UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

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

BRIEF OF AMICUS CURIAE NATIONAL WHISTLEBLOWERS CENTER AND

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INTEREST OF THE AMICUS

Established in 1988, the **National Whistleblowers Center (NWC)** is a non-profit tax-exempt public interest organization.[1] The Center regularly assists corporate employees throughout the United States who suffer from illegal retribution for lawfully disclosing violations of federal law. The NWC's extensive activities on behalf of employee whistleblowers is set forth on its web page, www.whistleblowers.org. The NWC has participated as amicus curiae in the following cases: *English v. General Electric*, 496 U.S. 72 (1990), *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (1985); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Haddle v. Garrison*, 525 U.S. 121 (1998); *Vermont Agency Of Natural Resources v. United States ex rel. Stevens*, (98-1828) 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000), along with numerous lower court decisions, including cases under the Sarbanes-Oxley Act. The NWC provides technical information to various Congressional committees in order to assist Congress in drafting legislation that will effectuate Congress' intent to protect whistleblowers. Most recently the NWC provided assistance to the Senate Banking Committee to ensure that the protections set forth in Section 21F of the Securities Exchange Act adequately prohibited retaliation. The NWC worked directly with the staff of the Senate Judiciary Committee in initially recommending to the Committee that corporate whistleblowers be protected, and later in the legislative-drafting process. The NWC fully endorsed the final efforts of the Judiciary Committee, and strongly supported the enactment of Section 806 into law. *See* 148 Cong. Rec. S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the NWC).

The NWC's support for the whistleblower provision ultimately incorporated into SOX

[1] Based on the NWC's extensive track record on SOX cases, Complainants' counsel invited NWC to submit this amicus brief.

was noted by the Senate Judiciary Committee in its full Conference Report (S. Rep. 107-146, at 10):

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The 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. …
>
> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

The NWC successfully urged the staff of the Senate Judiciary Committee to model the Sarbanes-Oxley whistleblower protection on the existing Department of Labor-enforced laws. This included using AIR 21's provisions, at the time the most recently enacted DOL-whistleblower law. AIR 21, in turn, was modeled on the Energy Reorganization Act (ERA). ERA followed the environmental whistleblower laws and the 1969 Mine Health and Safety Act.

ARGUMENT

The SOX whistleblower protection flows from the protections set forth in the 1969 Mine Health and Safety Act, and the well-established judicial precedent interpreting that law, and other similar laws. Regardless of the specific whistleblower law at issue, the principles setting forth the appropriate interpretation of protected activity are aligned, whether those activities occurred

in the context of mine safety, labor relations, environmental protection or within the complex and highly regulated nuclear power industry. As explained by the Court of Appeals in *Passaic Valley Sewerage Comm. v. U.S. Department of Labor,* 992 F.2d 474 (3rd Cir. 1993):

> Furthermore, the whistle-blower provision of the Clean Water Act mirrors that of several other federal environmental, safety and energy statutes. The legislative history of § 507 indicates that it was patterned after some of these provisions. S.Rep. No. 414, 92d Cong., 2d Sess. 83 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3748. Construing such a whistle-blower statute, the Supreme Court has afforded broad protection to employees, noting that broad protection is necessary "'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122-23, 92 S.Ct. 798, 801-02, 31 L.Ed.2d 79 (1972) (citing *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C.Cir.1951)) ("testimony" under the National Labor Relations Act's whistle-blower provision includes sworn statement of employee to investigator which was not later used at formal hearing).
>
> Similarly, our sister courts of appeals have consistently construed those statutes to lend broad protective coverage to internal complainants, as well as other employees. See, e.g., *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1163 (9th Cir.1984) (internal safety and quality control complaints protected under Energy Reorganization Act of 1974); *NLRB v. Retail Store Employees Union*, 570 F.2d 586 (6th Cir.), cert. denied, 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed.2d 109 (1978) (employee who refused to testify in support of union protected under the National Labor Relations Act); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 779 (D.C.Cir.1974), cert. denied, 420 U.S. 938, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975) (coal miner's "notification to the foreman of possible dangers" protected activity under Federal Coal Mine Health and Safety Act of 1969); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-12 (10th Cir.1985), cert. denied, 478 U.S. 1011, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986) (protection under Energy Reorganization Act's whistle-blower provision); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir.1982) (Energy Reorganization Act); *Rayner v. Smirl*, 873 F.2d 60, 64 (4th Cir.), cert. denied, 493 U.S. 876, 110 S.Ct. 213, 107 L.Ed.2d 166 (1989) (Federal Railroad Safety Act); *Pogue v. United States Dept. of Labor*, 940 F.2d 1287, 1289 (9th Cir.1991) (whistle-blower provisions of four separate environmental statutes); *Love v. RE/MAX of America, Inc*., 738 F.2d 383, 387 (10th Cir.1984) (Fair Labor Standards Act) . . .
>
> In each area of whistleblower protection Congress entrusted the Department of Labor to

apply established labor law principles to ensure that employees would have the "complete freedom necessary" to "prevent" "Channels of information from being dried up by employer intimidation of prospective complainants." *NLRB v. Scrivener*, 405 U.S. 117, 122-24 (1972), cited to with approval by the U.S. Department of Labor in the context of its employee protection provisions. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1986), and *Wells v. Kansas Gas and Electric Co*., 83-ERA-12 (Sec'y June 14, 1984), *aff'd Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir.1985), *cert. denied*, 106 S.Ct. 3311 (1986).

