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CONFESSIONS OF A WHISTLEBLOWER: THE NEED TO REFORM THE WHISTLEBLOWER PROVISION OF THE SARBANES-OXLEY ACT

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I. INTRODUCTION

A. Life as a Whistleblower[1]

David Welch sits down in the lounge chair of his home in Huddleston, Virginia ready for his interview.[2] He is dressed casually, wearing khaki pants and a yellow polo shirt. Welch was the first whistleblower[3] to seek protection under the

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* J.D. Candidate, May 2010, The John Marshall Law School; M.B.A., Loyola University Chicago - Graduate School of Business, 2007. I dedicate this Comment to my parents and my sister for supporting me and believing in me throughout my educational endeavors. I would like to thank the rest of my family and friends for their encouragement and support. A special thank you to the editors and staff of The John Marshall Law Review for their work on this Comment, as well as all the faculty members who have guided me through law school and prepared me to become a successful member in the legal community.

1. *See* BLACK'S LAW DICTIONARY 1627 (8th ed. 2004) (defining a whistleblower as "an employee who reports employer wrongdoing to a governmental or law-enforcement agency"); *see also* Curtis C. Verschoor, *To Blow the Whistle or Not Is a Tough Decision!*, STRATEGIC FIN., Oct. 2005, at 22 (quoting Brian Martin, a professor at the University of Woolongong in Australia who defines whistleblowing as a "disclosure about significant wrongdoing made by a concerned citizen . . . motivated by notions of public interest, who has perceived the wrongdoing in a particular role and initiates the disclosure . . . to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing").

2. Stephen Taub, *Five Years Out of Work*, CFO, May 18, 2007, *available at* http://www.cfo.com/article.cfm/9210493/1/c_9211482. The beginning part of this Comment is semi-fictional and is based on the interview with David Welch done by CFO.com. The actual interview was conducted over the phone. *Id.*

3. *Id.* Welch refused to certify certain financial results after questioning the bank's accounting policies. *Id.* He was fired shortly after that, although the bank claims Welch was fired for refusing to meet with its attorney and an external auditor without his own attorney present. *Id.* The Occupational Safety and Health Administration ("OSHA"), which oversees the initial investigations of complaints, found that Cardinal did not violate Section 806 when firing Welch for refusing to meet with the external auditor. Deborah Solomon, *For Financial Whistle-Blowers, New Shield Is an Imperfect One*,

Whistleblower Provision of the Sarbanes-Oxley Act of 2002 ("SOX").[4] Five years[5] later, he is giving his account of life as a whistleblower.

"If you are a whistle-blower and you have no money, you have to stop. The deep pockets of corporations can starve out an unemployed whistle-blower," says Welch, who has now lost over half a million dollars and was forced to sell his family farm and move into a rental property.[6] He had to look for a new job after his former employer Cardinal Bancshares refused to reinstate him to his position of Chief Financial Officer, even after a Department of Labor ("DOL") Administrative Law Judge ordered that Welch be reinstated.[7] Now, Welch has a high mountain to climb before he can find a job in the banking industry again. Welch recounts his struggles, stating that "when prospective employers began to check references, it was the end." "The bank told them I was a whistle-blower. Prospective employers assumed I am not to be trusted. I have a black eye in the accounting and banking industry . . . [i]t's like there is a bull's-eye painted on you."[8] Unable to find a job in the financial industry, Welch switched careers and is now an accounting professor at Franklin University in Ohio, after receiving his doctoral degree.[9] Before ending the interview, Welch is asked one final question, "[w]ould you do it

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WALL ST. J., Oct. 4, 2004, at A1.

4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered Sections of 11, 15, 18, 28, and 29 U.S.C.).

5. Welch filed for protection in 2002, and the interview took place in 2007. Taub, *supra* note 2.

6. *Id.* Welch had also wiped out his savings and now drives a 1996 Subaru with 270,000 miles on it. *Id.* By October 2004, Welch had already owed 90,000 dollars in legal fees alone. Solomon, *supra* note 3, at A1.

7. Taub, *supra* note 2. A "recommended decision and order" by the Department of Labor is not considered a final order and Cardinal Bancshares waited to see if Welch would file suit in the federal district court rather than reinstate him. *Id.* Because the decision is not a final order and does not carry a penalty against the employer for failing to reinstate, many employers simply refuse to reinstate the whistleblower and instead rely on the fact that the whistleblowing employee often does not have the financial resources to continue a costly legal pursuit. Verschoor, *supra* note 1, at 21. In fact, according to the National Whistleblower Legal Defense and Education Fund, not a single whistleblower has been successful in getting reinstatement. Whistleblower Protection Blog, http://www.whistleblowersblog.org/2008/08/articles/corporate-1/ (last visited Feb. 14, 2010); *see also* Solomon, *supra* note 3, at A1 (stating that, as of October of 2004, not a single SOX whistleblower had returned to his or her job).

8. Taub, *supra* note 2. Even Welch admitted that if there were two candidates of equal qualification, as an employer, he would choose the one with a "clean history." *Id.*

9. *Id.*; Franklin University Faculty Profiles, http://www.franklin.edu/About-Franklin/Faculty-Profiles/David-E.-Welch.html (last visited Feb. 14, 2010).

again?"[10] Welch sits in his chair and mulls over the answer.

Down in Brazil, Ruben Carnero is contemplating the same thing. If given the chance, would he remain silent about his employer's false invoices and inflated sales figures or would he blow the whistle on his employer again?[11] Like Welch, he too sought protection under Section 806, claiming he was retaliated against by his employer; he was the first foreign employee to seek such protection in court.[12] Unlike Welch, Carnero is an Argentinean and worked outside of the territories of the United States in a Brazilian subsidiary of a U.S. corporation, Boston Scientific Corp., as the Latin American business development director.[13]

While Carnero and Welch lived a continent apart from each other, they nonetheless had something in common; neither was afforded the protection they thought they would receive under the Whistleblower Provision of SOX.[14] After six years of litigation, the Fourth Circuit Court of Appeals rejected Welch's claim and denied reinstatement in August of 2008.[15] As for Carnero, the First Circuit Court of Appeals found that Section 806 did not apply to an Argentinean working in Brazil and refused to reinstate him.[16]

This Comment examines the Whistleblower Provision of SOX and its inability to protect whistleblowers. It also recommends a new approach not only to better protect whistleblowers, but also to encourage more whistleblowers to expose corporate fraud.

Part one of this Comment discusses the background on the enactment of SOX and the Whistleblower Provision. Part two discusses how the Whistleblower Provision has not been able to protect whistleblowers as intended. Part three analyzes the extraterritorial reach of Section 806 and updates the discussion on *Carnero* in light of the recent *O'Mahony*[17] decision. Finally, this

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10. Taub, *supra* note 2.

11. Pamela A. MacLean, *'SOX' Does Not Extend Overseas*, NATL. L.J., Jan. 16, 2006, at 5.

12. *Id.*

13. *Id.* The nationality and location of the whistleblower's job are important factors and have been a source of confusion as to whether Section 806 would apply to foreigners or United States citizens working abroad. *See infra* Part B (discussing the applicability of Section 806).

14. *See* Carnero v. Boston Scientific Corp., 433 F.3d 1, 18 (1st Cir. 2006), *cert. denied*, 548 U.S. 906 (2006) (finding that Section 806 does not apply extraterritorially to a foreign employee working for a foreign subsidiary since there was not express congressional intent); Welch v. Chao, 536 F.3d 269, 279 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009) (finding that Welch did not engage in a protected activity as defined by Section 806 and thus, Cardinal Bancshares did not violate Section 806).

15. *Welch*, 536 F.3d at 279.

16. *Carnero*, 433 F.3d at 18. Carnero would have received protection had he been an American citizen working within the U.S. *Id.* at 6.

