



May 7, 2010

The Honorable David Michaels, PhD  
Assistant Secretary of Labor  
United States Department of Labor  
200 Constitution Ave, N.W.  
Washington, DC 20210

**Re: Sarbanes-Oxley Act Enforcement**

Dear Secretary Michaels:

As the Chief Financial Officer of a small bank in Virginia, I became one of the first Sarbanes-Oxley Act (“SOX”) whistleblowers in 2004 when I refused to certify financial reports. This quickly led to my termination. My subsequent experiences with the administrative and legal processes prompted me to write a doctoral dissertation analyzing the outcomes of over 27,000 federal whistleblower complaints at OSHA. My findings suggest that OSHA must undertake serious changes in order to carry out Congress’ intent in creating the whistleblower provision of SOX.

**I. OSHA’s Enforcement of SOX Falls Short Of Congressional Intent**

SOX investigators are less likely to find a SOX claim meritorious than claims under other laws enforced by OSHA. Between 1994 and 2008, OSHA investigators determined that only 874 (3.2%) claims of the 27,298 investigations completed had merit. When the outcomes of complaints filed under the only accounting and finance related act, the Sarbanes-Oxley Act of 2002 (SOX) are viewed separately from the other 16 more traditional workplace-safety laws, investigators’ meritorious findings were even more rare – 18 (1.4%) of 1,242 investigations completed. This was less than one half the overall meritorious findings rate of 3.2% (see Appendix A). It is not plausible that 98.6% of the time companies are innocent of any wrongdoing. The lack of meritorious findings for SOX whistleblowers effectively nullifies the intent of Congress.

One could question whether the political party that occupies the White House and holds the majority position in Congress might influence the outcomes of whistleblower complaints. A comparison of outcomes during the administrations of Presidents Clinton, Bush and Obama demonstrates that OSHA has favored employers under all three administrations: (see Appendix C):

- During the Clinton administration, OSHA issued employees a favorable decision in 3.7% of all whistleblower cases, compared with 2.4% during the Bush Administration. The 1.3% decrease in favorable outcomes for employees during the Bush Administration is significant.
- Like many other whistleblowers, I hoped that significant change would occur after President Obama took office. Unfortunately, preliminary data shows that the percentage of meritorious findings overall did not change from 3.2% and the meritorious findings rate for SOX complaints fell from 1.4% (2002 – 2008) to 1.0% in 2009 (see Appendix B). The lack of an improved success rate could be attributed to the length of time it takes to replace policies from the previous administration.
- However, when the three measures of outcomes examined – investigator’s meritorious findings, OSHA negotiated settlements, and cases dismissed by OSHA – the outcomes during President Obama’s first year in office more closely resemble the outcomes during the Bush administration than the outcomes during the Clinton administration (see Appendix C and Appendix D). Again, this could be attributed to the length of time it takes to replace policies from the previous administration.

Again, OSHA reached favorable decisions for SOX whistleblowers even less frequently than in other cases. One reason for the low rate of meritorious findings for SOX complaints may be the inadequate training of OSHA investigators and lack of understanding by ALJs regarding complex securities regulations and corporate accounting principles. Regardless of the cause, when whistleblowers’ complaints are mishandled by an OSHA investigator, the whistleblower is usually left with few resources to assist him or her through the appeals process.<sup>1</sup> The fate of their case is virtually sealed. In dismissing so many SOX complaints, OSHA sends the wrong message to corporate America. The SOX whistleblower provision becomes a paper tiger.

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<sup>1</sup> My research shows that the vast majority of whistleblowers struggle to find new employment and have considerable financial difficulties. My survey revealed that :

- a. ~ 78% endured moderate to severe financial difficulties in the first 60 months after blowing the whistle,
- b. ~ 83% found it was extremely difficult to impossible to find a new job in the same field,
- c. ~ 66% found it was extremely difficult to impossible to find a new job even when changing professions, and
- d. ~ 59% had to change professions before they could find any job (Welch, 2009, pg. 70-74).

## **II. Moving Forward: Strategies for Strengthening OSHA's Prevention and Enforcement Role**

Based on my research, I recommend that OSHA take the following steps to strengthen its enforcement:

### **A. Selection of Administrative Law Judges and the Administrative Review Board who Understand the Underlying Securities Laws and Accounting Principles**

OSHA should select Administrative Law Judges and Administrative Review Board members who have a full understanding of securities fraud and the very complex securities regulations and accounting standards. Judges who do not understand the internal controls required by SOX and other securities regulations cannot assist the DOL in enforcing these laws. In the end, uninformed administrative judges provide a rubber stamp to reckless corporate behavior and greed.

### **B. Enhanced Training for OSHA Investigators**

OSHA enforces approximately 17 federal laws. These vary widely – from the Energy Reorganization Act of 1978 to SOX. The breadth of OSHA's enforcement role forces investigators to become generalists. OSHA should require investigators to specialize in one or two areas of whistleblower law so that they can receive intensive training on specific areas of the law. At the very least, OSHA must provide regular training for investigators on securities regulations and corporate accounting standards, such as training regarding the Generally Accepted Accounting Principles ("GAAP"). Furthermore, investigators must be trained to routinely interview complainants as a cornerstone of any investigation. It should be a rare case when an investigator does not interview a whistleblower like me.

### **C. Re-open Closed SOX Investigations to Ensure They Meet Procedural and Substantive Legal Standards**

Given the current financial crisis and the extremely low rate of favorable outcomes for SOX whistleblowers, OSHA should reopen investigations to ensure they meet internal OSHA procedural standards and to ensure that ALJs and the ARB applied the correct legal standards. Shareholders and our nation's economy suffer when corporations are permitted to attack conscientious employees without the threat of zealous enforcement by OSHA.

**D. The Benefit to Shareholders, Taxpayers, and Our Nation's Economy Justifies the Enhanced Enforcement Measures**

As the financial crisis of 2008 reveals, our nation's economy is dependent upon the integrity of corporate executives and professionals. Moving forward, OSHA must encourage corporate employees who have insider knowledge to come forward before a crisis hits. The agency must ensure these corporate insiders that OSHA can provide them the protection that Congress intended. Strengthening enforcement will send a clear message to corporations that corporate greed and retaliation against those who challenge corporate greed will not be tolerated.

**III. Conclusion**

My personal experience with OSHA's investigative process seems to be the perfect example of a case being closed too quickly without a proper investigation. The investigator did not interview me and did not allow me to provide my interpretation of the 350-400 pages of complex journal entries, memoranda, and banking regulations. OSHA dismissed my complaint in less than four (4) working days. Luckily I had the strength and support necessary to file an appeal with an ALJ, but not all SOX complainants have these resources. The ALJ not only found in my favor, he ordered my employer to reinstate me. At the next stage of my seven-year odyssey, ARB Judge Oliver M. Transue overturned the ALJ's decision.

Though I will never receive the justice that I believe is due, my experience with OSHA's process has motivated me to help others avoid the hardships I endured. I urge you to take immediate steps to strengthen SOX enforcement. I would be happy to meet with you to discuss my research and my experiences at OSHA. I look forward to your reply.

Very truly yours,



David Welch

Enclosures