On November 12, 2010 the Board issued an order asking for briefing as to "What must a claimant establish . . . to sustain a claim of having engaged in protected activity?" The Board also asked for briefing on four sub-questions related to the scope of protected activity:

* "Whether the claimant must establish that the protected activity definitively and specifically relates to a violation"

* "What must a claimant show in order to meet the requirement that the complainant reasonably believes that the employer's conduct at issue violated one or more of the laws . . . ."

* "Whether the claimant must establish the various elements of fraud . . . ?"

* "Should Section 806 be interpreted to independently impose a materiality requirement on communications . . .?"

The answer to these questions all lie within Congress' clear expression of intent at the time it enacted § 806 of SOX. Congress intended the definition of protected disclosure to be interpreted in accordance with the well defined case law the U.S. Department of Labor and most courts of appeal had developed under the statutes upon which the SOX was modeled. Based on Congress' expressions of intent, the controlling standard is set forth in the *Munsey- Guttman-Passaic Valley* line of cases. The scope of protected activity is somewhat different depending upon whether an employee uses an established channel for raising a concern, or simply expresses

a concern to someone outside of any reporting structures.

I. PROTECTED ACTIVITY RAISED THORUGH UN-OFFICIAL CHANNELS UNDER SOX IS DEFINED BY THE *PASSAIC VALLEY* CASE AND THE AUTHORITY UPON WHICH *PASSAIC VALLEY* WAS BASED.

The controlling precedent for interpreting the scope of protected activity raised by an employee using unofficial channels (i.e. such as complaining to a co-worker or a supervisor) under SOX was clearly established by Congress. This precedent reaches back into well-settled case law under the 1969 Mine Safety Act, and an unbroken line of judicial and administrative precedent that was in-place at the time Congress enacted SOX. Congress, both by the statutory structure of the SOX, and its explicit reference to this body of case law, made its intentions perfectly clear. This Board must apply this precedent to the current case, and clarify the scope of protected activity under the law.

This Department has construed protected activity broadly, consistent with the established law calling for broad interpretation to further the remedial purposes. *See*, *e.g*. *Guttman v. Passaic Valley Sewerage Comm.*, 85-WPC-2, D&O of SOL, pp. 10-13 (March 13, 1992), *aff'd, Passaic Valley Sewerage Comm. v. U.S. Department of Labor*, 992 F.2d 474, 478-79 (3rd Cir. 1993); *Willy v. Coastal Corp.*, 85-CAA-1, D&O of SOL, p. 13 (June 1, 1994). The *Guttman* case reflected the standard followed by this Board for years before the passage of SOX. It is based on the unquestioned line of cases developed under the laws upon which SOX was ultimately modeled, including the Mine Health and Safety Act and the National Labor Relations Act.

Congress was fully cognizant of the case law when it enacted SOX, and by modeling SOX upon these prior laws, Congress expressed its intention that the Department of Labor follow this unbroken line of precedent. Not one word in SOX demonstrates an intent to overturn

this long line of cases for which Congress, as far back as 1978, had explicitly affirmed. *See Kansas Gas and Electric Co. v. Brock*, cited above.

If there was any doubt whatsoever about the standard the DOL was required to apply in SOX cases under 18 U.S.C. § 1514A(a)(1), Congress explicitly re-affirmed the prior precedent of the DOL when it cited, with approval, to the case of *Passaic Valley Sewerage Comm. v. U.S. Department of Labor*, 992 F.2d 474, 478-79 (3rd Cir. 1993) in the legislative history of SOX. The *Passaic Valley* case affirmed the Secretary of Labor's definition of protected activity as set forth in the underlying case of *Guttman*, cited above. In *Guttman* the Secretary described the reach of protection for raising concerns through unofficial channels as follows:

> I note that in the present case, however misguided Complainant's allegations may have been shown to be, there was **never any contention that they were frivolous or brought in abuse of the statute.** Rather, the record shows that they were pressed by the Complainant in good faith as his very strongly and seriously held beliefs. I find that Complainant's communication of these alleged violations to P.V.S.C. officials was fully protected under the whistleblower provision of the FWPCA. 33 U.S.C. 1367.

85-WPC-2, D&O of SOL (emphasis added). Thus, as long as an internal complaint made outside the formal reporting channels was made in good faith, and was not frivolous, it was protected. In *Passaic Valley*, cited above, 992 F.2d at 478-79, the Third Circuit affirmed saying:

> protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated . . ..

