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By Facsimile and eRulemaking Submission
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Dr. David Michaels
Assistant Secretary for OSHA
U.S. Department of Labor

c/o OSHA Docket Office
Docket No. OSHA-2011-0126
U.S. Department of Labor, Room N-2625
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Comment on OSHA's Interim Rule Regarding
Procedures For Handling SOX Retaliation Complaints

Dear Dr. Michaels:

I am writing in response to the Occupational Safety and Health Administration's ("OSHA") request for comment on its interim final rule regarding Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended. I write as an attorney who specializes in the representation of whistleblowers in such complaints before OSHA.[1]

I. Introduction

The U.S. Department of Labor issued a final interim rule revising regulations governing Sarbanes-Oxley Act ("SOX") whistleblower complaints in order to implement changes enacted into the law by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The interim rule was issued and became effective November 3, 2011, and is open for public comment through January 3, 2012. The implementing procedures make a number of necessary, positive changes in order to facilitate the handling of whistleblower complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX"). In large part, the rules simply effectuate the changes made by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and are rather modest in scope. We

[1] Julie Zibulsky, an associate with my firm, and Andrew Schroeder, a law clerk with the firm, assisted in the research and writing of this comment.

write, however, in support of some of the positive changes that will most help protect whistleblowers.

Some lawyers representing corporate interests have criticized the interim rule as going beyond merely implementing the changes to SOX made by the Dodd-Frank Act, and instead furthering an employee-friendly agenda. These criticisms have focused, in particular, on the provision requiring OSHA to accept SOX whistleblower complaints that are made orally, on the amendment to the reinstatement provision which removes language stating that reinstatement is inappropriate where a respondent establishes that the complainant is a security risk, and on the Secretary's consistently held position that it has authority to enforce preliminary orders of reinstatement. The criticisms are supported by little substance, and, in my opinion, simply reveal frustration with the fact that OSHA, along with the Department of Labor's Administrative Review Board, has shown a growing commitment to the protection of whistleblowers over the past couple of years.

One recent article reports that management-side attorneys are concerned that the interim rule "will make pursuing a SOX whistleblower claim far less daunting." Ben James, *OSHA Changes To SOX Whistleblower Regs Go Too Far: Attys*, LAW360 (Nov. 10, 2010). The fact that the defense bar would air such a complaint raises an important initial question: why *should* OSHA procedures make pursuing a whistleblower complaint daunting for an employee in a procedural sense? Congress enacted SOX's whistleblower provisions to ensure that employees could raise concerns about potentially harmful fraud on shareholders and others without fear of retaliation. It is daunting enough for an employee to consider taking on her employer and its illegal practices. Before she ever reaches the point where she contacts OSHA about alleged retaliation, the whistleblower will have had to overcome fears of job loss, hostility, isolation, and other forms of retaliation, and reported her concerns about fraud to her supervisor or regulators. If the purpose of SOX whistleblower protections is to encourage and facilitate the timely reporting of financial fraud that can cause tremendous harm to the public good, the administrative process should be as accessible as possible. There is no good reason to make the prospect of blowing the whistle on one's employer more daunting.

II. Reducing Oral Complaints into Written Form

The interim rule amends Section 1980.103(b) of OSHA's procedures for handling retaliation complaints under SOX to eliminate the requirement that whistleblower complaints "must be in writing and should include a full statement of the acts and omission, with pertinent dates, which are believed to constitute violations." The final interim rule states, "No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language." 29 C.F.R. § 1980.103(b) (Nov. 3, 2011).

Critics have complained that allowing OSHA to put oral complaints into written form inappropriately expands OSHA's role from one of independently reviewing a whistleblower's complaint to one of developing and authoring it. This objection is without merit for a number of reasons. It overstates the magnitude of the change OSHA has initiated and it stakes out a position designed to undermine OSHA's role in protecting workers, and, ultimately, the public.

Making it clear that OSHA can accept oral complaints is better described as a clarification than as an amendment to existing procedures. In OSHA's recently updated manual for investigators who handle whistleblower complaints, the agency explains that a provision requiring acceptance of oral complaints "reaffirms OSHA's longstanding practice under all statutes of reducing all orally-filed complaints into writing," and that "clarifications in this section are being made in order to increase consistency in complaint processing among the various statutes and ensure that all complainants have equal access to the complaint process." Whistleblower Investigations Manual, Department of Labor, Occupational Safety and Health Administration, September 20, 2011, Chap. 1, Sec. 6 (hereinafter "OSHA Manual"). As this explanation suggests, OSHA has historically had a duty to investigate and supplement complaints filed by employees under the various whistleblower laws the agency administers. 29 C.F.R. § 1980.04(e)(2); OSHA Manual *passim*. Thus, in practice, the interim rule's amendment regarding oral complaints changes very little in how OSHA has been operating for some years.

