

Sarbanes-Oxley and the whistleblower

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BY ALLEN B. ROBERTS

Some four years after the enactment of Sarbanes-Oxley, parties to whistleblower proceedings and their counsel are seeing the benefit, confusion, and opportunity of an array of interpretive decisions. As with other legislation, whether Sarbanes-Oxley delivers expansive whistleblower protection or disappointment and unrealised hope will depend largely upon the perspective of those invoking its protections. But more than with most other legislation, tallying results likely will be influenced by an intricate interplay between inconsistent substantive provisions and the extent to which interpretive authority exercised by the Department of Labor (DOL) will receive judicial deference.

What types of communications did Congress intend to protect?

At its core, Sarbanes-Oxley is designed to protect shareholders from losses associated with frauds and swindles and to effect change in public company accounting, accountability, corporate governance, internal controls and securities regulation. Statutory objectives are promoted by the Section 301 requirement that audit committees of listed issuers establish procedures for the receipt of confidential, anonymous employee concerns regarding accounting, internal accounting controls, or auditing matters. Covered employers have responded by adopting whistleblower hotlines.

Once Congress decreed that companies subject to Sarbanes-Oxley establish such procedures for reports related to accounting and audit matters, it would have seemed a simple matter to have made whistleblower protections coextensive with Section 301. In its enactment of Section 806 whistleblower protections, Congress did not do that. Nor did Congress adopt for its whistleblower protection the standards recited in Section 307 for attorneys appearing and practicing before the Securities and Exchange Commission (SEC) concerning evidence of a material violation of securities law, breach of fiduciary duty,

or similar violation by the listed company or any of its agents. Congress even bypassed the standards a company might elect to adopt as a code of ethics for its senior financial officers in furtherance of the directive of Section 406.

Instead of following the lead of the substantive mandates that are integral to other purposes of Sarbanes-Oxley, Section 806 set its own independent course. It protects a whistleblower having an objectively reasonable belief and expressing concern that the acts complained of fall within specific categories of fraud announced in federal criminal statutes (mail, wire, bank, or securities) or constitute a violation of either an SEC rule or regulation or federal law relating to fraud against shareholders. By its overlap, Section 806 may reach to incorporate some matters stated elsewhere in Sarbanes-Oxley. But nowhere does Section 806 expressly extend whistleblower protection to all of the interests separately identified elsewhere in Sarbanes-Oxley.

Thus, Section 806 does not expressly embrace other Sarbanes-Oxley provisions by conferring protection on someone solely for raising a concern by way of a Section 301 hotline, or on an attorney for raising a Section 307 concern for a material violation of securities law or fiduciary breach or on someone for reporting a violation of a company's code of ethics applicable to senior financial officers. Any extrapolation to comprehend these matters – unless included in the menu of Section 806 protections – would appear to be without statutory authority. Nevertheless, some administrative decisions by DOL Administrative Law Judges (ALJs) suggest a different expansive and inclusive approach.

As a general proposition, the Supreme Court credits Congress for attaching meanings that it intends, adopting a presumption that “Congress acts intentionally and purposely in the disparate inclusion or exclusion.” It remains to be seen what reception final administrative and judicial determinations might give to attempts to expand Section 806 protections beyond the

literal bounds defined by Congress' express inclusions. That issue invites examination of administrative agency and court jurisdiction, addressed next.

Will delegation of administrative authority to the DOL and shared jurisdiction with Federal Courts aid uniformity or result in conflicting interpretations?

Administrative guidance is percolating as initial and review decisions issue to suggest the contours Congress intended when it created whistleblower protections, borrowed administrative procedures from an airline industry and air carrier safety whistleblower law, and appended them to legislation designed to address issues affecting publicly traded companies and investors. But for two fundamental reasons the weight those decisions will have remains to be seen. First, there is the question of concurrent primary jurisdiction of the DOL and US District Courts, a feature relatively unique in the Sarbanes-Oxley enforcement scheme. Second, is the question of judicial deference to the expertise of the DOL.

