets forth the conceptual components of protected activity under the SOX anti-retaliation provision.

Protected Activity Under SOX

Type of Conduct	Directed to	Relating To
"[T]o provide information, cause information to be provided, or otherwise assist in an investigation"	"(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)"	"[A]ny conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348,[11] any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."
"[T]o file, cause to be filed, testify, participate in, or otherwise assist in"	"[A] proceeding filed or about to be filed"	"[A]n alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."

III. Enforcement – the SOX Anti-Retaliation Provision in Practice

A. Enforcement Mechanism – Private Right of Action

The SOX anti-retaliation provision provides for a private right of action, with an initial complaint process adjudicated by the DOL and an additional mechanism to file a complaint in federal district court if the DOL fails to reach a final resolution of the complaint within 180 days.

The DOL process provides that:

- Employees alleging retaliatory conduct may file complaints with the Occupational Health and Safety Administration ("**OSHA**") within 180 days after the alleged violation (i.e., the retaliation), or after the date the employee became aware of the alleged violation. If OSHA determines the complaint is valid with respect to timeliness and jurisdiction, it investigates the allegations.
- If OSHA's investigation finds support for the retaliation claim, OSHA will order reinstatement of the employee, payment of back wages, restoration of benefits and other relief to make the employee whole, including compensation for special damages and the employee's attorney fees and litigation costs.

[10] SOX Section 806, 18 U.S.C. § 1514A.

[11] These sections define mail fraud, wire fraud, bank fraud, and securities fraud.

- OSHA's findings and order may be appealed by either party to the DOL's administrative law judges (OALJ) for *de novo* review. An administrative law judge's decision may be appealed to the DOL's Administrative Review Board ("**ARB**"). The ARB's final order is made on behalf of the Secretary of Labor, and is deemed to constitute the final resolution required under the statute.
- If the DOL does not issue a final order within 180 days of the complaint's filing, the employee (but not the employer) may seek *de novo* review by withdrawing the claim from the ARB and filing the complaint in the federal district court of the district where the alleged violation occurred.
- The ARB's final order is appealable to the federal appellate court for the circuit in which the alleged violation occurred.

B. Burdens of Proof – A Complainant-Friendly Standard

The employee-complainant's burden of proof standard is low and requires only that the complainant make a *prima facie* showing that the protected activity was "a contributing factor in the unfavorable personnel action" alleged in the complaint. The complainant is not required to demonstrate that the protected activity was the primary reason for or cause of the "unfavorable personnel action," and courts have rarely found a complainant to have failed to make the required showing. The complainant-friendly standard corresponds to that of other anti-retaliation regimes, including the aviation anti-retaliation protection statute, upon which the procedural mechanisms of the SOX anti-retaliation provision are based.[12]

To rebut the employee complaint and preclude investigation by OSHA, the employer faces a much higher burden: a requirement to demonstrate "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of" the protected activity. Courts have been most willing to find this burden met when an employer can present a record of documented issues with an employee complainant's performance over time, or evidence that a complainant's violation of an explicit company policy was the reason for termination or other unfavorable personnel action.[13]

C. Defining the Standard for "Protected Activity"

The threshold question for potential anti-retaliation claims is whether the employee has engaged in "protected activity." There are two standards presently employed by federal courts in assessing "protected activity:" (i) the "reasonable belief" standard adopted by the ARB in 2011 and (ii) the prior "definitively and specifically" standard set forth in an earlier 2006 ARB decision.

Reasonable Belief – Subjective and Objective Elements

Protected activity, under the ARB and some federal courts, requires the whistleblower to have both a subjective belief and an objectively reasonable belief that the conduct complained of constitutes a violation of the relevant law.[14]

According to the ARB, an "objectively reasonable belief" is determined by "whether a reasonable person, in the same factual circumstances and with the same training and experience as the [plaintiff], would have

[12] The SOX anti-retaliation procedural mechanisms are explicitly adopted from the aviation anti-retaliation procedures, set forth in 49 U.S.C. § 42121(b).

[13] See *infra* Section 3.G.

[14] Stewart v. Doral Financial Corp. No. 13-cv-1349, 2014 WL 661587 (D.P.R. Feb 21, 2014); Leshinsky v. Telvent GIT, S.A., No. 10-cv-4511, 2013 WL 1811877 (S.D.N.Y. May 1, 2013).

held a reasonable belief that the conduct complained of constituted a violation of pertinent law."[15] The Southern District of New York has looked to the complainant's training and experience in determining whether the "objectively reasonable" component of the reasonable belief standard had been met.[16]

The Third Circuit became the first appellate court to officially endorse the Sylvester reasonable belief standard in 2013, and federal district courts in New York and Puerto Rico have also adopted the standard.[17]

"Definitively and Specifically Relate" – Older Standard

Other federal courts continue to apply a previous standard for protected activity set forth by the ARB in 2006, requiring protected communications to "definitively and specifically" relate to a statute or rule listed in the SOX anti-retaliation provision.[18] The Sixth Circuit continues to apply the "definitively and specifically" standard, as do some district courts.[19]