To the extent that the new rule actually alters the method by which employees can file complaints, moreover, it simply helps ensure that *all* workers are capable of submitting complaints, which is precisely what the implementing rules should facilitate. SOX itself has no written complaint requirement, and the implementing regulations should not erect additional barriers to employees who have faced retaliation for raising concerns about conduct they reasonably believe to constitute fraud. Some employees submitting complaints may not be able to write out their complaints in a legible fashion or may not be able to write in English. This should not interfere with their ability to report important financial concerns. It is notable that the management-side attorneys who complain that the new rule creates a conflict of interest for OSHA and expands OSHA's role offer no alternative suggestions for how to handle the complaints of employees who may be unable to effectively file their complaints with OSHA in writing.

It is important to remember that whatever flexibility OSHA procedures afford to complainants in the administrative process benefits not only the complainants but also the public at large, who have a strong interest in the timely reporting of fraud. Millions of people have lost billions of dollars in assets in recent years as a result of frauds such as those committed by Enron, Bernard Madoff and more recently MF Global Holdings Ltd. Preventing such frauds is the overriding purpose of the whistleblower provisions that Congress included in the Sarbanes-Oxley and Dodd-Frank Acts.

A major goal of the revised regulations is to make the procedures for handling SOX claims consistent with the procedures the OSHA uses for claims filed under other whistleblower statutes administered by OSHA. The clarification regarding oral complaints furthers this goal. The new rule is also consistent with the recent Supreme Court decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011). In *Kasten*, the Supreme Court held that the anti-retaliation provision of the Fair Labor Standards Act protects complaints that are made orally. Id. at 1336. Rather than representing a significant (much less dangerous) expansion of OSHA's authority, the new provision allowing oral complaints simply reinforces OSHA's responsibility to receive and investigate complaints, regardless of their initial form.

II. Reinstatement Provisions: Decisions Should Be Made on a Case-by-Case Basis, and Preliminary Reinstatement Orders are Enforceable

In addition to the acceptance of oral complaints, management-side attorneys have criticized the revision of the procedures governing OSHA's issuance of orders reinstating a terminated employee to her former position after finding that the employer had fired her in violation of SOX's whistleblower-protection provisions. OSHA removed a statement from Section 1980.105(a)(1) "that reinstatement would not be appropriate where the respondent establishes that the complainant is a security risk." The new rule explains that a determination of whether reinstatement is appropriate should be based on the facts of each particular case.

This amendment makes SOX procedural regulations consistent with procedures for other statutes administered by OSHA, which, like SOX, do not contain an explicit prohibition of reinstatement under predetermined circumstances. This is a welcome revision because it removes language that invites employers to assert that a whistleblowing employee poses a "security" problem, even if only due to the animosity that her whistleblowing has stirred up on the part of managers who committed the fraud she exposed, as a way of avoiding her reinstatement. There is no need for OSHA procedures to include such a provision, as the agency can consider all the circumstances in deciding whether to order reinstatement.

In the same vein, some commentators have criticized OSHA for maintaining its position that preliminary reinstatement orders are enforceable in federal court – despite, they argue, that federal courts have "consistently" held otherwise. James, *OSHA Changes To SOX Whistleblower Regs Go Too Far: Attys.* Such statements are misleading. As OSHA explains in commentary issued with the new rule, the Secretary of Labor has consistently taken the position that preliminary reinstatement orders are enforceable. Very few courts have addressed the enforceability of preliminary reinstatement orders issued under SOX. None has ruled that the federal courts lack jurisdiction to enforce preliminary orders of reinstatement. The leading case on the issue, *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469 (2nd Cir. 2006), declined to enforce an order of reinstatement without agreement amongst the three Judges on the panel as to the basis. Only one Judge, Judge Jacobs, concluded that the district court lacked jurisdiction

to enforce a preliminary order of reinstatement. *Id.* at 470-76. Judge Leval concurred in the result but found that the order was invalid because the defendant had been denied due process before OSHA. *Id.* at 476-81. Judge Straub dissented, writing that the district court had jurisdiction to enforce a preliminary order of reinstatement. *Id.* at 483-90. Thus, while the district court below was overruled on its ruling regarding the enforceability of the particular order at issue, the district court was *not* overruled on its jurisdictional ruling.