The Third Circuit concluded that Mr. Guttman's internal complaints constituted a "proceeding"

and affirmed the finding that his activity was protected. 992 F.2d at 480.

Critically, the Senate Conference Report approving the language of § 806 explicitly cited to *Passaic Valley* as the controlling standard for SOX. Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), available at 2002 WL 32054527. However, even without this explicit approval of the *Passaic Valley* standard, Congress was cognizant of the Department of Labor's prior record on whistleblower cases and decided not only to structure § 806 on these prior statutes, but to also grant the Labor Department the initial jurisdiction to adjudicate § 806 cases.

Thus, under unquestionable prior precedent, the standard for judging whether an employee's subjective or objective beliefs that his or her disclosures implicate the misconduct or frauds identified under SOX is ***not*** **the "**definitively and specifically relates to a violation" standard, but rather the "**frivolous or brought in abuse of the statute**" standard. As intended by Congress, *Guttman* and *Passaic Valley* control the legal interpretation of the scope of protected activity.

The standards set forth in *Guttman* and *Passaic Valley* stretch back for many years, and the cases upon which these two precedents rely provide answers for the other questions raised by the Board. The "reasonable belief" standard applicable to SOX is not based on the beliefs of a sophisticated accountant or stockbroker. There was never any precedent under the *Guttman-Passaic Valley* line of cases that conditioned employee protections on a sophisticated understanding of the law. In the nuclear power cases, which concerned a highly regulated and highly technical industry, there was never any requirement that workers have advanced knowledge of the science behind nuclear energy or the long-term impact of the specific "safety"

concerns they raised. Indeed, in most cases it turned out that not only was the concern not related to an actual violation of law, most often there was never even a valid safety issue.

Complaints to OSHA that touch on public safety and the environment have long been protected under the environmental whistleblower provisions. *Scerbo v. Consolidated Edison of NY*, 89-CAA-1, D&O of SOL, at 4-5 (Nov. 13, 1992); *Williams v. TIW Fabrication & Machining, Inc*., 88-SWD-3, D&O of SOL, at 8 (June 24, 1992). In *Jayko v. Ohio EPA*, 1999-CAA-5, RD&O, at 64 (October 2, 2000), ALJ Phalen explained the purposes of these protections in general terms that afford protection to lay people acting within those general concepts.

But the law was not solely concerned with fixing safety problems. The law was also designed to protect "channels of information." The law did not want to endorse any policy or precedent that would chill employee speech. Thus, every time the standard for protected activity was analyzed by the Secretary of Labor in the cases upon which the *Guttman-Passaic Valley* precedent is based, the cases were analyzed in the context of protecting channels of information,[2] not in ensuring that valid complaints were filed. The standard set forth in *Guttman* had nothing whatsoever to do with whether or not his complaints were "definitive" or "specific." They were designed to protect the channels of information.

In regard to any requirement related to an employee's need to set forth the legal elements of fraud in his or her complaint, or to establish the "materiality" of his or her complaints, such requirement would be at war with the *Guttman-Passaic Valley* standard. All of the cases upon

[2] While employers are encouraged to establish channels for raising compliance concerns, they cannot impose a chain of command to limit how employees raise protected concerns. *Leveille v. New York Air National Guard*, 94-TSC-3/4, D&O of Remand by SOL, at 16-17 (December 11, 1995); *West v. Systems Applications International*, 94-CAA-15, D&O of Remand by SOL, at 7 (April 19, 1995); *Dutkiewicz v. Clean Harbors Environmental Services*, 95-STA-34, D&O of ARB, at 7 (August 8, 1997), *aff'd*, *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984).

which the *Guttman-Passaic Valley* rulings were based *never* mandated a high level of detail or sophistication in an employee's allegation. The opposite was the case. The correct standard is whether or not the concern was "frivolous" or raised as an abuse of the law itself.

The Third Circuit addressed these issues in *Passaic Valley* at 992 F.2d at 478-49, saying,

> The whistle-blower provision 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 . . ...
>
> [A]n employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of in-house or external review in order to merit protection under § 507(a) for the obvious reason that such a standard would chill employee initiatives in bringing to light perceived discrepancies in the workings of their agency.

Again, the standard was whether or not the issues raised by the employee were, on there face, frivolous. Once the complaint was found not to be frivolous, there would be no need or legal justification to require further "scrutiny" of the complaint. In fact, any further scrutiny of the validity of the complaint, be it from "in-house" or "external" sources would is impermissible and would constitute complete negation of the *Guttman-Passaic Valley* standards.

It would be completely improper for an ALJ or this Board to subject any employee complaints to further "scrutiny" than the "non-frivolous" standards mandated by the *Guttman-Passaic Valley* rule. Consequently, permitting an employer to scrutinize the validity of an employee's protected disclosures in the light of fraud standards or "materiality" standards would be an abuse of discretion. The standard is straightforward: Were the complaints frivolous or not? Where the complaints raised in order to "abuse the statute?"

