ADMINISTRATIVE REVIEW BOARD
DEPARTMENT OF LABOR

ARB Case No. 07-123
ALJ Case Nos. 2007-SOX-039, 2007-SOX-042

In the Matter of:

KATHY J. SYLVESTER and
THERESA NEUSCHAFER,
Complainants,

v.

PAREXEL INTERNATIONAL LLC,
Respondent.

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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The Securities and Exchange Commission (the "Commission") submits this brief, *amicus curiae*, in response to the request by the Administrative Review Board ("ARB") that the Commission and other interested persons file *amicus* briefs addressing what a claimant must establish to sustain a claim of having engaged in protected activity under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002

("SOX"), 18 U.S.C. 1514A.

STATEMENT OF THE ISSUES

In connection with its more general question of what a claimant must establish to sustain a claim of having engaged in protected activity under Section 806, the ARB requested views on five specific questions. The Commission will address the following two questions:

(1) Must the claimant establish that the asserted violation of the laws listed in Section 806 of SOX involves or relates to fraud against shareholders?

(2) Must the claimant establish that the protected activity "definitively and specifically" relates to a violation of one or more of the laws listed in Section 806?

STATEMENT OF THE CASE

A. SOX Section 806

Section 806, 18 U.S.C. 1514A, is entitled "Whistleblower protection for employees of publicly traded companies." Section 806(a) provides:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in

> any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> > (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 [criminal mail fraud], 1343 [criminal wire fraud], 1344 [criminal bank fraud], or 1348 [criminal securities fraud], 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.

B. The case under review by the ARB

This case involves complaints by Kathy Sylvester and Theresa Neuschafer, both of whom were employed by Parexel International LLC, a public company that operates research facilities for testing drugs in a clinical setting on behalf of

drug manufacturers. Sylvester served as Case Report Forms Department Manager. In this capacity, she was responsible for, among other things, the accurate reporting of data and related research results from clinical studies conducted by Parexel pursuant to the law and regulations promulgated by the Food and Drug Administration. Neuschafer was employed as a Clinical Research Nurse.

Sylvester informed two of her coworkers, the Nurse Manager and the Clinical Research Coordinator / Manager, that several of the researchers were reporting false clinical data in violation of the FDA standards by falsely recording the time points at which testing was supposedly performed on clinical subjects. Similarly, Neuschafer informed the Clinical Research Coordinator / Manager that two coworkers "were reporting false clinical data." Neuschafer later disclosed additional clinical misconduct to Sylvester, her coworker, who disclosed that misconduct to Neuschafer's supervisor. Sylvester and Neuschafer were later disciplined and ultimately fired by Parexel. The two employees then filed complaints alleging that they suffered retaliation and unlawful termination by Parexel in response to their disclosures to supervisors of reporting violations by other employees of certain clinical drug testing protocols. They allege that these reporting violations constituted fraud and that their disclosures were protected

activity under Section 806.

Parexel moved to dismiss the two complaints. In granting the motion, the ALJ held that "[t]he alleged fraudulent conduct must 'at least be of a type that would be adverse to investors' interests' and meet the standards for materiality under the securities laws such that a reasonable shareholder would consider it important in deciding how to vote." Slip at 9 (citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154, ALJ Case No. 2003-SOX-27 (Sept. 29, 2006), 2006 WL 3246910 at *7). Applying this standard to the allegations of the two complaints, the ALJ determined:

> Sylvester's complaint on its face does not satisfy these requirements because she alleges only that she reported that certain of Respondent's employees were falsely recording and reporting clinical data in violation of FDA regulations .... Neuschafer's complaint on its face does not satisfy these requirements because, in substance, Neuschafer alleges only that she reported to Sylvester that her coworkers were reporting such false clinical data. Thus, neither complaint satisfies the legal requirements for protected activity under SOX, because each complainant alleges at most that she reported that her coworkers were reporting false clinical data contrary to FDA requirements. Any such additional references to FDA regulations or violations thereof do not involve, inherently or otherwise, reference to shareholder fraud or violations of federal criminal statutes related to shareholder fraud or SEC statutory or regulatory requirements.