A similar result was reached in the Sixth Circuit. In *Solis v. Tenn. Commerce Bancorp, Inc.*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010), the district court held that it had jurisdiction to enforce the Secretary's order of preliminary reinstatement, and issued a preliminary injunction requiring immediate reinstatement of the complainant. The defendants then appealed to the Sixth Circuit and moved for a stay pending appeal. The defendants argued that the district court lacked jurisdiction to enforce preliminary orders issued under the procedures set forth in 49 § U.S.C. 42121(b)(2). The Sixth Circuit noted that, "[t]he district court's authority, therefore, turns on whether a preliminary reinstatement order is an order issued under paragraph (3) for the purposes of judicial enforcement. This issue of first impression on this court has been addressed only once in a published court of appeals decision, *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006), a case in which the three judges had three different takes on the issue." *Solis v. Tenn. Commerce Bancorp., Inc*, No. 10-5602, slip op. at 2 (6th Cir. May 25, 2010). The Sixth Circuit found that "the defendants' motion for a stay raises a substantial question as to the authority of the district court to issue the preliminary injunction," but applying "traditional injunctive relief standards," the court granted the stay because it was supported by a balancing of the harms. *Id.* at 2. In October 2010, the parties jointly moved for dismissal. The Sixth Circuit thus never reached the jurisdictional question on the merits, and, like the Second Circuit, reached no conclusion as to the enforceability of preliminary reinstatement orders.

Finally, in *Welch v. Cardinal Bankshares*, 407 F. Supp. 2d 773 (W.D. Va. 2006), the district court granted the defendants' motion to dismiss the complainants' enforcement proceeding, holding that, due to confusion throughout the administrative process and the orders issued by the ALJ, "there [wa]s not a preliminary order of reinstatement for th[e] court to enforce." Therefore, it found it "unnecessary to consider whether it would have had the authority to enforce the preliminary order of reinstatement had such an order been properly entered." *Id.*

The cases cited above demonstrate that while opponents might point to instances of federal courts declining to enforce preliminary orders, no court has held that it lacks jurisdiction to enforce them. In fact, of the judges who have confronted the question, many appear to believe, as OSHA does, that the courts do have the power to enforce preliminary orders.

OSHA's consistent position on preliminary reinstatement orders also reflects the intent of Congress. Congress intended that where OSHA finds reasonable cause to believe that an

employee has been discharged in violation of SOX, the employee should be preliminarily reinstated to her position. This is clear from the plain language of the statute. SOX complaints are "governed under the rules and procedures" provided in 49 U.S.C. § 42121(b), which sets out the procedures for handling whistleblower complaints under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). See 18 U.S.C. § 1514A(b)(2)(A). The AIR 21 regulation, 49 U.S.C. § 42121(b)(2)(a), states that if the Secretary concludes that there is reasonable cause to believe that a violation of the statute occurred, then the Secretary "shall" issue a preliminary order "providing the relief prescribed" in 49 U.S.C. § 42121(b)(3)(B). That subsection includes reinstatement as a remedy. 49 U.S.C. § 42121(b)(6)(A) then provides that a person "on whose behalf an order was issued under" subsection (b)(3) can bring "a civil action against the person to whom such an order was issued to require compliance with such an order" in the "appropriate United States district court." It is thus clear that AIR 21 provides for judicial enforcement both of final orders, which are specifically delineated in (b)(3)(B), and of preliminary orders, which are issued under (b)(3)(B) authority.

The AIR 21 statute does not provide that federal courts have jurisdiction to enforce only "final orders," but instead confers jurisdiction on them to enforce all orders "issued under" subsection (b)(3)(B). If Congress did not intend for judicial enforcement of preliminary orders, it would have given the federal courts jurisdiction to enforce only "final orders" rather than *all* orders issued under subsection (b)(3)(B). A preliminary reinstatement order is indisputably an order issued under subsection (b)(3)(B). If Congress had intended to distinguish preliminary orders from orders that were listed directly under subsection (b)(3)(B), it would have separately delineated relief available under subsection (b)(2)(A). Instead, Congress provided all the relief available in (b)(3)(B).

As noted in the commentary to the rule, the fact that (b)(3)(B) is titled "final orders" does not control the outcome. A statutory heading cannot control the plain meaning of the statute. Such an argument also overlooks that the title of the section at issue, (b)(6)(A), is titled "Enforcement of *order* by parties." (emphasis added). Neither this subsection title nor any of the text under it reference "final" orders. The plain language of the statute makes clear that preliminary orders are enforceable.