D. Application – Scope of Protected Activity

- **Expressing "Concerns" Without Belief in Illegality of Conduct Not Protected Activity**: Gale v. World Financial Group, ARB No. 06-083, ALJ No. 2006-SOX-43 (ARB May 29, 2008) (finding no protected activity where complainant only expressed "concerns" about a parent company's business operations and certain practices and policies, but indicated in deposition testimony that he did not believe employer engaged in any illegal or fraudulent activity).
- **Reporting Violations of Internal Company Policies Unrelated to Fraud or SEC Regulations Not Protected Activity**: Andaya v. Atlas Air, Inc. No. 10-cv-7878, 2012 WL 1871511 (S.D.N.Y. Apr. 30, 2012) ("complaints largely related to internal corporate policies concerning corporate waste, personnel matters, and relationships with vendors…are not the subjects courts have found covered by SOX.").
- **Reporting Violations of U.S. Laws Unrelated to Fraud or SEC Regulations Not Protected Activity**: Joy v. Robbins & Myers, Inc., ARB No. 08-049, ALJ No. 2007-SOX-74 (ARB Oct. 29, 2009) (finding no protected activity where information related to possible violations of U.S. export laws).
    - **Reporting Illegal Conduct on Company Property Without Nexus to Fraud or SEC Regulations Not Protected Activity:** Miller v. Stifel, Nicolaus & Co., 812 F. Supp. 2d 975 (D. Minn. Sept. 20, 2011) (case below ALJ No. 2009-SOX-57) (no protected activity where employee alleged sale of marijuana on company property, use of office facilities for personal activities by co-workers, and company failure to pay a postage bill).

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[15] Sylvester v. Paraxel Int'l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42, slip op. at 17-18 (ARB May 25, 2011).

[16] Perez v. Progenic's Pharmaceuticals, Inc., No. 10-cv-8278 (S.D.N.Y. July 24, 2013) (2013 WL 3835199) (finding that experienced chemist, without knowledge or training in securities law or familiarity with "corporate optimism" in press releases, had a reasonable belief that press releases positively describing results of clinical trials were misleading).

[17] See Wiest v. Lynch, No. 11-cv-4257, 2013 U.S. App. LEXIS 5345 (3d Cir. Mar. 19, 2013); Stewart v. Doral, No. 13-cv-1349 (D.P.R. Feb. 21, 2014); Perez v. Progenic's Pharmaceuticals, Inc., 10-cv-8278 (S.D.N.Y. July 24, 2013) (2013 WL 3835199).

[18] Platone v. FLYi, Inc., ARB No. 04-154, ALJ NO. 2003-SOX-27, slip op. at 17 (ARB Sept. 29, 2006).

[19] Riddle v. First Tennessee Bank, National Association, No. 11-cv-6277, 2012 U.S. App. LEXIS 18684 (6th Cir. Aug. 31, 2012); Sharkey v. J.P. Morgan Chase & Co., No. 10-cv-3824 (S.D.N.Y. Dec. 12, 2013) (applying the "definitively and specifically" standard).

  - **Reporting Violations of Anti-Discrimination Statutes Not Protected Activity**: Smith v. Hewlett Packard, ARB No. 06-064, ALJ Nos. 2005-SOX-88 through 92 (ARB Apr. 29, 2008) (allegations of racial discrimination in employee performance rating system did not constitute protected activity).