Any other standard would defeat the primary purpose of § 806 and the laws upon which it is modeled. These laws were designed to protect "channels of communication," not to ensure that

employees raise sophisticated or well documented allegations.

II. EMPLOYEE DISCLOSURES TO APPROVED CHANNELS ARE ENTITLED TO A HIGHER LEVEL OF PROTECTION.

The *Guttman-Passaic Valley* standard was developed in the context of informal employee complaints to co-workers or supervisors. However, most whistleblower laws also, implicitly or explicitly, identify channels of communication open to employees for raising complaints. Depending on the law, these official channels differ. In the context of Title VII, the official channel generally includes the EEOC, agency EEO offices and state agencies. In nuclear power, these channels are often a resident inspector hired by the NRC or the plant's safety office. Under the National Labor Relations Act, communications to the Board have heightened protection.

The Sarbanes-Oxley Act established various official lines of communication. For example, the law established the requirement that companies create Audit Committees that are authorized to accept employee concerns. 15 U.S.C. § 78f(m)(4). Similarly, Section 806 identified various approved reports to Congress, the SEC or other regulatory bodies. Additionally, § 806 explicitly identified supervisors and internal corporate concerns programs as an approved channel of communication (i.e. disclosures to persons with the "authority to investigate, discovery, or terminate misconduct"). 18 U.S.C. § 1514A(1)(C).

The well-developed case law concerning protected disclosures made through these official lines of communication is even broader than the informal disclosures protected under the *Guttman-Passaic Valley* standard. Communications made to these official reporting offices are very broad -- and designed to ensure that persons can freely and without fear raise issues with the offices designed to review the veracity of a complaint. Reference 18 U.S.C. §1514A(a)(2).

In this regard the *Guttman-Passaic Valley* line of cases all explicitly cite to the key cases

decided under the 1969 Mine Health and Safety Act. In *Guttman* the Secretary of Labor explicitly cited to *Munsey v. Federal Mine Safety and Health Review Comm'n*, 595 F.2d 735, 742-743 (D.C. Cir. 1978) as authority for interpreting he scope of protected activity. The *Munsey* decision was also cited in numerous administrative and court decisions leading up to the *Guttman* Final Order.

The *Munsey* decision set forth the proper scope of protected activity in the context of an employee who raises concerns through an established line of communication. That standard is even broader than the "not frivolous" standard that controls informal complaints. In *Munsey*, communications made through established channels - even those established informally by custom and usage, are near absolute. There are no heightened standards or materiality requirements. Indeed, issues raised through official channels are protected, period. It is the act of using the protected channels to raise the concern that triggers the protection, not the content of the concern. Again, this rule makes perfect sense once the overriding purpose of the law is properly understood: the protection of channels of communication. If complaints filed through proper channels could be subject to a restrictive content analysis, such an analysis would have a chilling effect on employee speech. Employees would have to second-guess themselves before raising concerns, even before organizations or structures that are explicitly designed to accept such complaints, and weed out the important complaints from the frivolous complaints.

The *Munsey* Court protected such complaints, even in the face of corporate attempts to demonstrate that the complaint was frivolous and/or raised in bad faith. As the Court held: "The actual statutory language fails to suggest that notification is to be judged on any good faith or not frivolous standard." 595 F.2d at 742.

The *Munsey* Court carefully reviewed the legislative history behind the Act when it concluded that corporations could not raise a "bad faith" or "frivolous" defense when defending a retaliation case filed under the Act (595 F.2d at 742-43):

> Senator Kennedy emphasized the need to encourage the reporting of suspected safety violations:
>
> > Mr. President, the rationale for this amendment is clear. For safety's sake, we want to encourage the reporting of suspected violations of health and safety regulations. Section (103(g) of the Act) confirms this concern by calling for immediate inspection whenever a representative of miners believes that there may be a violation of health or safety standards.
> >
> > But miners will not speak up if they fear retaliation. This amendment should deter such retaliation, and, therefore, encourage miners to bring dangers and suspected violations to public attention.
>
> 115 Cong.Rec. 27948 (1969). We believe that Senator Kennedy's desire to "encourage" safety violation reports strongly suggests that Congress would not want to place additional procedural and substantive burdens on miners who seek the protection of section 110(b) by requiring that the miners demonstrate their state of mind and the merit of their complaints. See *Baker v. Department of Interior*, 193 U.S.App.D.C. 361, 595 F.2d 746 at 749-750 (1978) (requiring specific intent to notify federal authorities would place a burden on miners inconsistent with the purpose of section 110(b)).
>
> In addition, Senator Kennedy stated that the new section would give coal miners the same protection from reprisal that workers already had under other legislation. 115 Cong.Rec. 27948 (1969). Specifically, he referred to section 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1976).[3] When section 8(a)(4) was debated on the floor of the Senate, the bill's sponsor, Senator Wagner, was asked how the section would be applied in a situation much like the one the Board found in this proceeding:
>
> > MR. HASTINGS. Now let me inquire about paragraph (4), on page 11, which says that it shall be an unfair labor

[3] 29 U.S.C. § 158(a)(4) (1976) states: "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."

practice for an employer

To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

Suppose an employee should file a perfectly outrageous charge, one which was not true, and which he knew was not true: Under paragraph (4) is it the Senator's notion that the employer might, because of that, and even if that fact were shown, be found guilty of an unfair labor practice?

