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January 3, 2012

David Michaels, PhD, MPH, Assistant Secretary of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW, Room S2315
Washington, DC 20210

RE: Comments on Proposed Rules under Dodd-Frank Act, Docket Number: OSHA-2011-0126, RIN 1218-AC53

Dear Dr. Michaels:

A. Introduction

I submit these comments to the proposed amended regulations at 29 CFR Part 1980, 76 Fed. Reg. 68084-68097, adopted on Aug. 31, 2010. I am the Legal Director of the National Whistleblowers Center (NWC). I have been a lawyer for 30 years, and have practiced before the US Department of Labor (DOL) since 1996. I have handled over 20 environmental, nuclear, SOX and other whistleblower cases before the DOL.

B. The Department has made a wise policy decision in the requirement of notice promptly after filing in U.S. District Court, and should now declare that advance notice is no longer required under other laws.

I appreciate the Department's provision in Section 1980.114(b) that complainants give notice of filing a complaint in U.S. District Court promptly ***after*** filing such a complaint. I appreciate that the Department has not required any notice before filing such a complaint. The statute makes no provision for a prerequisite notice to the Department before filing a civil action, and adding any procedural hurdle for such claims would be contrary to the Act's remedial purpose. It is understandable that the Department will need prompt notice after the filing of such an action so that Department employees can stop working on a case after the Department loses jurisdiction.

The Department's wise policy on notice of Dodd-Frank Act and SOX civil actions should now be replicated in the Department's regulations under other whistleblower protection laws. These regulations include, for example, 29 C.F.R. § 24.114(b) (ERA), 29 C.F.R. § 1978.114(b) (STAA), 29 C.F.R. § 1982.114(b) (NTSSA, FRSA), and 29 C.F.R. § 1983.114(b) (CSPIA). If this Department were to merely issue notice that it was renouncing its interests in prior notice of civil actions and accepting notice within seven (7) days of filing the civil action, it would be beneficial to plaintiffs and their attorneys. In some cases, defendants are claiming that the Department's regulations is an additional procedural hurdle that can trip up whistleblower claims

before they reach an adjudication on the merits. Such usage is contrary to the remedial purposes of the acts, and I ask this Department to renounce it.

In *Austerman v. Behne, Inc*., Case No. 10-4502 (D.Minn. 4/28/2011), the court held that a complainant's failure to give notice 15-days before filing a civil action did not constitute bad faith and did not deprive the district court of jurisdiction. Interpretation of statutes conferring jurisdiction to Article III court is exclusively the province of those courts. *Ramey v. Bowsher*, 9 F.3d 133, 137, n. 7 (DC Cir. 1993) (citing *Sumner v. Mata*, 449 U.S. 539, 547 n. 2 (1981)). It is inappropriate for an executive branch agency to issue an interpretation of a statute conferring jurisdiction on a court. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). The statutes confer jurisdiction on the U.S. district courts without imposing any requirement of advance notice to the other parties or the Department of Labor. It is helpful to have a regulation that reflects the correct state of the law and that is congruent with the remedial purposes of the Act.

As it is material to the significance of the Department's proposed change to Section 1980.114(b), and to the other changes I am recommending, please let me expound of the remedial purpose of the employee protections. The purpose of the employee protections is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993); *Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). Employees can play an important role in protecting the public from the specific harms to our economy that prompted Congress to enact Dodd-Frank. Similar protections in other laws protect our environment, the public health and the safety of transportation. They can keep managers and government officials honest by exposing attempts to cover up frauds and weaknesses in internal controls. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. Accordingly, the federal statutes prohibit such discrimination.

To achieve the ends of eliminating discrimination, and protecting complainants from retaliation, the law mandates that "employees must feel secure that any action they may take" furthering "Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

Congress included a provision for *de novo* review by a United States District Court in the event that the Secretary has not issued a final decision within 180 days after the filing of a complaint, and there is no showing that the delay is due to the bad faith of the complainant. Congress obviously wanted to expand the avenues of relief available to corporate whistleblowers. The *de novo* process in district courts is available as an option for complainants, but is not required. Preserving the complainant's options for adjudication of their claims on the merits furthers the remedial purposes of the Act. Thank you.