Slip at 9. The ALJ concluded that "[s]uch complaints about the accuracy and

conduct of clinical drug or medical procedure trials do not qualify as protected activity under SOX because they do not have a definitive and specific relation to fraud involving shareholders[.]" Slip at 12.

ARGUMENT

I. So long as the asserted violation was reasonably believed by the claimant to constitute mail fraud under 18 U.S.C. 1341, wire fraud under 18 U.S.C. 1343, bank fraud under 18 U.S.C. 1344, or a violation of a rule or regulation of the Commission, Section 806 does not further require that the misconduct be related to fraud against shareholders or be adverse to the interests of investors.

The principal question in this case is whether a claimant must establish that the asserted violation of the laws listed in Section 806 involves or relates to fraud against shareholders. The ALJ held that the alleged fraudulent conduct must "'at least be of a type that would be adverse to investors' interests,'" and that neither complaint satisfied this legal requirement, "because each complainant alleges at most that she reported that her coworkers were reporting false clinical data contrary to FDA requirements." Slip at 9 (citing *Platone,* 2006 WL 3246910 at *7). Some district courts, as well as the ARB, have read into the statute the requirement that the alleged fraudulent conduct must relate to fraud against shareholders, or must at least be of a type that would be adverse to investors'

interests.

In *Bishop v. PCS Administration (USA), Inc.*, No. 05 C 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006), the first case to address the issue, the district court found: "All the statutes and regulations referenced in § 1514A(a)(1) are ones setting forth fraud. The phrase 'relating to fraud against shareholders' in this provision must be read as modifying each item in the series, including 'rule or regulation of the Securities and Exchange Commission.'" This was followed a few months later by *Livingston v. Wyeth Inc.*, No. 1:03CV00919, 2006 WL 2129794, at *10 (M.D.N.C. July 28, 2006), in which the district court held that "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud." 1/

The ARB joined in this approach in *Platone,* 2006 WL 3246910 at *7, in which the ARB held that "when allegations of mail or wire fraud arise under the

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1/ The court of appeals, in an appeal in *Livingston*, did not consider whether the disclosures must involve securities fraud, but did state that they must involve fraud: "All except the violations described under (5) [any rule or regulation of the Securities and Exchange Commission] refer explicitly to a company's *fraud.* We conclude that number (5) also refers to regulations prohibiting fraud." *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 n.1 (4th Cir. 2008). A few months later in *Welch v. Chao*, 536 F.3d 269, 276 n.3 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009), however, the court referred to this statement as "dicta."

employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests." In an accompanying footnote, the ARB noted that the preamble to SOX states: "To *protect investors* by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." *Platone*, 2006 WL 3246910 at *7, n.106 (quoting Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002)) (emphasis added by the ARB). 2/

Several other district courts have also adopted this limitation. *See, e.g.*, *Portes v. Wyeth Pharm., Inc.*, No. 06 Civ. 2689, 2007 WL 2363356, at *4 (S.D.N.Y. Aug. 20, 2007) (conduct must be "closely related to potential fraud against shareholders"); *Lawson v. FMR LLC*, Nos. 08-10466-DPW, 08-10758-DPW, 2010 WL 1345153, at *15 (D. Mass. Mar. 31, 2010) ("there are ... indications that a relation to shareholder fraud is imperative for each of the six categories of violations listed [;] [t]he legislative history makes clear that Congress passed SOX to address the problems of shareholder fraud that had gone

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2/ The Fourth Circuit, in an appeal in *Platone*, expressly declined to consider this determination, deciding the case on alternate grounds. *Platone v. U.S. Dep't of Labor*, 548 F.3d 322, 326 n.3 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 622 (2009).