MR. WAGNER. Merely because he has filed charges related to unfair labor practices no employee should be discriminated against. That is exactly what that section means; otherwise, even though there might be flagrant violations of the provisions of this measure, an employee would not be free to file charges. He would know that the moment the charges were filed he would be discharged.

MR. HASTINGS. The trouble here is the same trouble we frequently have. In trying to correct one evil, we create a new one. I agree with all that. I agree that the worker ought to have a right to make complaint about the violation of this proposed law, and that he ought not to be discriminated against for so doing; but I had in mind whether we could not put in the measure a provision that a person who did so in good faith should not be discriminated against, and not leave the provision as broad as it is, so that an employee might file charges maliciously, for instance, knowing that he could not lose his job even if he did so maliciously.

MR. WAGNER. The suggestion of the Senator would bring up another question that would complicate the situation still more. I do not think the provision as it now stands will be subject to any abuse.

MR. HASTINGS. The Senator from New York is in charge of the bill.

MR. WAGNER. I am satisfied with the provision as it stands.

79 Cong.Rec. 7676 (1935). Following Senator Wagner's interpretation of the section, the NLRB has held that section 8(a)(4) provides protection even for an employee who files meritless charges. *Bayport Fabrication, Inc*., 185 N.L.R.B. 516, 517 (1970); *American International Aluminum Corp*., 149 N.L.R.B. 1205, 1210 (1964).

Thus, if an employee utilizes an established line of communication to raise a concern, the ability of the company or an ALJ to scrutinize the contents of that complaint is extremely limited.

Accord, *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998 (5th Cir. 1969) (discussing "participation clause" protection under Title VII); *Booker v. Brown & Williamson Tobacco Co*., 879 F.2d 1304, 1312 (6th Cir.1989) (noting that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection").

In the context of the Sarbanes Oxley Act, complaints covered under the *Munsey* Standard would include not only complaints to the SEC, but also complaints raised to the audit committee, other internal complaints to officials designated by the company to investigate or correct misconduct, and supervisors.

III. THE DEPARTMENT OF LABOR HAS NOT CHANGED THE *MUNSEY-GUTTMAN-PASSAIC VALLEY* DOCTRINES AND THEY REMAIN BINDING NOTWITHSTANDING *PLATONE*.

After the 2002 enactment of SOX this Board begin to require that protected activity "definitively and specifically" relate to a specific violation. *Platone v. FLYi, Inc*., 25 IER Cases 278, 287, 2006 DOLSOX LEXIS 105, *33 (Dep't of Labor Sept. 29, 2006), *aff'd Platone v. Department of Labor*, 548 F.3d 322, 326 (4th Cir. 2008). This Board did not state how a heightened standard for protected activity would further the remedial purposes of the statute and did not attempt to reconcile this higher standard with past precedent. Instead, this Board cited to *Kester v. Carolina Power & Light Co*., ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 9 (ARB Sept. 30, 2003), for the proposition that in nuclear whistleblower complaints, protected activity must "definitively and specifically" relate to nuclear safety. In *Kester*, the complainant had raised a concern about falsified authorizations to access a nuclear power plant. The ARB rightly decided that these concerns were protected. As such, the Board's usage of the words

"definitively and specifically" was dicta and not intended to heighten the standard from the prior standard enunciated in *Guttman*.[4] Neither in *Kester* nor in *Platone* did this Board cite to or address the broad *Guttman* standard that had been in use for years.

The *Kester* dicta was based on the holding in *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). The *American Nuclear* decision introduced the concept of "definitively and specifically" into the nomenclature of protected disclosures. In that case the complainant, Mr. Sprague found he was not protected when he impulsively complained to radiation protection technicians that he was not getting the correct report of his exposure. As the court noted, he had never filed an official conditions report ("CR"), he never spoke to a supervisor or manager about his concern, and he never contacted any government agency. His protest and request for a report "lacks a sufficient nexus to safety concerns." It was not participation in proceedings, and therefore he had a higher standard to meet to show that he was opposing a violation.[5]

The Court in *American Nuclear* did not overturn the legality of the Department of Labor's prior precedent interpreting the scope of protected activity, and did not address the standards mandated by the *Munsey*, *Guttman* or *Passaic Valley* line of cases. The holding was very narrow, and was clearly applicable to the unique factual circumstances presented in that case (i.e. very non-specific issues raised to co-workers). There is no indication whatsoever that the court in *American Nuclear* intended to create a new standard for protected disclosures, or to substitute

[4] The ARB did cite to *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998), and was apparently buttressing its decision to withstand review. Still, there is no indication that the ARB intended to modify the standard for finding protected activity.