17. O'Mahony v. Accenture, Ltd., 537 F. Supp. 2d 506 (S.D.N.Y. 2008). In

Comment proposes reformation of Section 806 in order to better protect whistleblowers and clarify the confusion among courts on its application and reach.

II. BACKGROUND

A. Introduction to SOX and the Whistleblower Provision

Concerned about the collapse of Enron and other corporate scandals involving Fortune 500 companies, Congress hastily enacted SOX.[18] The enactment's main purpose was to rebuild investor confidence in the U.S. securities market.[19] It sought to curb corporate fraud and other violations of securities regulations by "improving the accuracy and reliability of corporate disclosures."[20] One of the key provisions in achieving this objective is Section 806, known as the Whistleblower Provision.[21] The Whistleblower Provision protects employees of public corporations from being discriminated or retaliated against for reporting fraudulent activities by their employer.[22] However, who is

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February of 2008, the Southern District of New York found that Section 806 applied to a foreign employee in a foreign country if the alleged misconduct took place within United States' territory. *Id.* 513-14.

18. *See* 148 CONG. REC. E1451-03 (daily ed. Jul. 25, 2002) (statement of Rep. Sununu) ("The citizens of my state, and indeed all Americans, have watched the stock market tumble as accounting scandals have shaken investor confidence. Investors have watched as the values of their portfolios have fallen. They want—and deserve—tough action against fraud and malfeasance. In short, they want Wall Street to abide by the common sense principles that guide Main Street, and the public deserves nothing less."); *see generally* Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1 (2007) (recommending changes to SOX); Jennifer Christian, Note, *Whistleblower Protection Under Sarbanes-Oxley: Key Provisions and Recent Case Developments*, 31 OKLA. CITY U. L. REV. 331 (2006) (recanting the events that led to the passage of SOX); James L. Buchwalter, *Construction and Application of Whistleblower Provision of Sarbanes-Oxley Act, 18 U.S.C.A. §1514(A)(a)(1)*, 15 A.L.R. FED. 2D 315 (2006) (analyzing cases interpreting the whistleblower provisions of the law).

19. *See* Earle & Madek, *supra* note 18, at 4 (quoting that Congress' purpose for enacting SOX was to "restore investor confidence by improving corporate financial reporting"); *see also* 148 CONG. REC. S6683 (daily ed. Jul. 12, 2002) (quoting a legislative clerk who reported that SOX was created as "to improve quality and transparency in financial reporting and independent audits and accounting services for public companies, . . . to increase corporate responsibility and the usefulness of corporate financial disclosure, to protect the objectivity and independence of securities analysts, to improve Securities and Exchange Commission resources and oversight").

20. 148 CONG. REC. 13,347, 13,347 H4383 (daily ed. Jul. 17, 2002) (statement of Rep. Oxley).

21. Codified as 18 U.S.C. § 1514A (2006).

22. "No company . . . or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or

protected and what constitutes a whistleblowing activity depends on the reviewing court's interpretation.[23]

1. Who Is Protected?

The statute provides that any employee of a publicly traded company is protected.[24] Nonetheless, it is unclear whether this protection extends to employees of private subsidiaries of a public corporation or employees working abroad for a covered employer. Moreover, depending on the interpretation of the statute itself, an employee of a private corporation that contracts with or acts as an agent of a publicly held corporation may be covered as well.[25]

Although most administrative and federal court decisions have rejected the more broad interpretation of Section 806 to cover employees of contractors and agents of the public corporation,[26] courts have found employees of private subsidiaries of public corporations to be protected under Section 806.[27] However, the

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in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" in whistleblowing "fraud against shareholders." 18 U.S.C. § 1514A(a)(1)-(2)(2006).

23. *See* Christian, *supra* note 18, at 333-47 (reviewing the various interpretations by the courts on what type of employees are protected under Section 806 and what amounts to a protected activity).

24. 18 U.S.C. § 1514A(a) (2006); *see also* Donn C. Meindertsma & Melinda L. Kirk, *Sarbanes-Oxley Whistleblower Risks: Still Real, Still Hazy*, WASH. LEGAL FOUND., Jan. 26, 2007, at 1, *available at* http://www.wlf.org/upload/1-26-07Meindertsma.pdf (noting that Section 806's protection is not limited to a particular industry as some other whistleblower protections are, but rather covers all publicly traded companies).

25. *See* Christian, *supra* note 18, at 333-34 (discussing that Section 1514A(a) may lend itself to two interpretations: broad and narrow). The broad interpretation "would include not only employees of publicly held corporations, but also employees of privately held corporations that contract or do work on behalf of a publicly held corporation, such as law firms and accounting offices." *Id.*

26. *See* Earle & Madek, *supra* note 18, at 7-8 (observing that this rejection of the broad interpretation is rather odd, given the fact that OSHA's regulation on SOX defines an employee as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative"). Furthermore, OSHA's regulation defines a company representative as "any officer, employee, contractor or subcontractor, or agent of a company." *Id.* Given these definitions, one would expect courts to accept the broader interpretation to include employees of contractors or agents, even if they are private companies. Christian, *supra* note 18, at 334-35.

27. Christian, *supra* note 18, at 335. However, the public parent corporation has to have some control over the subsidiary, such as oversight of the audit committee, direct or indirect contribution to its financials, and authority to affect whistleblowing employee's employment. *Id.*; *see also* Platone v. Atl. Coast Airlines, 2003-SOX-27, 2004 DOLSOX LEXIS 69, at *58 (A.L.J. Apr. 30, 2004) (finding that, while a parent corporation is generally not

employee cannot just bring a complaint against its private employer; the parent public corporation must usually be named as a party in the complaint.[28]

Courts have had different opinions as to the extraterritorial application of Section 806. The First Circuit, as discussed above in *Carnero*, as well as many DOL administrative decisions have refused to extend protection to employees outside of the U.S.[29] However, in *O'Mahony v. Accenture, Ltd.*, the Southern District of New York Court found that Section 806 may apply to foreign employees in a foreign country if the alleged misconduct originated within U.S. territory.[30]

2. What Is a Protected Activity?

The Whistleblower Provision protects employees retaliated against for providing information or assisting with investigations conducted by "a Federal regulatory agency or law enforcement agency," any member or committee of Congress, "a person with supervisory authority over the employee," or "such person working for the employer who has the authority to investigate, discover, or terminate misconduct."[31] It also protects employees who are involved in a proceeding or investigation related to an alleged violation.[32] Most importantly, the employee must actually "blow the whistle," that is, provide information about an alleged fraudulent activity by the employer to the specified authorities in the statute.[33]

Moreover, in order to be protected, the whistleblowing employee must have had reasonable belief that the employer

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liable for acts done by its subsidiary, a parent corporation will be found liable if the subsidiary is merely an instrumentality of the parent corporation).

28. Christian, *supra* note 18, at 335; *see also* Meindertsma & Kirk, *supra* note 24, at 3 (stating that many cases have been dismissed because the complaint did not name a public corporation as a defendant).

29. *See Carnero*, 433 F.3d at 18 (finding that SOX protection does not extend overseas); *see also* Michael Delikat, *Developments Under Sarbanes-Oxley Whistleblower Law*, *in* INTERNAL INVESTIGATIONS 2007: LEGAL, ETHICAL & STRATEGIC ISSUES 56 (PLI Corp. L. & Prac. Course Handbook Series No. 11355, 2007) (discussing the various ALJ decisions that did not extend protection to employees outside of the United States).

30. *O'Mahony*, 537 F. Supp. 2d at 515. The court applied what is known as the conduct test rather than the presumption against extraterritoriality test used by the First Circuit. *Id.*

31. 18 U.S.C. § 1514A(a)(1)(A)-(C) (2006). *See also* Terry M. Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1761 (2007) (stating that much like other whistleblower statutes, Section 806 does not protect those who go straight to the media to blow the whistle).