C. Deciding appeals on the merits.

I suggest three modifications to Section 1980.110(a) that would further the goal of deciding cases on their merits. First, the Department should allow thirty (30) days for submission of appeals to the ARB. Second, the Department can allow a party to set out sufficient grounds for the ARB review, but then add additional grounds in the brief. I urge deletion of the sentence that says, "The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed waived." Third, the Department should make explicit the ARB's unpublicized policy of allowing extensions of time to file an enumeration of the legal issues on which review is sought.

In appeals to the federal circuit courts, counsel is obligated to review the entire record to set out the assignments of error during the process of writing the brief. No delineation of issues is required for the notice of appeal or the petition for review. Federal Rules of Appellate Procedure, 3 and 15. To require that a party review the entire record to identify all the errors in less than ten business days (since the ten days run from the date of the decision, not the date counsel receives it) is unrealistic and unfair. Some RD&O's can be over 150 pages. Other errors may reside in a lengthy transcript of the oral hearing. The ARB's need to assess whether a petition for review is worthy of briefing on the merits is fully met when a complainant sets out sufficient grounds for review. There is no Departmental advantage in requiring that a complainant set out ***all*** legal issues. To add that legal issues not raised are waived is to add a procedural hurdle that will derail some meritorious appeals. The issues flow from the brief, not the petition. Section 1980.110(a) is an anomaly in appellate practice and contrary to the remedial purpose of the Act.

In Section 1980.105(c), the Department allows 30 days to file a simple objection and request for *de novo* review. It is uneven that parties are allowed thirty (30) days to file a simple request for hearing, but less than ten (10) days to review the entire record to identify all the assignments of legal error. From time to time, each of us might be in a hearing or take a vacation that is longer than ten (10) days. I suggest that thirty (30) days would be a better time limit for Section 1980.110(a).

In *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, 2006-ERA-1, the complainant was unrepresented by counsel at the time the ALJ issued a recommended decision and order (RD&O) of dismissal. The complainant retained counsel of the 8th day after issuance of the RD&O. Counsel promptly attempted to contact the ARB by telephone to inquire about the deadline for submitting the petition, but could not get through. Earnest counsel endeavored to prepare a compliant petition for review and took to the eleventh (11th) day after issuance of the RD&O. The Administrative Review Board (ARB) dismissed the petition as untimely, rejecting the arguments I made in an amicus brief in support of reconsideration. The ARB refused to apply 29 CFR § 24.115 so that Mr. Prince could be allowed a one-day extension of time. This outcome

is contrary to the remedial purposes of whistleblower protections. This outcome is entirely preventable through slight adjustments to this regulation.

The ARB has recognized that a whistleblower protection statute "should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." *Fields v. Florida Power Corp*., USDOL/OALJ Reporter (HTML) ARB No. 97-070 , ALJ No. 96-ERA-22 (ARB Mar. 13, 1998) at 10 (decision under the Energy Reorganization Act, 42 U.S.C. § 5851, citing *English v. General Elec. Co*., 496 U.S. 72 (1990) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws")). When interpreting a case under the employee protections, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). "Narrow" or "hypertechnical" interpretations to these laws, are to be avoided as undermining Congressional intent. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). Section 1980.110(a) is a deviation from this jurisprudential philosophy.

Many attorneys will enter into agreements to represent clients for only particular stages of a case. It is not unusual for clients and attorneys to spend some time after an adverse decision negotiating over terms of representation for the next stage of a case. During this time, the petitioner is unrepresented by counsel. When the Department's rules require a full statement of issues in a short period of time while the client and attorney need time to conclude negotiations over representation, the natural consequence is that meritorious cases will not be filed within the extremely tight deadline. The problem is compounded by the failure to provide an option to file a timely petition for review with a motion for an extension of time to file an amended petition or a statement of issues. This is particularly so as an attorney may need to search and review the record before being able to adequately identify the reasons for filing a petition. This level of review cannot proceed until after the client and attorney conclude negotiations over terms for the next phase of representation.