unreported in the past"), *certifying interlocutory appeal*, 2010 WL 3001185 (D. Mass. July 28, 2010). Several district courts have rejected such a limitation. *See, e.g.*, *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382-83 (M.D. Ga. 2007) (rejecting such an interpretation); *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) ("§ 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"); *Hemphill v. Celanese Corp.*, No. 3:08-CV-2131-B, 2010 WL 2473845, at *6 (N.D. Tex. June 16, 2010) ("absent a more clear directive that fraud must be alleged, the Court declines to impose such a requirement on Hemphill's claims"). The question has not been directly considered by the courts of appeals. *See, e.g.*, *Allen v. Admin. Review Bd.*, 514 F.3d 468, 480 n.8 (5th Cir. 2008) ("Because the issue is not before us, we express no opinion on whether the first five enumerated categories of protected activity found in § 1514A require some form of scienter related to fraud against shareholders"). *See also supra* notes 1 and 2.

As discussed below, we do not believe Section 806 is limited to allegations of fraud against shareholders or to conduct that is otherwise adverse to the interests of investors.

A. The language of Section 806 is unambiguous.

There is nothing in the language of Section 806 that would indicate that an alleged violation of any of the six categories of laws and regulations to which an employee's communication must relate, other than the final one ("any provision of Federal law relating to fraud against shareholders"), is qualified by a requirement that it must be related to fraud against shareholders or of a type that would be adverse to investors' interests. In *Reyna v. ConAgra Foods, Inc.*, the district court examined the relevant canons of statutory construction and rejected the employer's interpretation that the last phrase of the provision, "relating to fraud against shareholders," modified each of the preceding phrases in the provision:

> Defendants' redrafting of the statute conflicts directly with the "doctrine of the last antecedent." . . . Under the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses (here, the relative clause "relating to fraud against shareholder") are to be applied to the words or phrase immediately preceding them (here, "any provision of Federal law"), and are not to be construed as extending to or including others more remote[.]

506 F. Supp. 2d at 1382. The court cited, among others, *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003). Writing for a unanimous Court in *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), Justice Scalia explained "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily

be read as modifying only the noun or phrase that it immediately follows[,]" citing 2A N. Singer, Sutherland on Statutory Construction § 47.33, p. 369 (6th rev. ed. 2000) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"). "While this rule is not an absolute and can assuredly be overcome by other indicia of meaning," the Court said, "we have said that construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id*.

The district court in *Reyna* further held:

> Defendants' proposed interpretation also conflicts with the supplementary rule that "[w]here the modifier *is* set off from two or more antecedents by a comma, the supplementary 'rule of punctuation' teaches that the comma indicates the drafter's intent that the modifier relate to more than the last antecedent." *Bingham* [*v. United States*], 724 F.2d [921] at 926 n. 3 [(11th Cir. 1984)] (citation omitted). Here, the drafters did *not* set off "relating to fraud against shareholders" with a comma. Instead, they chose to set off from the preceding phrases the entire last phrase, "any provision of Federal law relating to fraud against shareholders," with a comma. This indicates the drafters' intent that this entire last phrase stand alone rather than intending for a part of it to be stretched to modify each of the phrases preceding the comma.

506 F. Supp. 2d at 1383.

We believe that the district court's reasoning in *Reyna* is sound.

B. The legislative history shows that Congress did not intend to limit the violations covered by Section 806 to those relating to fraud against shareholders or adverse to the interests of investors.

The legislative history supports the view that Congress did not intend to limit the scope of protected communications to those involving violations related to fraud against shareholders or violations adverse to investors' interests. Although the ARB appeared to base its holding in *Platone ("*the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests") on the preamble to SOX ("To protect investors"), *Platone*, 2006 WL 3246910 at *7, n.106, it is important to note that Section 806 was introduced by Senator Leahy as part of a separate act, The Corporate and Criminal Fraud Accountability Act of 2002 (the "Accountability Act"), and reported by the committee he chaired, the Senate Committee on the Judiciary, rather than by Senator Sarbanes' Committee on Banking, Housing, and Urban Affairs. *See* S. Rep. 107-146, 2002 WL 863249 (the "Senate Report"). The Accountability Act was added by the Conference Committee to the final version of the SOX bill.