Administrative and judicial jurisdiction

Because employee protections for whistleblowing under other laws had been assigned previously to the DOL and delegated to the Occupational Safety and Health Administration (OSHA), Congress conferred jurisdiction on the DOL for its whistleblower expertise in addressing the elements of employee-protective legislation appended to Sarbanes-Oxley. For much of the history of Sarbanes-Oxley, DOL ALJs have been the primary source of interpretive authority for questions of jurisdiction, procedure, and substantive law governing Section 806 whistleblower issues. As cases advance from ALJs to reported decisions of the DOL Administrative Review Board (ARB), a more unified body of administrative law is starting to emerge. However, identifying a clear source of interpretive guidance is further complicated by the relationship ►►

of the DOL to the courts in the enforcement of Sarbanes-Oxley.

Unlike other administrative schemes, for its whistleblower protections Sarbanes-Oxley does not bestow exclusive decision-making authority on the DOL or restrict federal courts to a limited review function. Instead, US district courts have independent authority after a case has been unresolved for at least 180 days if the whistleblower elects to abandon the administrative process by filing a lawsuit in federal court. This relatively unique feature of primary court jurisdiction invites inquiry into the measure of deference courts may confer on administrative agency expertise for interpretation of whistleblower protections asserted under Section 806.

Even those cases that run the full administrative course will be subject to judicial scrutiny, and review by a US court of appeals may produce further amplification or refinement of the Sarbanes-Oxley whistleblower provisions, albeit under conventional standards of review and deference to administrative agencies.

Administrative expertise

Separate from considerations of uniformity or comity between the DOL and the courts, comprehensive enforcement may not emerge until there is comprehensive appreciation of terms and the reach of Sarbanes-Oxley. In some measure, the uniformity of construction and the judicial respect accorded administrative determinations may turn on the degree to which ALJs and the ARB are influenced by the historic and continuing expertise of the SEC and other governmental agencies and departments and the courts in assessing the criminal frauds, securities regulation, and shareholder protection matters about which a protected whistleblower must have a reasonable belief. After all, Sarbanes-Oxley whistleblower protections are rooted in issues within the substantive expertise of the SEC and regulatory and law enforcement bodies

concerned with the criminal frauds or securities and shareholder matters listed in Section 806. Delegation to DOL is a reflection more of its *procedural* expertise demonstrated in addressing whistleblower claims in a host of employee-protective statutes than in its expertise in assessing or addressing the *substantive* criminal frauds and the violations of SEC rules and regulations and securities law that Congress expressly made the object of whistleblower protections when it enacted Sarbanes-Oxley Section 806.

The expertise of administrative agencies and the deference to which their determinations are entitled may become a pivotal factor in construing Sarbanes-Oxley terms. Both administrative agencies and the courts must give effect to clearly stated congressional intent. Nevertheless, as a general proposition, the judiciary is the final authority on issues of statutory construction and it must reject administrative constructions that are contrary to clear congressional intent. Where legislation does not speak clearly on an issue, courts reviewing administrative determinations are charged to address whether the approach supplied by an administrative agency is based on the agency's permissible construction of the statute. As a consequence, courts reviewing DOL administrative decisions or asked to give them precedential weight may be disinclined to bow to determinations of law considered to be erroneous, or they may deny deference to determinations of reasonable belief challenged as outside the expertise of an ALJ or the ARB.

Conclusion

As with any newly enacted legislation, Sarbanes-Oxley whistleblower provisions remain subject to the interpretation and definition that come from litigated determinations. Both uncertainty and an opportunity to shape administrative and judicial construction are by-products of a unique enforcement scheme.

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Without a single source of pronouncements on the substance of Sarbanes-Oxley whistleblower protections, compliance activity and the posture taken in an administrative investigation or in litigation will continue to be influenced by the unusual interplay between administrative and judicial jurisdiction. Until a common interpretive theme emerges, parties and their counsel will need to assess the significance of an evolving universe of ALJ, ARB, and court decisions addressing the protections Congress intended for Sarbanes-Oxley whistleblowers. ■



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