[5] The ANR decision is now outdated in light of the Supreme Court's thorough analysis of the scope of protection under the opposition clause in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. ___, 129 S.Ct. 846 (2009).

the existing standards set forth in the law. Even if the Court had intended such a radical and sweeping result, its ruling would have been limited to nuclear power cases in the Sixth Circuit until such time as the Department of Labor reviewed the holding and determined whether to change its well established and Congressionally mandated precedent in either nuclear cases or other similar laws, such as the Federal Water Pollution Control Act.

For whatever reason, the Department of Labor apparently relied upon the flawed interpretation in *American Nuclear* to somehow conclude that its core standards for interpreting protected disclosures had changed. But this reliance was in error. Consistent with the requirements of *FCC v. Fox Television Stations, Inc*., 556 U.S. ___, 129 S. Ct. 1800 (2009), *Good Samaritan Hasp. v. Shalala*, 508 U.S. 402,417 (1993), and *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U. S. 29, 46-57 (1983), the Board could not simply jettison the long-standing *Munsey-Guttman-Passaic Valley* standards and alter those standards without first carefully explaining why it was changing the standards for protected disclosures. *See Thompson v. U.S. Department of Labor*, 885 F.2d 551 (9th Cir. 1989) ("It is an elemental tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them.").[6]

If the Board had overturned its prior precedent, the new standard would be entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). As the *Platone* decision does not cite to or even recognize the existence of *Guttman* or other cases adopting a broad standard, the *Platone* opinion fails to meet the requirements of *Fox Television Stations* to modify past policy. Thus, the *Platone*

[6] The U.S. Chamber of Commerce, at page 10 of its *amicus* brief, recognizes the requirements for an agency to change its policy, but fails to consider whether the ARB met those requirements in adopting the "definitively and specifically" standard for protected activity.

standard is not proper precedent and the Board should not rely upon that case, or any cases that adopt that standard, in setting forth the proper standards for defining a protected disclosure.

Moreover, given the Congressional endorsement of the *Munsey-Guttman-Passaic Valley* standards in the context of the Sarbanes-Oxley Act, the Board cannot not overturn those standards and substitute them with the heightened *Platone* standard.

Unfortunately, the *Platone* standard crept its way into SOX case law without the Board having properly overturned the prior controlling decisions. Giving deference to this Board's authority in the area, courts have followed this Board's lead and applied the *Platone* standard in other cases. *Van Asdale v. Int'l Game Technology*, 577 F.3d 989, 997 (9th Cir. 2009); *Day v. Staples, Inc*., 555 F.3d 42, 54-55 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008); *Allen v. Admin. Review Bd*., 514 F.3d 468, 476 (5th Cir. 2008) ("We agree with the ARB's legal conclusion that an employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A."). None of these court decisions are proper precedent or controlling on this Board. The *Platone* lines of cases were issued without the Board having complied with the *Fox Television*/*Thompson* line of cases.

The NWC urges this Board to reject the "definitively and specifically" standard as a mistake, and return to the broad standard that better comports with the statute's remedial purpose. There is every reason to expect that courts will defer to this Board's expertise and follow the renewed standard. *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571 (11th Cir. 1997) (Court must apply due deference to the Secretary of Labor's interpretation of the statutes which he or she administers.); *Collins v. Beazer Homes*, 334 F.Supp. 2d 1365. 1374 n. 10 (N.D. Ga. 2004); *Welch v. Chao*, 536 F.3d 269, 276 n. 2 (4th Cir. 2008); *Day v. Staples, Inc*., 555

F.3d 42, 54 n. 7 (1st Cir. 2009).

Not only is the "definitively and specifically" standard in direct conflict with controlling prior precedent, that standard undermines the purpose behind SOX. As explained by Professor Richard Moberly in his careful study of § 806, the narrow reading of "protected activity . . . likely [makes] the road steeper for future whistleblowers." Richard Moberly, "Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win," *William & Mary Law Review*, Vol. 49, Fall 2007, at p. 138.

Moreover, the scientific study on whistleblower disclosures published by the Association of Certified Fraud Auditors recognized that a very broad definition of protected disclosure was necessary if corporations were to be in a position to identify fraud. Based on its careful study, the Association recommended strong protection for whistleblowers, and urged that the standard for raising a protected disclosure cover any employee who raised a concern about "suspicious activities." Association of Certified Fraud Examiners (ACFE), *2010 Global Fraud Survey: Report to the Nations on Occupational Fraud and Abuse*, p. 5.

In turn, both the Moberly study and the ACFE report are consistent with Congress' understanding of the core purpose behind the SOX. Congress passed § 806 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.