- **Reporting Violations of Foreign Law Not Protected Activity**: Villanueva v. U.S. Dep't of Labor, No. 12-60122 (5th Cir. Feb. 12, 2014) (finding no protected activity where complainant provided information regarding conduct he reasonably believed violated Colombian law).
- **Reporting Extraterritorial Conduct Not Protected Activity**: Liu v. Siemens, A.G., (S.D.N.Y. Oct. 21, 2013) (holding, on a motion to dismiss, that SOX anti-retaliation protection did not apply extraterritorially and therefore did not protect employees of U.S. public companies working overseas).
- **Performing Assigned Job Responsibilities that Include Reporting May Be Protected Activity**: Robinson v. Morgan-Stanley, ARB Case No. 07-070, slip op. at 24-25 (Jan. 10, 2010) (holding that the SOX anti-retaliation provision "does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties"). Barker v. UBS AG, CA No. 3:09–CV–2084, 2012 WL 2361211 (D.Conn. May 22, 2012) (in denial of summary judgment for defendant, finding employee tasked with reporting discrepancies related to the company's exchange holdings raised an issue of fact as to whether she engaged in protected activity in the course of her normal job activities).
  - **But "Stepping Outside Role" May Be Required to Find Protected Activity**: Riddle v. First Tennessee Bank, No. 3:10-cv-0578, 2011 WL 4348298 (M.D.Tenn. Sept. 16, 2011) (finding complainant was not entitled to anti-retaliation protection for performing her ordinary course job responsibilities, where she did not "step outside [her] role" in reporting alleged violations).
- **Reporting Improper Activities at Third-Party Entities May Be Protected Activity**: Lawson clarified that private contractor employees reporting on improper activities at public companies were subject to anti-retaliation protection. Even before Lawson, however, the ARB held that the SOX anti-retaliation provision did not, on its face, limit its application to reported misconduct of the complainant's employer or any other specific type of perpetrator, and therefore that reporting of third-party conduct could constitute protected activity. Funke v. Federal Express Corp., ARB No. 09-004, ALJ No. 2007-SOX-43 (ARB July 8, 2011) (finding protected activity where FedEx courier alerted superiors and local law enforcement that a third party was allegedly using FedEx as a conduit for potential mail fraud); Spinner v. David Landau & Assoc., LLC, No. 10-111, ALJ No. 2010-SOX-029, 2012 DOL Ad. Rev. Bd. LEXIS 48 (May 31, 2012) (rejecting the First Circuit's Lawson decision and holding SOX anti-retaliation protection extended to employees of private contractors, such as accounting firms, performing work for public companies).
  - **Reporting Alleged Fraud by a Client Protected Activity**: Sharkey v. J.P. Morgan Chase & Co., 805 F. Supp. 2d 45 (S.D.N.Y. Aug. 19, 2011) (finding employee reporting to her superiors regarding alleged fraud and illegal activity on the part of a client constituted protected activity).
- **Raising Concerns Regarding Accuracy of Specific Disclosures Protected Activity**: Stewart v. Doral Financial Corp., 13-cv-1349 (D.P.R. Feb. 21, 2014) (finding protected activity where Principal Accounting Officer expressed written concerns to employer's Audit Committee that employer would fail to accurately report financial information in upcoming quarters based on comments and events observed by complainant).
- **Reporting Activities Implicating Fraud Statutes Protected Activity, Even Where No Shareholder Harm Is Suggested**: Lockheed Martin v. Adm. Review Bd., US DOL, No. 11-9524 (10th Cir. June 4, 2013) (finding that reporting of a supervisor's misuse of the corporate pen-pal

program was found to be protected activity where complainant communicated a belief that the supervisor had engaged in mail or wire fraud). C.f. Guitron v. Wells Fargo Bank, N.A. No. C 10-3461 CW, 2012 WL 2708517 (N.D.Cal. July 6, 2012) (finding that reporting of aggressive sales techniques, in alleged violation of company policy, did not implicate bank fraud and therefore was not protected activity). See also Gladitsch v. Neo@Ogilvy, No. 11 Civ. 919 DAB, 2012 WL 1003513 (S.D.N.Y. Mar. 21, 2012) (finding reporting of vendor overcharging a client to be protected activity because allegations implicated mail and wire fraud).

- **Reporting Expectation of Future Violations Protected Activity, According to the ARB**: Barrett v. e-Smart Technologies, Inc., ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013) (holding that "reporting an actual violation is not required" for protected activity, and that "[a] complainant can engage in protected activity when he reports a belief of a violation that is about to occur or is in the stages of occurring" in the context of misstatements and omissions in a draft Form 10-K).
  - **Reporting "Likely to Happen" Future Violations Protected Activity in the Third Circuit**: Wiest v. Lynch, No. 11-4257, 2013 WL 111784 (3d Cir. 2013) (holding that protected activity includes communications that have not yet occurred, as long as the reporting employee reasonably believes the violation is likely to happen). Leshinsky v. Telvent GIT, S.A., No. 10-cv-4511, 2013 WL 1811877, at *10 (S.D.N.Y. May 1, 2013) (finding "imminent crimes, or at least crimes in their infancy" are within the scope of protected activity because it "furthers the purpose of Section 806 to nip corporate wrongdoing in the bud, rather than permitting a scheme to blossom into a full-fledged crime before whistleblower protections take effect").
  - **But Reporting Violations that May Occur Upon a Future Contingency Not Protected Activity in the Fourth Circuit**: Livingston v. Wyeth, Inc., 520 F.3d 344, 352 (4th Cir. 2008) (holding communications claiming that violations might occur upon some future contingency did not constitute protected activity).

E. Application – Scope of Covered Entities

When enacted, SOX's anti-retaliation provision covered companies with registered securities under Section 12 of the 1934 Act or with reporting requirements under Section 15(d) of the 1934 Act. Coverage encompassed not only company employees, but also contractors, subcontractors, and agents. In July 2010, Dodd-Frank amended the scope of covered entities to include "nationally recognized statistical rating organizations," as defined in Section 3(a) of the 1934 Act.

On March 4, 2014, the Supreme Court in Lawson v. FMR LLC ruled that the scope of the SOX anti-retaliation provision extended to employees of private companies that perform work for public companies. Lawson resolved a split between the Court of Appeals for the First Circuit, which had held that SOX's anti-retaliation provision did not extend to employees of private companies performing work for public companies, and the ARB, which had held that private-company employees were covered by the SOX anti-retaliation provision.[20]

The Court noted that the expansive interpretation of the scope of the anti-retaliation provision was in accordance with the purpose of SOX, namely combatting improper financial reporting and accounting practices and encouraging the reporting of such practices. The facts of Lawson provided the Court with an opportunity to rule on a clear delineation of SOX's scope, because plaintiffs were employees of private

[20] Spinner v. Landau & Assoc., LLC, No. 10-111 etc., ALJ No. 2010-SOX-029 (May 31, 2012).

mutual fund investment advisors performing work for public mutual funds. As the Court noted, mutual funds are public companies with essentially no employees, such that if SOX did not apply to the employees of the mutual fund's contractors, there would be no one able to report potential improper financial or accounting practices regarding the mutual funds under the cover of SOX anti-retaliation protections.