At NWC, it is hard enough for us to find attorneys who will take whistleblower cases to the Department of Labor. Please do not make it harder on us. To the extent that the ARB needs to determine that there are good issues present for briefing, this goal can be achieved without limiting a party to only those issues identified in the petition for review. The Department can require that a party file a petition that identifies good grounds for the review, and then permit the party to raise additional assignments of error in their brief. This later alternative would still allow the ARB to screen the petitions for meritorious issues for briefing, and preserve the fundamental goal of deciding cases on their merits instead of adding more technical grounds to defeat claims.

Finally, many attorneys will be unfamiliar with the ARB's practice of allowing reasonable extensions of time for the list of legal issues, upon faxing in a motion setting out good cause for the extension. Public notice of this policy through the regulation would save some cases from the fate suffered by Mr. Prince.

I ask the Department to (1) change the time limit for a petition for review from 10 days to 30 days; (2) require that a petition for review set forth legal issues showing good cause to allow full briefing; (3) eliminate the provision that, "The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed

waived;" and (4) specify in the regulation that the ARB may extend the time to submit identification of legal issues for review upon motion and for good cause shown. These changes will advance the remedial purposes of the Act by lowering the procedural hurdles to a decision on the merits. These changes can accomplish this goal without prejudice to opposing parties or to the Department.

D. Parties need a list of the "applicable confidentiality laws."

Section 1980.104(c) fails to specify what "other applicable confidentiality laws" might apply to a respondent's answer. Withholding information from the complainant can prevent the investigator from receiving available information that would shed light on that matter. "Other confidentiality laws" might not apply to the non-public disclosures made in the course of an investigation.

Creating vagueness in the regulation on the conduct of the investigation will open the door to greater disparities within the national program. The practice among OSHA field offices is uneven on conducting transparent investigations. Complainants will have a right to the employer's response once OSHA closes its investigation and the complainant submits a FOIA request. Parties can also request unredacted versions through formal discovery before the ALJ. However, the complainant could assist OSHA in its investigation if the complainant has a copy of the respondent's response.

In an effort to promptly complete investigations, some investigators are inclined to accept employer justifications for an adverse action without probing into whether such justifications are credible and consistent with other evidence. This approach is less than desirable. To serve the critical objectives of these whistleblower protection statutes, it is worthy that the regulation calls on OSHA investigators to provide a complainant with the respondent's submissions and to afford the complainant an opportunity to respond. This purpose is furthered by clarifying the limited grounds on which respondent's information may be redacted.

E. The regulations can assist investigators, judges, parties and their counsel by explaining SOX's extraterritorial application under Dodd-Frank.

As evidenced by the ARB's pending considerations in *Villanueva v. Core Laboratories NV*, ARB No. 09-108, 2009-SOX-6, the extraterritorial application of SOX has been a time consuming and controversial issue. The Department could facilitate determination of these issues by making a few clarifications in the regulations. Specifically, I propose adding a paragraph 29 CFR § 1980.102(c) that provides as follows:

> (c) The employee protections of the Act shall have the same extraterritorial application as the Securities Exchange Act, including the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1.

The Foreign Corrupt Practices Act (FCPA) is codified as part of the Securities Exchange Act (SEA) at 15 U.S.C. §§ 78dd-1 and as such, is within the scope of protection under SOX Section 806. The FCPA prohibits payments to foreign government officials in connection with obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be

offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage to assist in obtaining or retaining business for or with, or directing business to, any person. The FCPA also requires companies whose securities are listed in the United States to meet SEC accounting provisions. See 15 U.S.C. §§ 78m(b)(2) and (3). These accounting provisions were designed to operate in tandem with the anti-bribery provisions of the FCPA. The FCPA covers both issuers and domestic concerns within the meaning of 15 U.S.C. §§ 78dd-1 and 78dd-2.