S. Rep. No. 107-146, at 5 (2002).

IV. THE PRESENT CASE IS COVERED UNDER THE *MUNSEY* STANDARD.

In the present case, respondent has set out the official channels for employees to use in

raising compliance concerns. It has adopted and published the Parexel International Corporation Code of Business Conduct and Ethics to inform both its employees and its investors of the thoroughness of its internal controls.[7] It declares, "[t]his Code is intended to deter wrongdoing and to promote the conduct of the Company business in accordance with high standards of integrity and in compliance with applicable laws and regulations." On page 4, it states:

> Every employee, officer and director has the responsibility to ask questions, seek guidance, **report suspected violations** and express concerns regarding compliance with this Code. Employees, officers or directors who are aware of conduct or circumstances that violate applicable law or this Code should **notify his or her supervisor** or the General Counsel. [Emphasis added.]

Thus, reporting suspected violations of law to one's supervisor is the official channel for Parexel's employees to assure that the company is maintaining its internal controls as required by SOX. Reporting up the chain of command is the official proceeding to comply with SOX. Based on Parexel's own Ethical Standards, the complainant in this case raised his concerns pursuant to official channels, and thus the standard set forth in *Munsey v. Federal Mine Safety and Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978) applied.

V. COMPLAINANTS NEED NOT ESTABLISH THAT THE CONCERN THEY RAISED RELATES TO FRAUD ON SHAREHOLDERS.

While SOX clearly prohibits frauds on shareholders, it also protects employees who disclose suspicious activities that may indicate the existence of a potential fraud. In the context of nuclear power, not every improperly installed bolt will result in the release of radiation, but employees have the right to complaint about improperly installed bolts because it could indicate that a problem may arise in the future. As explained by the Association of Certified Fraud

[7] Parexel's Code is available on its web page, under "Investors" and "Corporate Governance Documents" at:
http://investor.parexel.com/phoenix.zhtml?c=94569&p=irol-govboard

Auditors, the heart of any statute of policy designed to detect fraud is the protection of early-warnings. Fraud is designed to be well hidden, and employees are the most like source of disclosures that can lead to the detection of fraud. Consequently the ACFE mandates that employees be encouraged to report "suspicious activities." ACFE, *2010 Global Fraud Report*, cited above, pp. 5, 17.

Additionally, SOX coverage is not limited to fraud. Far from it. The provision in the statute that broadly protects any employee for raising a concern potential fraud against shareholders follows the more specific mandates of the law. These mandates cover every single requirement that the SEC imposes on regulated industry, whether these requirements are simply reporting mandates, internal corporate structural requirements or provisions of the securities laws designed to ultimately protect shareholders. Every rule, regulation and law administered by the SEC is covered under SOX, not just laws related to the protection of shareholders. SOX is a very broad statute. For example, if a company is merely negligent in failing to establish or maintain its internal controls, that is still a violation of its legal duties under SEC regulations. There is no public purpose that is served by allowing company managers to punish employees who raise concerns about management's neglect in failing to maintain required internal controls, even if no fraud is involved. *Accord*, *Smith v. Corning*, 496 F.Supp. 2d 244, 248 (W.D. NY 2007).

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB Case No. 04-149, 2004-SOX-11 (May 31, 2006), the ARB addressed the scope of protected activity under SOX. At p. 17, the ARB explained:

> SOX protection applies to the provision of information regarding not just fraud, but also "violation of … any rule or regulation of the Securities and Exchange Commission." 18 U.S.C.A. § 1514A(a)(1). . . . A complainant need not express a concern in every possible way or at every possible time in order to receive

> protection, so long as the complainant's actual communications "provide information, cause information to be provided, or otherwise assist in an investigation" regarding a covered violation. 18 U.S.C.A. § 1514A(a)(1).

Alleging fraud is not required for a SOX claim. Accord *Smith v. Corning*, 496 F.Supp. 2d 244, 248 (W.D. NY 2007); *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-2 (ALJ June 29, 2007); *Hughart v. Raymond James & Associates, Inc*., 2004-SOX-9 (ALJ Dec. 17, 2004); *Hendrix v. American Airlines, Inc*., 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004). There is no requirement that protected activity include any "magic words" to invoke protection. See *U.S. ex rel. Elms v. Accenture LLP*, No. 07-1361, 2009 WL 2189795, at *4 (4th Cir. July 22, 2009) (finding plaintiff who alleged he "expressed his misgivings" and stated the company was "shortchanging the government" sufficiently pleaded that he took action in furtherance of a *qui tam* suit to survive a Rule 12(b)(6) dismissal). The ARB further explained in *Klopfenstein*:

> It certainly is possible that Klopfenstein engaged in protected activity. The problems with PACO's in-transit inventory suggested, at a minimum, incompetence in Flow's internal controls that could affect the accuracy of its financial statements. *See* T. 716-717; RX 28. Klopfenstein's communications thus related to a general subject that was not clearly outside the realm covered by the SOX, and it certainly is possible that Klopfenstein could have believed that the problems were a deficiency amounting to a "violation" — within the *Collins* zone of SOX protection.