Although the Lawson decision was based on the circumstances of private mutual fund advisors, its holding extends to law firms and accounting firms advising public companies. Indeed, the potential expansiveness of the holding led the dissent to focus on the far-reaching possible implications of the majority's interpretation. The dissent highlighted the possibility that SOX could be used to regulate employment relationships between company officers and household employees, such as nannies, housekeepers and caretakers, and suggested an example of a nanny bringing an anti-retaliation complaint regarding his or her termination after expressing concern to his employer that the employer's child could be a participant in Internet fraud.

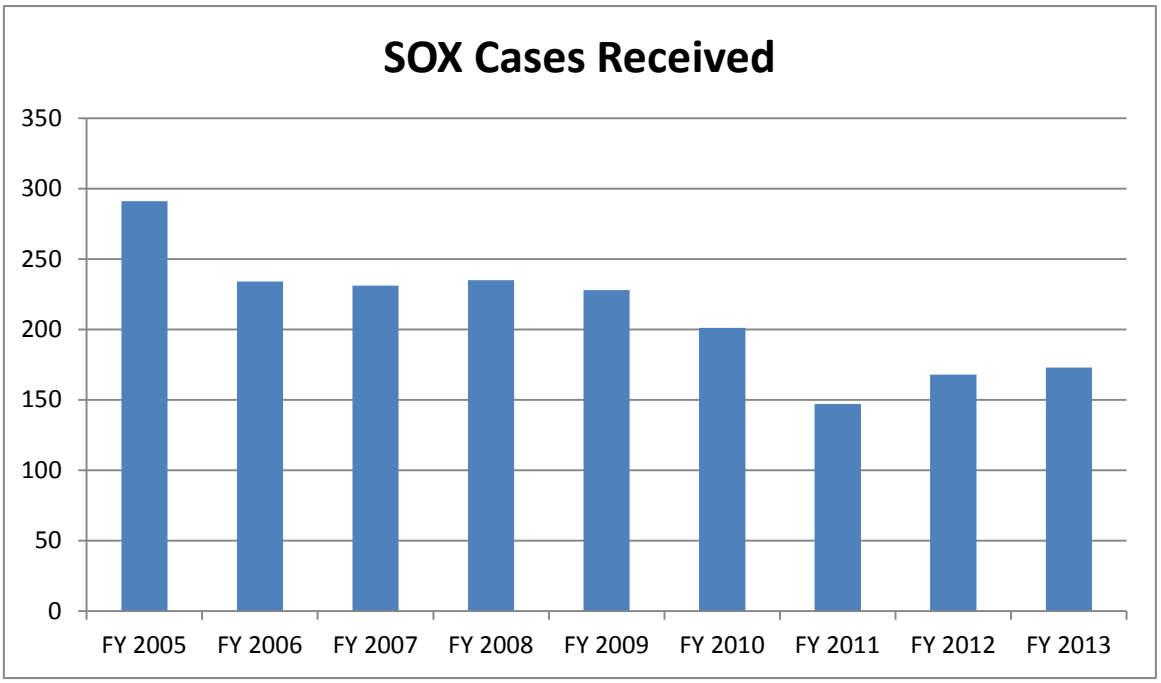
The extension of the anti-retaliation protections to private contractors raises interesting questions as to the scope of protected activities with respect to those contractors, including most prominently whether protected whistleblowing must relate to the contractor's work for a public company, or whether the reporting of purely "internal" violations are protected, so long as the violation concerns one of the laws enumerated in the statute. Although the Court referred to a number of potential "limiting principles" in Lawson it declined to adopt any specific limitations on its decision.

- **Extension of anti-retaliation protection only to the actual work performed by a private company for a public company, rather than to all of the private company's activities**. A broad reading of Lawson's scope to encompass all activities of a private company performing work for a public company has significant implications for the day-to-day operations of privately held law and accounting firms. For example, the Dewey & LeBoeuf indictment presents an interesting factual scenario through which to consider the potential scope of the Lawson decision. One of the allegations in the indictment is that Dewey & LeBoeuf's leaders made misrepresentations to lenders in trying to secure financing. Under the broadest reading of Lawson's scope, under which SOX anti-retaliation protection would apply to all internal activities at private contractors employed by public companies, such protection would have extended to Dewey & LeBoeuf employees reporting the alleged "cooking the books" or improper internal accounting practices. Under a more limited reading of Lawson, Dewey & LeBoeuf employees would only be protected for reporting improper accounting practices at public clients of the firm rather than the firm itself.
- **The extension of the anti-retaliation protection only to entities that perform contracts over a significant period of time, rather than to "every fleeting business relationship."** While the Court did not provide a clear distinction between "fleeting" and more "significant" contractual relationships, this potential limitation would likely not affect the extension of anti-retaliation protection in circumstances of established, long-term relationships between public companies and their outside counsel, auditors, or similar service providers. The Court cited the purchase of office supplies by a private company from a public company as an example of a "fleeting" business relationship, so this potential limitation would likely exclude from anti-retaliation protection only employees of private companies with minimal contractual relationships with public clients.
- **The extension of anti-retaliation protection to employees of entities other than the contractor itself.** The Court explicitly declined to decide "whether § 1514A also prohibits a