If subsection (b)(6)(A) were interpreted to provide for the enforcement of only final orders, this would lead to absurd results that Congress clearly did not intend. Subsection (b)(2)(A) provides that the employer has 30 days to file objections and request a hearing in the event that the Secretary finds reasonable cause for a violation. If the employer does not request a hearing, "the preliminary order shall be deemed a final order." If subsection (b)(6)(A) provided for enforcement only of "final orders" under (b)(3)(B), an order issued under (b)(2)(A), that became final by virtue of the respondents' lack of objection and request for hearing, would also be unenforceable. This would allow an employer to render any reinstatement order

unenforceable by simply declining to file objections and request a hearing. Likewise, subsection (b)(2)(A) provides that "[t]he filing of . . . objections shall not operate to stay any reinstatement remedy contained in the preliminary order." However, this portion of the statute would be completely meaningless if an employer were free to simply disobey preliminary orders of reinstatement. If employers are free to ignore preliminary orders, there would be no need for them to move for a stay, rendering this portion of the statute without purpose or effect. Such a reading of the statute would make multiple provisions and their protections meaningless. The only rational interpretation of the statute is that the "issued under" language in subsection (b)(6)(A) refers to any order that contains the relief described in that subsection.

Orders of preliminary reinstatement are further effectuated by OSHA's statement that a stay will be granted only under exceptional circumstances. Section 1980.106(b) has been revised to note that a respondent's motion to stay OSHA's preliminary order of reinstatement will be granted only based on exceptional circumstances, where the respondent can establish the necessary criteria for equitable relief. A stay should be available only in these circumstances, when the respondent has made the necessary showing that it would suffer irreparable injury, a likelihood of success on the merits, and that a balancing of the possible harms to the parties and the public favors a stay. Short of meeting these requirements, an order of preliminary reinstatement should be enforced. As Judge Straub wrote in his persuasive *Bechtel* dissent:

> The Act's provision for immediate orders of preliminary reinstatement encourages whistleblowing, by assuring potential whistleblowers that they will remain employed, integrated in the workplace, professionally engaged, and well-situated in the job market; such orders also facilitate whistleblowing, by enabling whistleblowers to continue on as observers and potential witnesses to corruption. Moreover, when a whistleblower is immediately reinstated, this assures his co-workers that they are protected and thereby encourages them to come forward as well. The alternative is likely to discourage initial whistleblowing and, where a whistleblower has been removed pending the administrative and judicial processes, to send a chilling signal to co-workers who notice the whistleblower's sudden (and to all appearances permanent) disappearance.

Bechtel, 448 F.2d at 486 (Straub, J., dissenting). Preliminary reinstatement protects a number of important values; it should be ordered and enforced unless the respondent is able to make a credible and persuasive showing that these values are overwhelmed.

Further, the addition of OSHA's statement that economic reinstatement is available where actual reinstatement would be inappropriate is of crucial significance for whistleblowers. Many whistleblowers have experienced severe retaliation and are fearful of returning to the workplace. These whistleblowers should not be punished for doing the right thing. In those instances, the only way to make the employee whole is to provide economic reinstatement.

However, OSHA's statement that actual reinstatement remains the presumptive remedy and the employer has no right to choose economic reinstatement is essential as well. Actual reinstatement protects interests that economic reinstatement cannot. Nonetheless, economic reinstatement must be available as a remedy for situations where a whistleblower cannot return to the workplace.

IV. Conclusion

OSHA's interim rule – particularly its statements regarding the filing of oral complaints and the availability of reinstatement – are not, in reality, significant changes to the SOX implementing procedures. The criticisms of the changes from the defense-side bar likely reflect their recognition that OSHA has begun to take its responsibility for protecting whistleblowers much more seriously in the past couple of years. This, along with the issuance of a number of recent decisions by the Department of Labor's Administrative Review Board and federal courts in favor of whistleblowers, promises greater protection for employees who report their concerns about serious instances of fraud. The defense-side critics do not argue that the new rule will lead to an increase in false or misleading claims, but complain only that submitting complaints will now be *easier*. As to this, they are likely correct – the amendments help to promote early reporting and protect whistleblowers, which, in turn, increases the likelihood that significant issues of fraud will be discovered and rectified before damage is passed on to innocent shareholders or the general public.

Thank you for the opportunity to comment on your agency's interim final rule for the handling of SOX whistleblower complaints. Please contact me if you have any questions or if I can be of further assistance.

Sincerely,

David J. Marshall

cc: Ms. Sandra Dillon, Acting Director
Office of the Whistleblower Protection Program