Although the Accountability Act was concerned with securities fraud in the aftermath of the Enron case, it was also concerned with corporate fraud generally. "This legislation aims to prevent and punish corporate and criminal fraud, protect

the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." Senate Report at 2. While Section 803 (debts nondischargeable if incurred in violation of securities fraud laws), Section 804 (statute of limitation for securities fraud), and Section 807 (criminal penalties for defrauding shareholders of publicly traded companies) are directly related to issues of securities fraud, other sections, including Section 806, are not so limited. Section 802 provides, among other things, for criminal penalties for destruction, alteration, or falsification of records with respect to "*any* matter within the jurisdiction of *any* department or agency of the United States[,]" (emphasis added). Section 805 directs the United States Sentencing Commission to review and amend, as appropriate, sentencing guidelines to ensure, among other things, that the guidelines include enhancements for "a fraud offense that endangers the solvency or financial security of a substantial number of victims[,]" and more generally that the guidelines are "sufficient to deter and punish organizational criminal misconduct."

As the First Circuit explained in *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009), Congress passed this protection in response to:

[A] culture, supported by law, that discourage[s] employees from

> reporting fraudulent behavior not only to the proper authorities ... but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.

555 F.3d at 52 (citing the Senate Report at 5). 3/ The Senate Report also noted, at 10:

> Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions.

The Committee on the Judiciary referred to the "tobacco industry litigation," which did not involve fraud against shareholders, as well as to Enron, to illustrate that corporate efforts to quiet whistleblowers transcend state lines. *Id*.

3/ Although the report went on to note, *id.*, that "[t]he consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied[,]" the Committee on the Judiciary did not limit its concern to securities fraud. The Committee stated flatly, at 18: "Section [806] of the bill would provide whistleblower protection to employees of publicly traded companies who report acts of fraud[.]"

C. Even if violations of the criminal fraud statutes and the Commission's rules and regulations do not directly affect investors initially, the consequences of such violations may affect them later.

Assuming that Congress was primarily interested in protecting investors, it still makes sense for the statute to protect communications related to alleged violations of rules or regulations of the Commission, or to alleged violations of the mail fraud, wire fraud and bank fraud statutes, even if the violations do not directly relate to fraud against shareholders or are not directly adverse to the interests of investors. Courts have interpreted Section 806 to require that the employee reasonably believe that a violation has actually occurred or is in progress. It is not enough for the employee to believe that "a violation is about to happen upon some future contingency." *Livingston v. Wyeth Inc.*, 520 F.3d 344, 352 (4th Cir. 2008). Yet violations of Commission rules and regulations, and violations of the criminal fraud statutes, though not at the time related to fraud against shareholders or adverse to the interests of investors, may quickly lead to violations of the antifraud provisions of the federal securities laws. For example, a company that is defrauding its customers or vendors will generally not disclose that it is violating criminal fraud statutes, and this undisclosed fraud, if material,

may quickly lead to material misstatements and omissions in the company's periodic reports. *See, e.g.*, SEC Litig. Rel. No. 20266 (Sept. 5, 2007) (the Commission filed a civil enforcement action charging Saks Incorporated with violating the financial reporting, books-and-records, and internal control provisions of the Exchange Act; the Commission alleged that from the mid-1990s until 2003, certain employees intentionally understated to vendors the sales performance of the vendors' merchandise in order to collect payments from the vendors to which Saks was not entitled, which practice contributed to the company's overstatement of income by material amounts in its financial statements); SEC Press Rel. No. 2006-82 (May 30, 2006) (several Tribune newspaper employees engaged in a fraudulent scheme to inflate two newspapers' paid circulation figures in order to induce advertisers to buy advertising space; Tribune's failure to detect this scheme led it to report inflated circulation figures and trends and misstate its circulation revenues and expenses in annual and quarterly reports it filed with the Commission from January 2002 to March 2004).

Violations of the criminal fraud statutes and of many of the Commission's rules and regulations are serious matters which, even if they do not directly affect investors initially, may affect them later. It makes sense to protect employees who

blow the whistle on such violations *before* the investors are directly affected.