contractor from retaliation against an employee of one of the other actors governed by the provision."[21] In practice, prohibiting retaliation against an employee of a third party subject to SOX could include protection of public company employees against retaliation by private contractors, such as an outside auditor taking retaliatory action against an employee of a public company's internal audit department. The Court suggested such retaliation was unlikely to occur, as a contractor would rarely have employment decision-making authority over public company employees.[22] However, a more likely scenario could be potential retaliatory action by a contractor over a sub-contractor's employees. For example, if anti-retaliation protection were limited to employees of the contractor itself, an employee of an expert consulting firm (as sub-contractor) retained by a law firm (as contractor) in connection with civil litigation for a public company would not be able to bring a claim for alleged retaliatory action by the law firm, such as terminating the sub-contractor's services or failing to hire the sub-contractor for other engagements.

F. Enforcement Statistics

The DOL reports statistics on SOX anti-retaliation actions filed from 2005 to the present, as shown below. Since fiscal year 2010, the annual number of complaints received has decreased somewhat, perhaps because of the enactment of Dodd-Frank, but complaints have risen steadily over the past three years.



Source: http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13.pdf

The vast majority of SOX anti-retaliation claims are dismissed or withdrawn. Of the 1,846 actions the DOL reports as "completed" in the fiscal year 2005 to fiscal year 2013 time period, 20 actions are reported with a determination of "merit" and approximately a hundred additional actions are listed as "settled."

[21] Lawson, 2013 U.S. LEXIS 1783, at *21.

[22] Lawson, 2013 U.S. LEXIS 1783, at *22.

G. Responding to Anti-Retaliation Complaints

After a complaint is filed, an employer may rebut the complaint and preclude an OSHA investigation "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of" the employee's reporting.[23]

Courts are likely to find that an employer has met the "clear and convincing evidence" standard to rebut an employee complaint where the employer has documentation showing a pattern of performance issues by the plaintiff employee. Persuasive documentation has been found to include written warnings regarding performance and behavior, performance counseling and individual action plans and similar documents created by the complainant employee in connection with prior performance issues.

Anti-retaliation claims have been rebutted in circumstances including:

- Where an employee disclosed internal company documents to a reporter in violation of company policy, and met directly with a reporter in violation of a company policy requiring media inquiries to be handled by the company's communication's department. Tides v. Boeing Co. 644 F. 3d 809 (9th Cir. May 3, 2011).
- Where an employee sent improper and offensive emails to co-workers, after a previous occurrence of similar conduct that had resulted in warnings and corrective counseling provided to the employee and the employee's creation of an action plan to address the conduct. Mann v. Fifth Third Bank, Nos. 1:09-cv-014, 2011 WL 1575537 (S.D. Ohio Apr. 25, 2011).
- Where an employee continued to report complaints about another employee's conduct, after the employer had investigated the other employee's conduct and found it to be within company policy, and where the complainant-employee had previously received written counseling and warnings regarding his performance and had written and signed an individual action plan designed to address deficiencies in the professionalism of his behavior and appearance. Riddle v. First Tennessee Bank, 2011 WL 4348298 (M.D. Tenn. Sept. 16, 2011).
- Where an employee's trading activities violated her company's trading policy, and the employee had previously had difficulty meeting her performance requirements and received written warnings in connection with those requirements. Miller v. Stifel, Nicolaus & Co., 812 F. Supp. 2d 975 (D. Minn. Sept. 20, 2011).
- Where a company president reported potentially illegal exports to the Department of Commerce, but later had a series of conflicts with the company's founder and outside directors, including making disparaging comments about the outside directors to shareholders and requesting the outside directors' resignation for reasons unrelated to the reported activity, resulting in the outside directors viewing the company president as insubordinate. Feldman et al. v. Law Enforcement Associates Corp. et al., 2014. U.S. App. LEXIS 8833 (4th Cir. May 12, 2014).

In a number of these cases, the DOL and the federal courts have been sympathetic to employers terminating employees on the basis of enforcement of clear company policy, even where the terminated employee later alleged that the employee's reporting was at least a "contributing factor" to the employee's termination.

[23] 49 U.S.C. § 42121(2)(B)(ii).

IV. Alternative Anti-Retaliation Enforcement: Dodd-Frank "Whistleblower" Anti-Retaliation Provision and the Consumer Financial Protection Act

A. The Dodd-Frank Anti-Retaliation Provision

In 2010, Dodd-Frank created a "whistleblower" reward program, rewarding "any individual who provides, or 2 or more individuals acting jointly 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."[24] The information must be "original," derived from the independent knowledge or analysis of the reporting individual and not known to the SEC from another source, and must lead to the "successful enforcement" of a judicial or administrative action resulting in monetary sanctions exceeding $1 million.