32. 18 U.S.C. § 1514A(a)(2) (2006).

33. *See* Christian, *supra* note 18, at 346-47 (discussing that an employee who merely refuses to participate in fraudulent activity is not protected since it was not expressed in the statute unlike other federal whistleblower provisions).

committed mail, wire, bank, or securities fraud,[34] violated the Securities and Exchange Commission ("SEC") regulations, or violated any other federal provision relating to fraud against shareholders.[35] The reasonable belief standard is met if a reasonable person with the same information and position as the employee would have also believed a violation occurred.[36] Whether the claim turns out to be true or not is irrelevant for protection as long as the whistleblowing employee actually believed the employer committed fraud against its shareholders.[37] Nonetheless, the alleged misconduct by the employer must be based on a violation of securities fraud outlined in the statute to be considered a protected activity.[38]

3. Procedures Used to File a Complaint

A retaliated employee must file a complaint with the Occupational Safety and Health Administration ("OSHA") within ninety days of the alleged violation.[39] The complaint must also

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34. As codified in 18 U.S.C. §§ 1341, 1343, 1344, 1348 (2006).

35. 18 U.S.C. § 1514A(a)(1)-(2) (2006).

36. Christian, *supra* note 18, at 345. Nonetheless, a court may conclude that the employee could not have had reasonable belief based on the employee's job duties, training, or education. Eden P. Sholeen & Rebecca L. Baker, *Unlocking the Mysteries of SOX Whistleblower Claims*, 44 HOUS. LAW. 10, 12 (2007).

37. *See* Christian, *supra* note 18, at 345 (stating that even in cases where the employee was completely wrong regarding the legality of the employer's act, the employee will still be protected if the court finds the employee's belief was reasonable); *see also* Allen v. Admin. Review Bd., 514 F.3d 468, 477 (5th Cir. 2008) (stating that "an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected"); Halloum v. Intel Corp., ARB No. 04-068, 2006 WL 3246900, at *5 (Dep't of Labor Jan. 31, 2006) (finding that reasonable belief was satisfied even though employer's alleged fraudulent accounting method was found to be an accepted accounting principal).

38. *See* Sholeen & Baker, *supra* note 36, at 13 (noting that many employees were not protected under Section 806 because they alleged violation of internal employment policies, ethical breaches, racial discrimination, etc., that did not relate to fraud against shareholders and, thus, not covered under SOX).

39. *Id.* at 15. The complaint must be written with sufficient facts alleging the acts that constitute retaliation. *Id.* Additionally, the statute of limitations runs once the employer communicates to the employee the adverse decision. *Id.* In limited circumstances, the court may toll the statute of limitation, such as "if the defendant affirmatively misleads the plaintiff regarding the cause of action, if the plaintiff has in some extraordinary way been prevented from asserting his or her rights, and if the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Id.* at 15-16 (quoting Lotspeich v. Starhe Memorial Hosp., 2005-SOX-14, 2005 DOLSOX LEXIS 51, at *9 (A.L.J. Mar. 3, 2005); *see also* Dworkin, *supra* note 31, at 1763 (noting that, unfortunately, many cases are dismissed because of the relatively short statute of limitations period since "[m]ost claimants don't realize what their rights are and how to pursue them in such a short period"); Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-*

contain four elements establishing a prima facie case before OSHA begins an investigation:[40] (1) the employee was engaged in a protected activity; (2) the employer was aware of the protected activity; (3) the employee suffered an unfavorable personnel decision; and (4) the surrounding circumstances indicate that there is an inference that protected activity was a contributing factor[41] in the unfavorable action.[42] After the investigation, OSHA renders an opinion, which can be appealed to the Office of Administrative Law Judges ("ALJ") by either the employee or the employer.[43] If no decision is made within 180 days of filing of complaint, the employee can file suit in a federal district court.[44]

4. Type of Relief

If the whistleblower is successful in his claim, he is entitled to reinstatement, backpay with interest, and special damages incurred as a result of the discrimination, "including litigation costs, expert witness fees, and reasonable attorney fees."[45] The

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Oxley Whistleblowers Rarely Win, 49 WM. & MARY L. REV. 65, 67 (2007) (stating that only 3.6% of whistleblowers have won relief through this initial administrative process conducted by OSHA in the first three years of implementation).

40. Sholeen & Baker, *supra* note 36, at 14. If the complaining employee does not establish the four elements, the complaint will be dismissed even before the investigation commences. *Id.* In addition, even if the complainant establishes a prima facie case, if the employer can "demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct," the investigation will not proceed. 29 C.F.R. § 1980.104(c) (2004).

41. A contributing factor means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (2d Cir. 1993).

42. 29 C.F.R. § 1980.104(b)(1) (2004). Generally, the shorter the time between the protected activity and the adverse personnel decision, the more likely the inference of causation will be met and the burden satisfied. 29 C.F.R. § 1980.104(b)(2) (2004).

43. Sholeen & Baker, *supra* note 36, at 17. The review must be filed within thirty days upon receiving the findings and preliminary order; and if the requesting party fails to object in a timely manner, the decision becomes final and no judicial review takes place. *Id.* The ALJ reviews the matter de novo and determines whether there is causation between the protected activity and the adverse personnel decision. Earle & Madek, *supra* note 18, at 10. The decision by the ALJ must be appealed to the Administrative Review Board (Board) within ten business days after decision and the Board's decision can be appealed to United States Court of Appeals, if filed within sixty days of final order. *Id.* at 12.

44. 18 U.S.C. § 1514A(b)(1)(B) (2006); *see also* 29 C.F.R. § 1980.114(a) (2004) (noting that there must be "no showing that there has been delay due to the bad faith of the complainant"); Solomon, *supra* note 3, at A1 (stating that the deadline of 180 days for a DOL decision has been missed more often than not).

45. 18 U.S.C. § 1514A(c) (2006). In fact, "an employee prevailing in any action . . . shall be entitled to all relief necessary to make the employee whole."

statute does not allow for punitive damages and is silent on whether damages for loss of reputation or pain and suffering would be allowed.[46]

B. Why Whistleblowers Are Important

When Congress enacted SOX, it was very mindful of the importance of whistleblowers in uncovering fraudulent activities by public corporations.[47] This was evident in the fact that Congress, in enacting SOX, made Section 806 one of the main components of the entire statute.[48] Members of Congress took measures to ensure that the DOL did not interpret certain provisions too narrowly and thus limit the rights of whistleblowers.[49] Moreover, in a recent study measuring the effectiveness of various methods of detecting corporate fraud, internal employees[50]—in other words, whistleblowers—turned out to be the most effective monitors in detecting fraud.[51] This is

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Id.; *see also* Dworkin, *supra* note 31, at 1763 (noting that although the statute authorizes a remedy to "make the employee whole," recovery is limited to equitable compensatory damages and an employee cannot recover for punitive or emotional damages). Studies have shown that without allowing the employee to recover more than just equitable damages, SOX remedies did not "adequately compensate the employee for the risks taken in reporting suspected wrongdoing" nor encourage whistleblowing as a result. *Id.*

46. Earle & Madek, *supra* note 18, at 3.

47. *See* 148 CONG. REC. S7350, S7358 (daily ed. Jul. 25, 2002) (statement of Rep. Leahy) (stating that "[w]e learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court . . . [t]here was no way we could have known about this without that kind of a whistleblower.").

48. *See* Brad Levy, Comment, *Pretty New SOX, but Plenty of Holes: An Analysis of the Government's Inability to Apply Section 806 of the Sarbanes-Oxley Act of 2002 Extraterritorially*, 40 TEX. TECH L. REV. 225, 230 (2007) (stating that Section 806 was not just an "afterthought, but rather a central component" of SOX since one of the main reasons SOX was enacted is to protect whistleblowers).