II. Although the ARB, and most courts, require that an employee's communications *definitively and specifically* relate to one or more of the federal laws or rules specified in Section 806, this qualification is not required, but, if adopted, should be interpreted consistent with the remedial purpose of Section 806.

The ARB has asked whether a 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. The term "definitively and specifically" appears to have originated in a whistleblower case brought under the Energy Reorganization Act. There, the Sixth Circuit said: "To constitute a protected safety report, an employee's acts must implicate safety definitively and specifically." *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (citing *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)). This language was picked up by the district court in an early Section 806 case, *Fraser v. Fiduciary Trust Co. Int'l*, No. 04 Civ 6958, 2005 WL 6328596, at *8 (S.D.N.Y June 23, 2005) ("Protected activity must implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically,'"citing *Am. Nuclear Res.*, 134 F.3d at 1295). The ARB adopted the language in *Platone,* 2006 WL 3246910 at *8 ("an employee's protected communications must relate 'definitively and

specifically' to the subject matter of the particular statute under which protection is afforded"). Although we do not favor the use of the phrase "definitively and specifically," a phrase that appears overly narrow and strict (particularly the word "definitively"), we agree with the courts that "a certain degree of specificity" is required; general inquiries are not enough.

The Sixth Circuit did not explain in *American Nuclear Resources* what it meant by the term "definitively and specifically." Although it cited the Eleventh Circuit's decision in *Bechtel*, that case did not use those words and sheds no light on what the Sixth Circuit intended. Although the words seem unduly limiting, both courts emphasized that whistleblower statutes should be interpreted broadly. "Courts interpret the statute broadly to implement its 'broad, remedial purpose,'" *Am. Nuclear Res.*, 134 F.3d at 1295 (referring to the Energy Reorganization Act). "[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws." *Bechtel*, 50 F.3d at 932. Similarly, in *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor,* 992 F.2d 474, 478 (3d Cir. 1993), which was cited in the Senate Report on the Accountability Act at 19, the Third Circuit said: "The whistle-blower provision [of the Federal Water Pollution Control Act] was enacted for the broad remedial

purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards."

The courts that have adopted the "definitively and specifically" requirement in applying Section 806 have generally interpreted it in a manner consistent with the remedial purpose of Section 806. In *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008), the court held that "an employee must show that his communications to his employer 'definitively and specifically relate[d]' to one of the laws listed in § 1514A." However, the court explained, at 276: "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." *See also Hemphill*, 2010 WL 2473845, at *5 ("[w]hile Hemphill's reports did not specifically cite the statute he perceived was being violated," his reports included enough specificity to raise a material issue of fact as to whether his report properly related to one of the categories enumerated in Section 1514A). Thus, the court in *Welch* held that, although "[g]eneral inquiries" would not constitute protected activity, 536 F.3d at

277 (quotation marks omitted), "the 'definitively and specifically' language does *not* in fact require that an employee complain of an *actual* violation." *Id.* (emphasis in original). Indeed, the court noted, "the ARB has squarely held that § 1514A protects an employee's communications based on a reasonable, but mistaken, belief that conduct constitutes a securities violation." *Id*. Contrary to the employer's contention there, the court held that "the 'definitively and specifically' language clearly does not impose a heightened pleading standard in Sarbanes-Oxley whistleblower cases." *Id*.

In *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006) (quotation marks omitted), the court recited that protected activity must "implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically[.]'" The court rejected a claim of protected activity with respect to a communication that was "barren of any allegations of conduct that would alert Defendants that Fraser believed the company was violating any federal rule or law related to fraud on shareholders." *Id*. With respect to another communication, however, the court found that, although the employee did not "expressly state" in his communication that the employer was engaged in illegal conduct related to fraud on shareholders, "given the context of the