Dodd-Frank's "whistleblower" reward program also includes an anti-retaliation provision, protecting individual "whistleblowers" from potential retaliatory conduct by employers. The prohibited retaliatory conduct mirrors the scope of the SOX anti-retaliation provision, forbidding an employer to "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower."[25]

The anti-retaliation cause of action established by Dodd-Frank permits claims to be brought directly in federal district court, without the involvement of the DOL. Dodd-Frank's anti-retaliation provision also provides for a much longer statute of limitations than the SOX anti-retaliation provision (up to ten years after the date of the violation) and for greater damages, including twice the amount of back pay a complainant would have received, reinstatement and compensation for litigation costs, expert witness fees and reasonable attorney fees.[26]

B. Enforcement of the Dodd-Frank Anti-Retaliation Provision

The recent enactment of the Dodd-Frank "whistleblower" reward program, including its anti-retaliation provision, means that available information on anti-retaliation claims under Dodd-Frank is limited. The scope of judicial rulings on the Dodd-Frank anti-retaliation provision may not be evident for several years, given the recent enactment of the statute and the time involved in SEC investigations.

However, the courts have provided some early guidance on the issue of whether employees reporting only through internal channels, and not to the SEC or CFTC, are protected against retaliation. The Fifth Circuit has held that Dodd-Frank's anti-retaliation provisions apply only to employees reporting information to the SEC, and do not extend to internal reporting channels.[27] District courts have split on whether internal reporting is protected, with courts in the District of Massachusetts and the Southern District of New York finding that internal reporting is protected, and courts in the Northern District of

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[24] 15 U.S.C. § 78u-6(a), as implemented in May 2011 by SEC Release No. 34–6454, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934." On May 16, 2014, the SEC indicated that it was soliciting comments on the collection of information on (i) Form TCR, a form that is proposed to be submitted by whistleblowers who wish to provide information to the SEC and its staff regarding potential violations of the securities laws and (ii) Form WB–APP, a form that is proposed to be submitted by whistleblowers filing a claim for a whistleblower award.

[25] 15 U.S.C. § 78u-6(h).

[26] 15 U.S.C. § 78u-6(h).

[27] Asadi v. GE Energy USA LLC 12-20522 (5th Cir. June 17, 2013).

California and District of Colorado holding that reporting to the SEC is required for anti-retaliation protection.[28]

Although the courts have provided limited guidance on the enforcement of the Dodd-Frank anti-retaliation provision, recent developments underscore the seriousness with which the SEC views the general Dodd-Frank whistleblower provisions. Sean McKessy, Chief of the SEC's Office of the Whistleblower, recently made public comments that the SEC was actively looking for confidentiality agreements, separation agreements, and employment agreements that impermissibly tried to prevent employees from bringing alleged violations to the SEC's attention. McKessy also suggested the possibility of penalties against individual attorneys responsible for drafting any agreements that appeared to prevent employees from reporting alleged violations, including revoking the attorneys' ability to practice before the SEC.[29]

C. The Consumer Financial Protection Act Anti-Retaliation Provision

In addition to the anti-retaliation provision included in the Dodd-Frank "whistleblower" reward program, the 2010 Dodd-Frank Act established anti-retaliation protection in connection with the reporting of information to the CFPB. Under the CFPA, employees reporting violations of financial consumer protection laws or engaging in other protected conduct related to such laws are protected from retaliation.

On April 2, 2014, OSHA promulgated an interim final rule on its procedures for enforcing the CFPA anti-retaliation provision. As described below, the procedures and standards are very similar to those applied in enforcing the SOX anti-retaliation provision. While the very recent unveiling of the interim final rule means that assessing the implications of the CFPA anti-retaliation provision will likely take years, OSHA's nearly wholesale adoption of the SOX anti-retaliation procedures and standards suggests that the enforcement parameters of the SOX provisions provide a guide for evaluating the future enforcement of the CFPA anti-enforcement provisions.

Notably, OSHA explicitly adopted the "reasonable belief" definition set forth by the DOL's ARB in the SOX anti-retaliation context[30] as the appropriate standard under the CFPA.

That standard, as set forth above, requires a complainant to have both a "subjective, good faith belief" and an "objectively reasonable belief" that the conduct complained of violates the relevant law or regulation. In its discussion of the reasonable belief standard, the OSHA release noted that "[t]he objective 'reasonableness' of a complainant's belief is typically determined 'based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." (quoting Sylvester).

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[28] Compare Ellington v. Giacoumakis, No. 13-11791 2013 U.S. Dist. LEXIS 148939 (D. Mass. Oct. 16, 2013); Rosenblum v. Thomson Reuters (Mkts) LLC, No. 13 Civ. 2219, 2013 U.S. Dist. LEXIS 153635 (S.D.N.Y. Oct. 25, 2013) with Banko v. Apple Inc., No. CV 13-02977 RS, 2013 U.S. Dist. LEXIS 149686 (N.D. Cal. Sept. 27, 2013); Wagner v. Bank of America Corp., No. 12-cv-00381-RBJ, 2013 U.S. Dist. LEXIS 101297 (D. Colo. July 19, 2013).