49. *See* 149 CONG. REC. S1725-01 (daily ed. Jan. 29, 2003) (statement of Rep. Leahy) (stating that Congress intended to interpret SOX broadly); *see also* Deborah Solomon & Kara Scannell, *SEC is Urged to Enforce 'Whistle-Blower' Provision*, WALL ST. J., Nov. 15, 2004, at A6 (reporting on Senators Leahy's and Grassley's efforts to ensure SEC is working with DOL to protect corporate whistleblowers).

50. The authors of the study labeled employees as external monitors and considered company management, board of directors, or the firm itself as internal governance. ALEXANDER DYCK, ADAIR MORSE & LUIGU ZINGALES, WHO BLOWS THE WHISTLE ON CORPORATE FRAUD 39 (2006), *available at* http://www.whistleblowersblog.org/Zingales,%20Whistle%20on%20Corp%20Fraud%20Nov06.pdf. This Comment uses the phrase "internal employees" to differentiate between those employees hired by the company on a contract basis, such as auditors or attorneys.

51. *See id.* (finding that employees accounted for 19.2% of fraud reported between 1996 and 2004). Other reports of fraud came from non-financial market regulators (e.g., industry regulators and other government agencies

because employees oftentimes have access to information unavailable to the public or even external auditors.[52] It would be very difficult to investigate corporate fraud without the corporate whistleblower, let alone discover instances of fraud, as many companies enforce the "corporate code of silence" and discourage employees from blowing the whistle.[53] Finally, whistleblowers play a critical role in restoring investor confidence as they tend to receive encouraging attention from the media[54]; thus, protecting them also becomes critical to further build investor confidence.[55]

III. ANALYSIS

A. Failure to Protect

While Congress patted itself on the back, and various scholars and members of the media applauded it for enacting the Whistleblower Provision, the legislative branch has not been able to protect the whistleblowers as it had initially intended.[56] The failure is mostly attributed to the Provision's procedural

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such as State Attorney General's offices, the Food and Drug Administration ("FDA"), the Federal Energy Regulatory Commission ("FERC"), etc.) at 16%, media at 16%, analysts at 14.7%, auditors at 14.1%, SEC at 5.8%, equity holders at 3.2%, and insurance and plaintiff's law firms at 2.6%. *Id.*

52. *See id.* at 26 (stating that "[e]mployees clearly have access to information for few if any frauds can be committed without involving some of them."). The scholars also contend that the number of employees blowing the whistle would be higher if there was less tension between access to information and lack of incentives to blow the whistle. *Id.*

53. Levy, *supra* note 48, at 231.

> The apparent efforts to cover up any alleged misconduct by Enron or Andersen were not limited to Andersen and the destruction of physical evidence and documents. In a variety of instances when corporate employees at both Enron and [Arthur] Andersen attempted to report or "blow the whistle" on fraud, they were discouraged at nearly every turn.

Id. (quoting a Senate Judiciary Committee report on SOX).

54. *Id.* at 230. In fact, Sherron Watkins, who blew the whistle on Enron, Cynthia Cooper, who blew the whistle on WorldCom Inc., and Coleen Rowley, who blew the whistle on the Federal Bureau of Investigations, shared Time magazine's Person of the Year award in 2002. John Gibeaut, *Culture Clash: Other Countries Don't Embrace Sarbanes or America's Reverence of Whistle-Blowers*, A.B.A. J., May 2006, *available at* http://www.abajournal.com/magazine/article/culture_clash/; *see also* Solomon, *supra* note 3, at A1 (stating that Welch expected to be successful in his claim against Cardinal because other whistleblowers, such as Watkins and Cooper, "were winning praise and gracing magazine covers").

55. *See* Levy, *supra* note 48, at 231 (arguing that the main reason Congress enacted SOX was to protect investors by providing protection for whistleblowers).

56. *See* Moberly, *supra* note 39, at 69-70 (stating that, despite high expectations, SOX yielded disappointing results). Many scholars initially praised the SOX's Whistleblower Provision as one of the most important whistleblower provisions in the world. *Id.* at 68.

difficulties, OSHA's inexperience in investigating securities fraud, and the lack of adequate remedies.[57]

1. Procedural Difficulties

Much of the confusion surrounding the Whistleblower Provision has to do with the procedure of filing a grievance.[58] As an initial matter, the ninety day statute of limitations to file a retaliation claim is rather short.[59] Many times, the aggrieved employee is not aware of his rights under the statute or what constitutes protected activity.[60] Moreover, the statute of limitations period begins when the employee learns of the employer's intent regarding the adverse decision and not when the adverse decision is actually implemented and the employee suffers the consequences.[61] In fact, in 2006, fifteen percent of the SOX whistleblower cases were dismissed for failure to file suit within the statutory period.[62]

Second, the scope of protection under the statute is narrow.[63] The Whistleblower Provision only protects an employee when he or she provides information to persons identified in the statute.[64] The statute does not protect those who blow the whistle to persons such as co-workers without supervisory authority, state or local authorities, or the media.[65] Furthermore, the reasonable belief

57. *See* Dworkin, *supra* note 31, at 1764-65 (arguing that SOX's statutory scheme is more illusory than meaningful because of the complex procedures, short statute of limitations, and inadequate remedies).

58. *See* Moberly, *supra* note 39, at 71 (stating that employees frequently lose their claim due to violation of a procedural rule or failing to meet the statutory requirements); *see also* Solomon & Scannell, *supra* note 49, at A6 (stating that majority of whistleblower claims have been dismissed for technical reasons).

59. Dworkin, *supra* note 31, at 1763.

60. *Id.*; *see also* Christian, *supra* note 18, at 339 (noting that the short statute of limitations has been a frequently litigated issue, many of which resulted in the dismissal of claim); Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 217 (2007) (stating that ninety days may not be sufficient for an employee to determine that adverse action was due to the whistleblowing activity).

61. Christian, *supra* note 18, at 339. However, the employer's intent to implement the adverse decision must be a "final, definitive, and unequivocal notice" to the employee. *Id.* (quoting Halpern v. XL Capital, Ltd., 2004-SOX-54 (A.R.B. Aug. 31, 2005)).

62. Meindertsma & Kirk, *supra* note 24, at 2.

63. *See* Moberly, *supra* note 39, at 100 (arguing that part of the reason why SOX whistleblowers have a low win rate is attributed to the fact that the employee has to demonstrate that he is within the boundaries of protection, i.e., he is a covered employee working for a covered employer and was engaged in a protected activity).

64. Ramirez, *supra* note 60, at 201.

65. *Id.*; *see* 18 U.S.C. § 1514A(a)(1) (2006) (outlining the entities which can receive information that constitutes fraud against shareholders such as

standard, in essence, assumes the whistleblowing employee has a thorough understanding of all the specific fraud statutes covered in Section 806 because it does not protect the employee if the violation falls outside the scope of the specified fraud provisions.[66] The employee must understand and objectively believe the employer's conduct was sufficiently material to amount to fraud against the shareholder even before OSHA conducts an investigation.[67]

Third, although the Whistleblower Provision seems employee-friendly, in reality, employers have an advantage under the statute.[68] On its surface, the fact that the employee's only burden under the Provision is to prove that the protected activity was a contributing factor in the adverse decision seems to favor the employee.[69] The employer, however, can rebut that fact by showing, with clear and convincing evidence,[70] that he or she would have made the same adverse decision against the employee based solely on a legitimate business reason.[71] But because most

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federal regulatory or law enforcement agencies, any members or committees of Congress, and persons with supervisory authority over the employee).

66. *See* Ramirez, *supra* note 60, at 207 (arguing that the whistleblower protection is narrowly drafted to limit protection and presumes that whistleblowing employees "enjoy facility with all relevant statutes and possess the ability to predict whether a court would find a violation."); Meindertsma & Kirk, *supra* note 24, at 3 (noting that the DOL administrative review board adopted a standard that requires the whistleblowing employee to allege that the employer's wrongdoing "definitely and specifically" violated a category of fraud listed under Section 806 in order to be protected); *see also Allen*, 514 F.3d at 479 (holding that plaintiff did not engage in protected activity because she is a CPA, and, therefore, the objective reasonableness of her belief is evaluated from the "perspective of an accounting expert," who should have known that her employer's conduct did not violate any securities laws).