In those cases where a complainant has raised a concern about fraud on the shareholders, it is not necessary for a complainant to establish all the elements of a fraud to be protected from retaliation for raising the concern. The law protects employees who are collecting information about possible fraud "before they have put all the pieces of the puzzle together." *See*, *e.g*., *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998) (drawing on the "filed or about to be filed" language of the False Claims Act).

The system of encouraging employees to come forward with information about

suspicious activity would fail if employees could be fired for raising concerns before they had objective evidence of every element of the violation. Internal auditors or outside investigators may establish proof of a violation by using information disclosed by disparate employees. Each employee may see only some of the pieces, yet an investigator must be able to assure each witness that they will be protected for sharing the pieces available to them. Therefore, no one employee's whistleblower complaint should be dismissed solely because the employee did not have information establishing any one particular requirement of a violation, including materiality.

The mischief caused by requiring employees to demonstrate a heightened standard for making protected disclosures is evident on the record in this case. According to the ALJ's decision, Parexel argued that the complainant's concerns over Good Clinical Practices was not protected. This argument is wrong. Parexel's entire business is predicated on compliance with the rules and regulations governing Good Clinical Practices. Its own Form 10-K[8] in place during the time period relevant to this case (its 2006 10-K) readily establishes the materiality of its good clinical practices (GCP). Not only are GCPs material to the company's stock prices, the company's entire corporate reputation and business plan is predicated on its reputation for demanding strict compliance with GCPs. We request that this Board take official notice of Parexel's 10-K forms filed with the SEC and provided to all investors, and carefully review this form in light of the ALJ's ruling. For example, on page 6 of its 2006 filing states:

> Clinical trials are monitored for CRS [Parexel's Clinical Research Services business] and are conducted by CRS in strict adherence with, good clinical practice ("GCP"). ***

[8] Parexel publishes its Forms 10-K on its web page for prospective investors at: http://investor.parexel.com/phoenix.zhtml?c=94569&p=irol-sec

> The information generated during these trials is critical to gaining marketing approval from the Food and Drug Administration ("FDA"), the European Agency for the Evaluation of Medicinal Products ("EMEA"), and other comparable regulatory agencies and market acceptance by clinicians and patients.

Page 12 states:

> Lack of success in obtaining approval for the conduct of clinical trials can adversely affect PAREXEL. Lack of success in obtaining marketing approval or clearance for a product for which PAREXEL has provided clinical trial or other services can also adversely affect the Company. ***
>
> Noncompliance with GCP can result in the disqualification of data collected during a clinical trial and in non−approval of a product application submitted to the FDA.

This is materiality. Good Clinical Practice is Parexel's main product.

Page 68 discusses the company's ethical standards, and clearly informed investors that employees, such as the complainants in this case, would not be subject to any retaliation if they raised concerns through the processes set forth in the company's code of ethics. The 10-K report states as follows:

> The Company has adopted a code of business conduct and ethics applicable to all of its employees, including its principal executive officers and principal financial officer. The code of business conduct and ethics is available on the Company's website (www.parexel.com) under the category "Investor Relations−Corporate Governance

The Board can take official notice of the 10-K form and the Code of Ethics published on the internet (and made available to all investors and all employees).

It is inconsistent for Parexel to inform investors that employees (such as the complainants in this case) are *required* to report potential misconduct to their supervisors, and then for Parexel to inform the Labor Department that such disclosures are not protected. In fact, Parexel's conduct toward the employees in this case appears to raise a regulatory issue for which the SEC should investigate. Parexel advertises to the investing public that it maintains accountability and

transparency through its Code of Ethics. Its ethical practices are material to what it markets to investors. The failure of Parexel to enforce its Code of Ethics raises the precise types of issues the Board highlighted in cases such as *Khandelwal v. Southern Calif Edison*, 97-ERA-6, p. 4 (March 31, 1998), and further demonstrates that the concerns raised by the employees in this case were not only material, but go to the heart of Parexel's regulatory practices.

CONCLUSION

The Board should re-affirm the requirement that protected activity under the SOX be evaluated under the *Munsey-Guttman-Passaic Valley* line of cases. ALJs cannot impose any standards on an employee's disclosures beyond those set forth in this line of cases. In other words, there is no statutory authority for requiring an employee to demonstrate that his or her concerns included a formal "fraud" allegation. Moreover, the form and content of a disclosure need not be "definitive" or "specific." The case should be remanded with instructions to the ALJ to broadly interpret the scope of protected activity consistent with the *Munsey-Guttman-Passaic Valley* requirements.

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I certify that a true copy of the foregoing Brief of *Amicus Curiae* National Whistleblowers Center was served by regular mail, unless email is indicated, on the following persons of the following address on this 31st day of December, 2010:

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