[29] SEC Warns In-House Attys Against Whistleblower Contracts, Law 360, Mar. 14, 2014. http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts. Appearing at the Georgetown University Law Center Corporate Counsel Institute, McKessy stated, "if we find that kind of language [limiting employees' reporting ability], not only are we going to go to the companies, we are going to go after the lawyers who drafted it . . . We have powers to eliminate the ability of lawyers to practice before the commission. That's not an authority we invoke lightly, but we are actively looking for examples of that."

[30] Sylvester v. Paraxel Int'l LLC, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011).

The Scope of Protected Conduct

Protected conduct under the CFPA is broadly defined to include more than reporting potential violations of financial consumer protection laws or participating in legal proceedings related to such potential violations; it also encompasses on-the-job action such as objecting to or refusing to participate in activities the employee reasonably believes to be in violation of consumer financial protection laws.[31]

Type of Conduct	Directed to	Relating To
Providing, causing to be provided, or being about to provide or cause to be provided information	The employer, the CFPB, or any other state, local or Federal government authority or law enforcement agency	Relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of the CFPA or any other provision of law subject to the jurisdiction of the CFPB, or any rule, order, standard, or prohibition prescribed by the CFPB
Testifying in	Any proceeding	Resulting from the administration or enforcement of any provision of the CFPA or any other provision of law subject to the jurisdiction of the CFPB, or any rule, order, standard or prohibition prescribed by the CFPB
Filing, instituting, or causing to be filed	Any proceeding	Under any Federal consumer financial law
Objecting to or refusing to participate in	Any activity, policy, practice or assigned task	That the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of or enforceable by the CFPB

D. Enforcement of the Consumer Financial Protection Act Anti-Retaliation Provision

Similar to the SOX anti-retaliation provision, and in contrast to the Dodd-Frank "whistleblower" anti-retaliation provision, the CFPA anti-retaliation provision provides for enforcement by the DOL, without the initial direct involvement of the federal courts.

OSHA's April 2, 2014 interim final rule on its procedures for enforcing the CFPA anti-retaliation provision provides for enforcement mechanisms very similar to the SOX anti-retaliation enforcement procedures. Enforcement involves an initial complaint to OSHA and an investigation and review process including escalation to the DOL's administrative law judges and ARB. Akin to the SOX anti-retaliation provision procedures, the CFPA provides that if the DOL does not issue a final decision on the complaint within 210 days after filing, the employee may seek *de novo* review in the federal district court of the district where the alleged violation occurred.

The CFPA anti-retaliation provision includes the same employee-friendly burdens of proof as the SOX anti-retaliation provision, requiring a complainant to demonstrate only that the protected conduct was "a

[31] 12 U.S.C. § 5567.

contributing factor in the unfavorable personnel action alleged in the complaint." To rebut that showing and preclude an OSHA investigation, the employer must demonstrate by "clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."

Remedies for violations of the CFPA anti-retaliation provision include reinstatement of the employee, back pay and compensatory damages, similar to the SOX anti-retaliation provision, but also require the violator to "take affirmative action to abate the violation."

V. Practical Considerations

A. Economic, Reputational and Regulatory Exposure

The economic exposure faced by companies to SOX anti-retaliation claims is circumscribed by statute. Those remedies include employee reinstatement, back pay and consequential damages. Punitive damages are not available. (As anti-retaliation complaints are typically dismissed, withdrawn or settled, public information on employer costs of resolving complaints is extremely limited.) The reputational and regulatory stakes are, however, significant. The SEC has made clear that the protection of whistleblowers is a priority. We would accordingly expect perceived retaliatory conduct to significantly affect the risk and settlement value of regulatory investigations, raising the stakes far beyond the statutorily defined civil remedies.

B. Addressing Risky Situations

In an environment of expanded risk after the Supreme Court's Lawson decision, employers may take certain proactive steps to minimize the potential threat of pretextual anti-retaliation claims. These "best practices" include:

- *Appropriately documented employee review process*. In cases where there are external complaints about an employee's performance from customers or clients, the company can reduce its risk of losing a pretextual retaliation claim by preserving a record of those complaints and producing them as evidence that the company's decision to terminate was not due to improper motives.
- *Prior written warnings*. Companies are at less risk of a pretextual retaliation claim when the company has issued prior written warnings to the former employee about issues unrelated to whistleblowing prior to the employee's termination or other disciplinary action.
- *Consistency of review process and disciplinary actions*. Companies are less likely to lose a pretextual retaliation claim brought by a former employee in cases where the company is able to establish a record that similarly situated employees have been treated consistently and that, prior to the termination, the company directed the employee to implement individual action plans or undergo corrective counseling to address issues of professionalism or other performance.
- *Clearly linking any disciplinary actions to lapses in employee performance and conduct*, recognizing that appropriate professional conduct may include following company protocols and maintaining workplace collegiality.
- *Clearly linking any non-discipline related employment actions* (e.g., a reduction in force) to objective standards that are not related to retaliatory behavior.
- *Appropriately addressing employee complaints and concerns*. When an employee has raised a complaint or concern, such as regarding the employer's financial reporting or internal controls, a

pretextual retaliation claim can be better defended against where the compliant or concern is appropriately considered and elevated. In addition, the employee should not be threatened with an adverse employment action or disparaged. Rather, any disagreement should be conveyed in an objective and documented manner.