67. *See* Stephen B. Stern & Jonathan Cohen, *Pleading a Sarbanes-Oxley Act Whistleblower Claim: What Is Required to Survive?*, 23 LAB. LAW. 191, 204 (2007) (noting that the DOL has stated Section 806 only applies to objectively reasonable complaints regarding fraud against shareholders). Many DOL decisions require that the alleged misrepresentations be material. *Id.*

68. *See* Moberly, *supra* note 39, at 72, 120 (noting that while the burden of proof under Section 806 seems "employee friendly," because of the various procedural hurdles, employees have only won 10.7% of causation cases at the OSHA level); *see also* Valerie Watnick, *Whistleblower Protection Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 863 (2007) (arguing that there is an "inherent bias against the complainant at the investigative and hearing stages of the proceedings.").

69. *See* Moberly, *supra* note 39, at 79-80 (commenting that the contributing factor of causation is an easy burden to meet for the employee).

70. *See* Christian, *supra* note 18, at 352 (stating that the clear and convincing burden is a higher burden than the preponderance of the evidence burden that the employee must meet).

71. *Id.*; *see Halloum*, 2003-SOX-7, at *8 (finding that employer who provided evidence of employee's violation of company policy alone established legitimate business reason by clear and convincing evidence for termination of whistleblower). *But see Platone*, 2004 DOLSOX LEXIS 69, at *13 (finding

states have adopted the at-will employment doctrine, the breadth of legitimate reasons under these state laws is wide, and many employers escape liability for terminating whistleblowers.[72] Moreover, the complainant does not have access to the employer's response to the complaint or any other documents submitted to OSHA during the investigation stage.[73] This, in turn, does not allow the employee to rebut any inaccuracies that may be contained in the employer's response.[74]

Finally, the time period it takes to receive a final disposition is too long for the employee.[75] The legislature designed Section 806's procedure to be an expedited process.[76] But during its investigation, the DOL frequently relaxes the implemented timelines or misses them all together.[77] Moreover, the decision by the DOL is not final and can be appealed to an appellate court, which then can draw out the process even more.[78] This prolonged process is disadvantageous to the employee because in most cases they have fewer resources than the employer and cannot afford to partake in lengthy litigation.[79]

2. *Inexperience of OSHA in Investigating Fraud Claims*

Part of the reason why the DOL misses the investigation timelines is due to the OSHA investigator's inexperience in

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that, although employer alleged that employee was terminated for a romantic relationship with a union leader in conflict of her management position within the company, a legitimate business reason, employer failed to establish by clear and convincing evidence that she would have been terminated for the failure to disclose the relationship alone).

72. *See* Watnick, *supra* note 68, at 860-61 (arguing that "the convergence of the at-will employment doctrine and the burden set out for a Sarbanes-Oxley whistleblower, leave the whistleblower largely unprotected").

73. *Id.* at 864.

74. *Id.*

75. *Id.* The longer it takes to decide the case, the longer the employee must go without a paycheck while continuing to pay legal fees. *Id.* at 841.

76. *See id.* at 864 (stating that the strict timelines that were put in place are not being followed).

77. *See id.* (stating that DOL often grants extensions, to employers in most cases, thereby hurting the employee who needs immediate relief); *see also* Solomon, *supra* note 3, at A1 (stating that DOL frequently misses the deadline of 180 days to conduct an investigation and issue a final order).

78. Earle & Madek, *supra* note 18, at 11-12; *see also* Ramirez, *supra* note 60, at 209 (noting that, in 2006, the median time to litigate a civil case in a federal court was 8.3 months). Moreover, the district court reviews the complaint *de novo*, and therefore resources and time spent within the DOL's process are essentially "wasted." *Id.*

79. *See* Ramirez, *supra* note 60, at 208 (stating that the time it takes a claim to process through the administrative or legal procedure affects the protection afforded to a complainant); Earle & Madek, *supra* note 18, at 25 (stating that many whistleblowers cannot financially survive years of litigation while waiting for a disposition without any compensation and that "[w]histleblowing should not be an option only for the wealthy few.").

assessing security fraud claims.[80] Although OSHA is in charge of administering some whistleblower statutes, it mainly deals with labor and employment matters.[81] Securities fraud, on the other hand, is a much more complex matter that requires the understanding of sophisticated financial documents and accounting practices in order to spot the financial irregularities and violation of a SOX provision.[82] In a SOX claim, it is essential that the OSHA investigators understand the intricacies of securities fraud because they do not merely determine whether a company violated a provision.[83] They must also determine whether it was reasonable for the employee to have believed that his employer committed fraud based on the facts of the claim before finding that he or she is protected.[84] However, OSHA investigators do not have the requisite training, background, or experience to assess these claims, as securities fraud is not an area of competence nor is it within OSHA's general arena of health and safety matters.[85] In addition, OSHA is hampered by its limited authority.[86] It does not have the power to subpoena companies to submit documents or order witnesses to testify, nor can it place anyone under oath before a court.[87] Even if the OSHA investigator finds in favor of the employee and orders reinstatement, its decision is merely a preliminary order that cannot be judicially enforced against the employer.[88]

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80. *See* Ramirez, *supra* note 60, at 210-11 (stating that OSHA investigators are required to become familiar with each statute, procedural requirements, and burdens of proof before commencing investigation; but with their core competence being employment law, they do not have the training to assess SOX claims).

81. *See* Earle & Madek, *supra* note 18, at 15 (describing the types of claims, such as sexual harassment or anti-union claims, that OSHA ordinarily deals with).

82. *See id.* (arguing that OSHA investigators do not have the training to understand violations of accounting principles because financial frauds are "not simple commonsense matters" as with other employment law violations such as sexual harassment); *see also* Solomon, *supra* note 3, at A1 (stating that financial frauds are difficult to detect as even financial regulators and investors failed to spot fraud at Enron, WorldCom, and other places for years).

83. Solomon, *supra* note 3, at A1.

84. *Id.*

85. *See* Ramirez, *supra* note 60, at 211 (noting that many practitioners believe neither OSHA investigators nor their supervisors have the necessary disposition, training, or experience to assess SOX claims, as they are outside of OSHA's area of expertise); Solomon, *supra* note 3, at A1 (commenting that OSHA lacks financial or accounting expertise).

86. Solomon, *supra* note 3, at A1.

87. *Id.*

88. Watnick, *supra* note 68, at 856; *see* Bechtel v. Competitive Tech., Inc., 448 F.3d 469, 472-73 (2d Cir. 2006) (finding that SOX does not authorize the district court to enforce preliminary orders or reinstatement by OSHA).

3. Inadequate Remedies

Assuming that the whistleblowing employee is successful in his claim and is reinstated to his job, these factors alone do not provide an adequate remedy to the aggrieved employee.[89] These whistleblowing employees are spending countless hours and resources "just to secure reinstatement and some financial compensation" for doing the right thing.[90] Mere reinstatement of her position does not "make the employee whole."[91] In fact, many employees who blew the whistle and remained or were reinstated to their jobs did not stay much longer.[92] Oftentimes, they were subject to emotional abuse, isolation, and increased demands from the employer.[93] Moreover, even if an employee tries to seek alternative employment, her reputation as a whistleblower will follow her, making it extremely difficult to find another job in the industry.[94]

The fact that Section 806 does not provide for punitive damages and is silent on damages for loss of reputation or emotional damages undercuts the effectiveness of the statute.[95]

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89. While Section 1514A(c)(1) entitles a successful claimant to "all relief necessary to make [her] whole," 1514A(c)(2) limits relief to only equitable compensatory damages and not other damages such as punitive or emotional, essentially only providing reinstatement as an actual remedy. Dworkin, *supra* note 31, at 1763.