[communication] and the circumstances giving rise to the communication," the communication was sufficient to satisfy the pleading requirement for a SOX whistleblowing claim. *Id*. at 323. In a later decision in the case, the court simply said that the reported information must have "a certain degree of specificity[.]" *Fraser v. Fiduciary Trust Co. Int'l*, No. 04 Civ. 6958, 2009 WL 2601389, at *5 (S.D.N.Y. Aug. 25, 2009) (quotation marks omitted), *aff'd*, 2010 WL 4009134 (2d Cir. 2010) (summary order). The whistleblower "'must state particular concerns which, at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal.'" *Id*. (quoting *Lerbs v. Buca di Beppo, Inc.*, ALJ Case No. 2004-SOX-8, slip at 12 (June 15, 2004)). The court found, however, that the employee never "expressed a specific concern that the information contained in the document [that was the subject of his concern] was illegal[,]" *id.* at *6, and granted summary judgement for the employer.

Other courts have addressed the issue without expressly adopting the words "definitively and specifically." In *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 725 (7th Cir. 2009) (emphasis added), the court said (in discussing reasonable belief): "[T]he 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." Similarly, in *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (emphasis added and footnote omitted), the court said: "The employee must show that his communications to the employer *specifically related* to one of the laws listed in § 1514A. * * * The employee is not required to provide the employer with the citation to the precise code provision in question. The employee is not required to show that there was an actual violation of the provision involved." 4/ In *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1377 (N.D. Ga. 2004), the court agreed with the employer that the

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4/ In an accompanying footnote, the court, quoting from the adopting release for DOL's rules implementing procedures under Section 806, said:

> In comments to the final regulations implementing the whistleblower provision, DOL stated it:
>
> > [B]elieve[d] that it would be overly restrictive to require a complaint to include detailed analyses when the purpose of the complaint is to trigger an investigation to determine whether evidence of discrimination exists .... Although the [SOX] complainant often is highly educated, not all employees have the sophistication or legal expertise to specifically aver the elements of a prima facie case and/or supply evidence in support thereof.
>
> Procedures for the Handling of Discrimination Complaints Under the Sarbanes-Oxley Act, 69 Fed. Reg. 163, 52106 (Aug. 24, 2004).

Day, 555 F.3d at 55 n.11.

connection of the employee's complaints to the substantive law protected in Section 806 was "less than direct." However, the court found that the employee's allegations detailed violations of the company's internal accounting controls in favor of preferential treatment based on personal relationships. *Id.* at 1378. Although, after an investigation, the employer ultimately determined that some of the employee's allegations lacked merit, the court said "this does not change the fact that [the employer] understood the nature and type of allegations that [the employee] made and that those allegations were within the zone of protection afforded by Sarbanes-Oxley." *Id*.

Section 806 requires only that the employee's communication "regard[] ... conduct which the employee reasonably believes constitutes a violation of" one of the enumerated federal laws or rules or regulations of the Commission. We do not believe that the qualification that the communication "must relate 'definitively and specifically' to" one of those laws should be added. Although the courts generally have accepted the qualification, we believe they have given it an appropriate interpretation consistent with the remedial purposes of Section 806. We agree with those courts that have focused on the degree to which the communication can be reasonably understood by the employer to implicate a possible violation of one

of the enumerated laws. As the court explained in *Welch*, 536 F.3d at 276, this requirement ensures that an employee's communications to his employer are factually specific and identify the specific conduct that the employee believes to be illegal. Beyond that, we do not believe that the employee's communication needs to include a detailed analysis of the alleged violation in order to be protected activity.

CONCLUSION

For the foregoing reasons, the Commission believes that (1) the asserted violation of one of the laws listed in Section 806 (as to which the employee provides information) need not relate to fraud against shareholders or be adverse to the interests of investors, and (2) while the Commission does not believe that the employee's whistleblowing activity must relate "definitively and specifically"

to one of those laws, if such a qualification is adopted, it should be interpreted, as the courts have done, to implement the remedial purpose of Section 806.

Respectfully submitted,

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December 2010

CERTIFICATE OF SERVICE

I certify that on December 30, 2010, I caused the required number of copies of the Brief of the Securities and Exchange Commission, Amicus Curiae, to be served on the General Counsel of the Administrative Review Board, and further, that I caused two copies to be served on the parties by United Parcel Service, addressed to counsel as follows:

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