- *Regular training of HR and other managerial personnel*, so that they can be educated on the differences, which can oftentimes be fact-specific and nuanced, between taking appropriate disciplinary and employment actions and inappropriate retaliatory actions.
- *Reviewing employment related contracts and separation agreements*, to ensure that their language could not be interpreted as trying to prevent employees from reporting to the SEC or a regulator.
- *Assessing whether additional reporting mechanisms are warranted*, such as employee hotlines or methods for anonymous submission of employee concerns.[32] Having such tools in place can give employees the opportunity to air grievances internally, without feeling like their only option is to blow the whistle. Also, the company would at least have a proper record of the complaint and its follow-up and disposition.

Employers should be particularly aware of a potential pretextual anti-retaliation claim risk in situations involving extensive reporting requirements coupled with the likelihood of employee termination. Examples include mergers and acquisitions, where redundant employees may be terminated. In addition, companies becoming publicly traded (via, for example, an initial public offering or a spin-off of a subsidiary) will want to consider the new rules to which they will become subject, when they are considering employment terminations and other disciplinary actions. After Lawson, private legal and financial advisors to public company merger participants are subject to the SOX anti-retaliation provision.

Overall, employers must continue to take appropriate disciplinary action, even if such action brings increased risk of inappropriate anti-retaliation claims. Protecting organizations from employee misconduct requires enforcing company policies even where an employee violating company policy may also be engaging in "protected activity." As set forth above, courts have dismissed complaints brought by purported "whistleblowers" who have been terminated for violations of company policies, particularly where the employee's reporting appears pretextual in the context of previous, well-documented performance issues.

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[32] Overlap with other regulatory regimes: Rule 8.3 of the ABA Model Rules of Professional Conduct requires an attorney to report another attorney who has "has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," but this reporting requirement does not extend to reporting conduct of non-lawyers, and the ABA Model Rules do not include provisions for internal reporting mechanisms at law firms or legal organizations.

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Exhibit A

Comparison of Anti-Retaliation Provisions

	SOX	Dodd-Frank	CFPA
Scope of protected activity	An individual has engaged in protected activity if he/she acts: (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 section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, 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); or (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.	Individual or individuals acting jointly must provide "original" information to the SEC that leads to the successful enforcement of a judicial or administrative action resulting in monetary sanctions exceeding $1 million.	An individual has engaged in protected activity if he/she has (1) provided, caused to be provided, or is about to provide or cause to be provided, information to the employer, the CFPB, or any other State, local, or Federal, government authority or law enforcement agency relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of this title or any other provision of law that is subject to the jurisdiction of the CFPB, or any rule, order, standard, or prohibition prescribed by the CFPB; (2) testified or will testify in any proceeding resulting from the administration or enforcement of any provision of this title or any other provision of law that is subject to the jurisdiction of the CFPB, or any rule, order, standard, or prohibition prescribed by the CFPB; (3) filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the CFPB.

	SOX	Dodd-Frank	CFPA
Where Claims Asserted	Initial complaint to OSHA and an investigation and review process including to the Department of Labor's Administrative Law Judges and Administrative Review Board. If the DOL does not issue a final decision on the complaint within 180 days after filing, the employee may seek *de novo* review in the federal district court where the alleged violation occurred.	Directly in federal district court.	Initial complaint to OSHA and an investigation and review process including to the Department of Labor's Administrative Law Judges and Administrative Review Board. If the DOL does not issue a final decision on the complaint within 210 days after filing, the employee may seek *de novo* review in the federal district court where the alleged violation occurred.
Remedies Available	Reinstatement of the employee, back pay and consequential damages.	Twice the amount of back pay a complainant would have received, reinstatement, and compensation for litigation costs, expert witness fees and reasonable attorney fees.	Reinstatement of the employee, back pay and compensatory damages, and violator must "take affirmative action to abate the violation."
Standard for Protected Activity	There are two standards presently employed by federal courts in assessing "protected activity:" the "reasonable belief" standard adopted by the ARB in 2011, and the prior "definitively and specifically" standard set forth in an earlier 2006 ARB decision. The reasonable belief standard is the one used in CFPA claims. The older standard, which is still applied by some federal courts, requires protected communications to "definitively and specifically" relate to a statute or rule listed in the SOX anti-retaliation provision.	Information must be original, meaning the SEC did not have it from another source, and it must lead to successful enforcement action with a sanction of at least $1 million.	Complainant must meet the reasonable belief standard, meaning the complainant has both a "subjective, good faith belief" and an "objectively reasonable belief" that the conduct complained of violates the relevant law or regulation. The objective reasonableness of a complainant's belief is typically determined based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.