90. Earle & Madek, *supra* note 18, at 30.

91. 18 U.S.C. § 1514A(c) (2006).

92. Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 950 (2002).

93. *See id.* at 951 (describing a study on health effects for whistleblowers who remained employed). More than eighty percent of the whistleblowers who were part of the survey experience stress related symptoms during the process of whistleblowing. *See id.* (citing a study that found that twenty-nine of thirty-five whistleblowers surveyed experienced stress related symptoms). Nearly half of the employees started to take prescription medicines that they had not taken before whistleblowing and also considered suicide. *Id.*

94. *See id.* at 952-53 (stating that some employers will go as far as to attack the employee's credibility in the industry to ensure that the employee does not find future employment); *see also* Taub, *supra* note 2 (discussing Welch's experience as a whistleblower and his inability to find a job in the banking industry as a result of his former employer's interference).

95. *See* 18 U.S.C. § 1514A(c) (2006) (outlining available remedies under the Whistleblower Provision). Although it is generally recognized that punitive damages are not allowed under the statute, some courts have allowed recovery of damages based on injury to reputation. *See* Hanna v. WCI Cmtys. Inc., 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) (finding that "a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity"). *But see* Murray v. TXU Corp., 2005 U.S. Dist. LEXIS 10945, at *10-11 (N.D. Tex. June 7, 2005) (finding that Congress would have included recovery of non-pecuniary loss such as injury to reputation within the statute if it intended to provide such damage recovery, and thus plaintiff is not allowed to recover damages for injury to reputation).

Studies have shown that whistleblower statutes that do not provide for punitive or emotional damages are ineffective in inducing whistleblowers because they do not provide an adequate relief to the whistleblower for taking the risk in reporting her employer's wrongdoing.[96] Moreover, whistleblower provisions that provide for financial incentives have been much more effective in inducing whistleblowers.[97] Coupled with the fact that most whistleblowers have not been successful in court, lack of adequate remedies will deter more whistleblowers from coming forward with information important to a corporate fraud investigation.[98]

B. Extraterritorial Application of Section 806[99]

Congress' failure to specify whether the Whistleblower Provision protects employees outside U.S. territory has generated great discussion because of the benefits and detriments of extraterritorial protection: on one hand, allowing extraterritorial application of SOX could have economic and political implications if it conflicts with foreign law or policy;[100] on the other hand, not protecting foreign whistleblowers could cause foreign subsidiaries

96. Dworkin, *supra* note 31, at 1763. Section 806 is based on a "protective whistleblower legislative model," which assumes that most employees are "people of conscience" and would blow the whistle if the fear of retaliation is not present. *Id.* at 1768; *see also* Bucy, *supra* note 92, at 959 (noting that Congress had a rational basis for that assumption as studies have shown most whistleblowers were model employees with strong moral senses and social responsibility).

97. *See* Bucy, *supra* note 92, at 970 (finding that giving financial incentives to whistleblower may be far more effective in spurring whistleblowers); *see also* Ben Depoorter & Jef De Mot, *Whistleblowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 140-41 (2006) (finding that since the amendments of 1986 to the False Claims Act—giving the whistleblower a larger percentage of the recovery as an incentive to litigate fraudulent claims against governmental contractors on behalf of the government—the number of whistleblowers increased drastically).

98. *See* Levy, *supra* note 48, at 231 (arguing that lack of meaningful protection from whistleblower statutes deters an employee from taking the risk of reporting corporate wrongdoings).

99. *See* Caryn R. Nutt, Comment, Carnero v. Boston Scientific Corporation: *Interpreting the Extraterritorial Effect of the Civil Whistleblower Protection Provision of the Sarbanes-Oxley Act*, 41 U.S.F.L. REV. 201, 202 (2006) (stating that "[t]he provision does not explicitly protect, nor does it explicitly exempt from protection, employees working abroad for foreign subsidiaries of United States corporations."); *see also* Small v. United States, 544 U.S. 385, 388-89 (2005) (finding that, generally, a statute enacted by Congress is presumed to apply within the territory of the U.S.). However, that presumption will be overcome if there is a significant effect on the U.S., harm to U.S. commerce or interest, or if the "center of gravity of a transaction" is in the U.S. 44B AM. JUR. 2D International Law § 71.

100. *See* Dworkin, *supra* note 31, at 1777 (noting cases where American companies instituted measures for SOX compliance abroad that caused conflicting policies with host country).

of U.S. companies or foreign companies trading in the U.S. securities market to disregard SOX with less risk of its fraudulent activity being exposed.[101] This is because the employees of such companies would not have an incentive to blow the whistle without protection.[102] Courts seem to be conflicted in interpreting congressional intent as well. Although in *Carnero*, the First Circuit found that Section 806 does not apply extraterritorially,[103] the recent *O'Mahony* decision of the Southern District of New York extended the protection to a foreign national working abroad.[104]

1. A Brief Explanation of Carnero

Ruben Carnero is an Argentinean who was employed by both Boston Scientific Argentina S.A. ("BSA") and Boston Scientific Do Brasil ("BSB"), subsidiaries of a Delaware corporation, Boston Scientific Corporation ("BSC").[105] Both BSB and BSA terminated him in 2002 and 2003 respectively, and he alleged that his terminations were in retaliation for reporting to BSC that its Latin American subsidiaries were engaged in fraudulent accounting practices.[106] Carnero's case eventually made it to the Court of Appeals for the First Circuit.[107] The court found that Carnero would indeed be a covered employee who was retaliated against by his employer in violation of Section 806— except for the fact that he is a foreign employee who was employed abroad.[108] The court decided the case under the presumption against extraterritorial application, reasoning that neither the express provisions nor the legislative history indicates that Congress intended for the Whistleblower Provision to apply extraterritorially.[109]

While it is true that the Whistleblower Provision does not show an express congressional intent for extraterritorial application, the First Circuit neglected to consider both the "conduct" test and the "effects" test in assessing the potential

101. *Id.*
102. Levy, *supra* note 48, at 227.
103. *Carnero*, 433 F.3d at 18.
104. *O'Mahony*, 537 F. Supp. 2d at 515.
105. *Carnero*, 433 F.3d at 2.
106. *Id.* at 2-3.
107. *Id.* Carnero initially filed a complaint against BSC with DOL under the Whistleblower Provision. *Id.* Although DOL found that BSC was a covered employer under SOX, it dismissed Carnero's claim, reasoning that the Whistleblower Provision did not apply to employees working abroad. *Id.* at 4. Carnero subsequently filed suit in the district court of Massachusetts to review his Whistleblower Provision claim, which was also dismissed. *Id.*
108. *Id.* at 6.
109. *Id.* at 9-16. The Court also emphasized that it did not want to open the gate for U.S. courts to start adjudicating employment relationships between foreign employees and their employers. *Id.* at 15.

extraterritorial application.[110] On the other hand, the Southern District of New York correctly considered both the "effects" and "conduct" tests to rebut the presumption against extraterritorial application.[111]

2. O'Mahony Decision

The *O'Mahony* case involves a foreign national who worked for a U.S. subsidiary of a foreign company that traded in the U.S. securities market.[112] Although at the time O'Mahony filed suit, she was no longer employed within the U.S., she alleged that the subsidiary in the U.S. tried to use her in a scheme to defraud the French government of tax revenue.[113]

In *O'Mahony*, the Court for the Southern District of New York recognized that there is a general presumption against extraterritorial application of statutes when Congress remains silent as to such application.[114] The court went even further and noted that in such cases, the Second Circuit also considers two factors: (1) whether the alleged misconduct took place within the U.S.; and (2) whether the alleged misconduct has a substantial adverse effect in the U.S. market.[115] The court distinguished *Carnero* and applied the conduct test.[116] It reasoned that, although the case involved a foreign employee, the alleged

110. *See* Levy, *supra* note 48, at 235-36 (stating that courts often use the "effects" test or "conduct" test, or a combination thereof, when deciphering legislative intent of an extraterritorial application of a statute).

111. *See O'Mahony*, 537 F. Supp. 2d at 512 (applying the "effects" and "conducts" test in determining extraterritorial application of a statute).

112. *Id.* Rosemary O'Mahony is an Irish national who was employed by Accenture LLP, the U.S. subsidiary of Accenture Ltd., a Bermuda company that traded on New York Stock Exchange. *Id.* at 507. She worked for Accenture LLP from 1984 to 2004. *Id.* She left the U.S. in 1992 for an expatriate assignment in France and was subsequently employed by Accenture SAS, Accenture's French subsidiary in 2004. *Id.* at 507-08.

113. *Id.* at 508.

114. *Id.* at 512.

115. *Id.*

116. *Id.* at 511-12. The factors the Court considered in applying the conduct test were:

> (1) the elements of the wrongful conduct in question as pled in plaintiff's theory of fraud in relation to the specific acts to which the statute apply; (2) the location of domestic conduct and contacts associated with the transaction in relation to those located in foreign states; (3) the timeline identifying when and where the relevant domestic and foreign acts occurred; (4) the materiality/substantiality of the domestic conduct relative to the particular fraudulent transaction the pleadings describe; (5) the causal connection between the domestic conduct and the alleged financial losses resulting from the alleged fraudulent transaction; and (6) an overarching measure of reasonableness gauged by the intent of congressional policy and principles of fairness in the circumstances surrounding the particular case.

Id. at 512-13.

fraudulent conduct took place within the U.S. by executives located in the U.S.[117] Moreover, the conduct occurred while the plaintiff was still employed by the U.S. subsidiary, even though she was working abroad at the time; therefore, the court concluded it had subject matter jurisdiction over the defendants.[118]

This decision was an important one because it helped preserve the congressional intent to protect American investors and the U.S. securities market by extending protection to foreign employees.[119] Although the court ultimately stated that its decision does not have any implications of extraterritorial application of the Whistleblower Provision because the alleged fraudulent conduct was done by a company located in the U.S., it was an important first step in extending protection to foreign employees employed abroad and, in turn, in deterring foreign subsidiaries from engaging in fraudulent conduct abroad.[120]

IV. PROPOSAL

A. Proposed Amendments and Revisions of the Whistleblower Provision

Before the intent of SOX is fully realized, the Whistleblower Provision must give meaningful protection to those who help discover fraud from within a company.[121] In order for that goal to be achieved, various amendments and revisions need to be implemented.[122] On the procedural side, this includes extending the statute of limitations, expanding the scope of protected activities, requiring the disclosure of any documents submitted to the adjudicating body by the employer, and having a department within the SEC, instead of OSHA, investigate complaints. On the substantive side, it includes making employers more accountable for retaliating, making the preliminary reinstatement order judicially enforceable, having an incentive-based provision rather than the current protection-based provision, and extending protection to employees of foreign subsidiaries and U.S. employees working abroad.

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117. *Id.* at 513-14.

118. *Id.* at 515.

119. Nutt, *supra* note 99, at 218.

120. *O'Mahony*, 537 F. Supp. 2d at 514-15.

121. *See* Dworkin, *supra* note 31, at 1764 (stating that the Whistleblower Provision only "gives the illusion of protection without truly meaningful opportunities or remedies for achieving it").

122. *See* Watnick, *supra* note 68, at 834 (arguing that changes need to be made to better protect whistleblowers and encourage them to come forward with information on corporate fraud).

1. Procedural Reforms

a. Extending the Statute of Limitations Period

The statute of limitations to file a claim should be extended from 90 days to at least 180 days.[123] This will give the aggrieved employees more time to consult with attorneys or other experts in order to learn their rights and remedial avenues to be pursued.[124] The extension of the statute of limitation will also protect those employees with valid claims who are ignorant of the short filing period and have their cases dismissed.[125]

b. Expanding the Scope of Protected Activities

The scope of coverage on the whistleblowing activity must be expanded. First, the requirement that the employee only report to statutorily identified persons in order to be protected should be amended to include state and local authorities, non-supervisory co-workers, and, in limited circumstances, the media.[126] Second, any disclosure of fraud that violates the law or affects the public health should be protected. This protection should expand beyond mere disclosure of specific instances of fraud listed within the statute. This will help protect whistleblowers by alleviating the pressure

123. *See* Earle & Madek, *supra* note 18, at 6 (stating that an amendment to the SOX bill shortened the statute of limitations period from 180 days to 90 days).

124. *See* Ramirez, *supra* note 60, at 218 (arguing that extending the statute of limitations period to one year would provide the employee adequate time to recognize retaliation and ways to remedy the situation without believing things will fall back into place and the retaliation will stop); Earle & Madek, *supra* note 18, at 52 (asserting that a longer statute of limitations period is necessary to encourage more whistleblowers to blow the whistle).

125. *See* Meindertsma & Kirk, *supra* note 24, at 2 (finding that in 2006, fifteen percent of cases were dismissed because of failure to file within the statute of limitations period); *see also* Moberly, *supra* note 39, at 132 (finding that in 46.4% of the ALJ cases where the claim was dismissed because of failure to file within the statutory period, the claim was filed between 90 and 180 days from the adverse action).

126. *See* Ramirez, *supra* note 60, at 202 (arguing that disclosures made to a "public body," which includes all federal, state, and local agencies in all branches of the government, as well as pertinent boards, committees, and other governmental offices, should be protected). Whistleblowing to the media should be protected if: (1) the employee has previously blown the whistle to a designated authority, both internally and externally, with substantially accurate evidence of fraud; (2) no response had been made; and (3) the employee reasonably believes that the employer will destroy the evidence of fraud and retaliated as a result. *See* Elletta S. Callahan, Terry M. Dworkin & David Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L L. 879, 893-94 (2004) (outlining the circumstances under the Employer Rights Act of United Kingdom where the whistleblower can make protected disclosures to the press).

on them to have sufficient legal knowledge to link the misconduct by their employer to the specific fraud provisions within the statute in order to be protected.[127]

c. Employee Access to Any Employer Submitted Documents

Employees need to have access to employer submissions made to OSHA during the investigation stage. Without full disclosure of employer submitted documents to the employee, the employee will not have the opportunity to rebut any erroneous assertions the employer may make in its submissions.[128] This may ultimately lead to an adverse decision against the employee, who then has to appeal to an ALJ, prolonging the process and incurring even more legal expenses while potentially being unemployed.[129]

d. The SEC Should Investigate Claims Rather Than the DOL

DOL and OSHA are ill-suited to investigate the complex nature of securities frauds because their expertise lies in employment matters.[130] The SEC, who is in charge of protecting investors in the U.S., should be responsible for the investigation as they already have the requisite knowledge and experience that can only be acquired from handling cases involving complex financial matters. More specifically, the Division of Enforcement should handle the SOX claims as its staff regularly conducts investigation of securities fraud and has the authority to institute administrative proceedings against corporations or individuals in violation of the statute.[131]

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127. *See* Moberly, *supra* note 39, at 113-14 (finding that 24.1% of ALJ cases and 18.2% of OSHA cases were found in favor of employer based on the fact that the employee did not allege violation of statutorily specified fraud provisions). There are numerous cases where both ALJs and OSHA interpret the protected activity narrowly to find that whistleblowers are only protected if they can demonstrate "a direct line between their disclosures of misconduct and the misconduct's relationship to shareholder fraud." *Id.* at 117.

128. *See* Watnick, *supra* note 68, at 864 (stating that employer submissions to OSHA can be damaging to the employee because they "may contain inaccuracies that will lead to a decision adverse to the employee").

129. *See id.* at 865 (asserting that the whistleblower proceedings before OSHA are "forced waiting periods" the claimant must endure without a guaranteed redress of injury).

130. *See* Ramirez, *supra* note 60, at 211 (arguing that OSHA does not have the training and experience to effectively investigate complex SOX claims); *see also* Earle & Madek, *supra* note 18, at 15 (observing that many claim investigation of securities fraud is outside OSHA's competence and that its investigators have yet to develop the knowledge necessary to understand financial claims).

131. *See* U.S. Securities and Exchange Commission, About the Division of Enforcement, http://www.sec.gov/divisions/enforce/about.htm (last modified Aug. 1, 2007) (outlining the goals and duties of the SEC's Division of Enforcement).

2. Substantive Reforms

a. Make Employers More Accountable for Their Actions

Congress should amend SOX to make the employers' burden higher in attempting to rebut the retaliation claim by limiting the scope of legitimate business reason, thereby making employers account for their actions.[132] Instead of shifting the burden back to the employee to prove retaliation if the employer furnishes clear and convincing evidence that the employee would have fired for independent reasons, the burden should belong to the employer to also prove that the legitimate business reason for the adverse decision was not a pretext.[133]

Also, the SEC should enforce the criminal provision for retaliation against the employers to deter them from retaliating in the first place. Although SOX imposes criminal penalties against anyone who retaliates against a whistleblower under Section 1107,[134] it is only after the information is given to "a law enforcement officer." Thus, unless an employee blows the whistle specifically to a member of law enforcement, there can be no criminal sanction imposed against the person who retaliates—even if an employee blows the whistle to a statutorily identified person such as a supervisor or a member of Congress.[135] This provision should be amended to include reporting to any of the statutorily identified persons.

b. Enforce the Reinstatement Orders

The Second Circuit's decision that courts lack the jurisdiction to enforce the preliminary orders of reinstatement was tremendously detrimental to whistleblower protection.[136] If a court renders a decision finding that it lacks the power to enforce

132. *See* Watnick, *supra* note 68, at 867 (commenting that employers can readily find some fault of an employee to use as a legitimate reason for the termination and defeat most whistleblower claims).

133. *See* Christian, *supra* note 18, at 344 (stating that some administrative decisions found that if the employer meets the burden, the employer only rebuts the presumption of retaliation and still has to provide evidence that the adverse employment action was not a pretext).

134. Codified as 18 U.S.C. § 1513(e) (2006), the statute reads as follows:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

135. *See* Dworkin, *supra* note 31, at 1764 (stating that the whistleblower must give truthful information to a law enforcement officer, must show employer's intent to retaliate, and such information must be correct before penalties can be imposed).

136. *Bechtel*, 448 F.3d at 473.

protection afforded in the Provision, it will discourage whistleblowers from coming forward.[137] Congress should amend SOX to explicitly give courts the power to enforce the preliminary reinstatement orders.

c. Give Financial Incentives to Blow the Whistle

To encourage more whistleblower to come forward, the Provision needs to be amended to give financial incentives, much like the False Claims Act.[138] Whistleblowing is an extremely costly endeavor for an employee to undertake without a promising consequence.[139] Because most employees are unsuccessful at getting reinstated, giving a successful whistleblower a monetary sum significant enough to compensate the risk they took will help spur whistleblowers. The monetary reward could be funded by a part of the fine levied against the employer or a portion of recovered amount from the shareholder restitution.

d. Extend the Protection Extraterritorially

Employees of foreign subsidiaries, whether they are foreigners or U.S. nationals, must also be protected. In the current global market, it is difficult to envision a corporation that does not have some international business presence.[140] Understandably, Congress did not want to enact a statute explicitly granting extraterritorial application, where the provision would affect labor relations of a foreign, sovereign country.[141] But if the courts employ the conduct and effects tests,[142] as the Second

137. *See* Watnick, *supra* note 68, at 856 (stating that the Second Circuit's refusal to enforce the reinstatement order is "further discouraging would be whistleblowers from reporting what they know").

138. *See supra* note 97 and accompanying text (discussing the False Claims Act and the effects of giving financial incentives to whistleblowers).

139. *See* Earle & Madek, *supra* note 18, at 25 (arguing that it is hard for employees to financially survive for years while their claims are being heard and that most employees end up losing after years of battle).

140. *See* Ian Schaffer, Note, *An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 FORDHAM L. REV. 1829, 1835 (2006) (explaining that international cooperation among regulators has increased to respond to the global market, "where cross-border securities transactions have become routine"); Nutt, *supra* note 99, at 218 (finding that in the new global economy, many U.S. corporations have foreign subsidiaries outside the territory of congressional reach).

141. *See Small*, 544 U.S. at 388-89 (finding that, generally, a statute enacted by Congress is presumed to apply within the territory of the U.S. to prevent unintentional discord between U.S. laws and those of foreign countries); *see also* Schaffer, *supra* note 139, at 1843 (commenting that European countries criticized the enactment of SOX because requiring its companies to implement some of the provisions to comply with SOX to trade in the U.S. would violate European privacy and labor laws).

142. The Effects and Conduct test were first used by Judge Hand in finding

Circuit has aptly decided to consider, the Whistleblower Provision can extend its protection to employees retained by foreign subsidiaries. Although no court has yet to utilize the effects test in the context of SOX, it would be appropriate to do so because the effects test requires a court to consider whether conduct outside the U.S. would have an adverse effect on the U.S. securities market.[143] This is consistent with the congressional intent of enacting SOX to protect investors in the U.S. securities market by spurring whistleblowers abroad to report fraudulent conduct that can adversely affect U.S. market.[144]

V. CONCLUSION

So far, of the nearly 1,000 complaints filed under the Whistleblower Provision, not a single employee has been successful.[145] Without providing meaningful protection, the Whistleblower Provision cannot achieve its main goal: protect employees who report fraud from retaliation, thereby protecting the shareholders.[146] The proposals in this Comment are just a few examples on what could be done. But Congress must ultimately reconvene on this matter and procure a better solution to give whistleblowers a clear legal protection. Congress must not act in haste as it did in the wake of the corporate scandals of 2002.[147]

Back in Virginia, Welch is sitting in his chair mulling over the question on whether he would blow the whistle again. After a brief moment, he firmly states, "Yes, it is the right thing to do."[148] The David Welchs of this world need the protection they were promised and deserve.

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extraterritorial application of antitrust case in *U.S. v. Aluminum Company of America ("Alcoa")*. Nutt, *supra* note 99, at 221-22.

143. *Id.* at 222. The two prongs of the effects test are: (1) whether the fraudulent conduct was intended to affect U.S. market, and (2) whether the fraudulent conduct in fact had an effect in the U.S. market. *Id.*

144. *See id.* at 217-18 (asserting that U.S. investors and securities market cannot be protected without the extraterritorial application of the Whistleblower Provision since fraud uncovered by foreign whistleblowers have just as much adverse effect to U.S. securities market as does domestic fraud).

145. Stephen Taub & Tim Reason, *Whistle-blowers Never Win*, CFO, June 8, 2007, *available at* http://www.cfo.com/article.cfm/9321686?f=search.

146. *See* Dworkin, *supra* note 31, at 1779 (explaining that Congress recognized the importance of whistleblowers by encouraging whistleblowers and making whistleblower protection a major part of SOX).

147. *See* Schaffer, *supra* note 140, at 1842 (stating that foreign commentators disapproved of the enactment of SOX "as being hastily drafted and as an attempt by Congress to achieve a quick-fix solution to corporate governance problems in an election year).

148. Taub, *supra* note 2. In fact, in a study conducted, more than eighty percent of whistleblowers reportedly would blow the whistle again if put in a similar situation. Bucy, *supra* note 92, at 961.