The SEC regularly enforces the FCPA and imposes penalties and requirements for disgorgement against companies found to engage in corrupt practices. Whistleblowers can recover awards for a percentage of such sanctions under the Dodd-Frank Act. As SOX Section 806 protects those raising concerns about any violations of the Securities Exchange Act, or SEC regulations, FCPA whistleblowers are also protected by SOX Section 806. The very nature of the FCPA means that a substantial portion of these whistleblowers will be residents of other countries. Therefore, the remedial purpose of SOX's employee protection would be severely limited if SOX were applied only to employees within the United States. This is a fundamental difference between SOX and Title VII. Title VII is meant to address civil rights within the United States. The FCPA, on the other hand, is specifically meant to address corruption in other countries. This purpose clearly overcomes the normal presumption against extraterritorial effect. See *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2884-86 (2010), for a description of this presumption. Indeed, even before the enactment of SOX, courts held that the SEA extends the jurisdiction of American courts to those engaged in conduct that affects transactions here in the United States. *See*, *e.g*., *Robinson v. TCI/US West Tele-communications Inc*., 117 F.3d 900, 904 (5th Cir. 1997); *Continental Grain v. Pac. Oilseeds*, 592 F.2d 409, 420 n.18 (8th Cir. 1979); *Doll v. James Martin Assocs*., 600 F. Supp. 510, 520 (E.D. Mich. 1984); *Schoenbaum v. Firstbrook,* 405 F.2d 200 (2d Cir. 1968), rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). Contrary decisions have failed to consider this historical precedent and the specific purposes of the FCPA. *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006), and *Ede v. The Swatch Group, Ltd*., ARB No. 05-053 ALJ No. 2004-SOX-69 (ARB June 27, 2007). Now would be a good time to renounce the holdings in *Carnero* and *Ede* and coordinate Department of Labor policy to be consistent with the extraterritorial scope of SEC regulatory action under the SEA.

F. To comport with Dodd-Frank's provision for confidential and anonymous whistleblower participation, the Department's regulations should provide that identifying information about SOX complainants will not be disclosed without either (1) complainant's express consent, or (2) an ALJ's finding of good cause.

The Dodd-Frank Act introduced a new paradigm for whistleblower practice through its explicit provision for the confidentiality of whistleblowers. Congress recognized that some employees in specialized or advanced areas of management would simply be unable to continue or advance their careers if their protected activities became known. See 15 U.S.C. 78u-6(h)(2). To encourage even these employees to come forward with information about violations, Congress provided that whistleblowers must be permitted to make their claims confidentially (with their names disclosed to the law enforcement agency, but not to others) or even anonymously (in which their

attorney makes their claim on their behalf without disclosing the client's name). See SEC Rule 240.21F-7. The SEC's final rules adopted on May 25, 2011,[1] provide additional information about the SEC's policies and practices for protecting the identity of whistleblowers.

The United States Tax Court has also held that the potential harm from disclosing a whistleblower's identity as a confidential informant outweighs the public interest in knowing the identity of a whistleblower claimant. See *Whistleblower 14106-10W v. Commissioner of Internal Revenue*, 137 T.C. No. 15 (12-8-2011).

As the SEC and the Tax Court now protect whistleblowers from public disclosure of their identities, the Department of Labor should bring its own practices into conformity. Some of my clients have been reluctant to participate with official proceedings at the Department of Labor because a final adjudication would result in a public decision with a full statement of the facts, searchable by their names, on the Department's web page. I ask the Department to modify its practices to protect those whistleblowers who wish to keep their identifying information out of the public record. At the same time, I am mindful that respondents will typically need to know the complainant's identify to prepare their defense. Still, they can prepare this defense, and fully participate in official proceedings, without making a public disclosure of the complainant's identity.

I ask this Department to add this sentence to proposed rule 29 CFR § 1980.104(a):

> The complainant's name and other identifying information shall be redacted unless the complainant has explicitly waived his or her right to confidentiality under paragraph (d) below.

As complaints are often submitted before the complainant can retain counsel, it would be wise to treat all complainants as confidential until they have an opportunity to learn about the consequences of waiving confidentiality.

I ask the Department to remove the phrase ", other than the complainant," from 29 CFR § 1980.104(d). The SEC Rule 240.21F-7 and *Whistleblower 14106-10W* case make clear that the modern practice, consistent with congressional policy expressed in Dodd-Frank, is to protect the confidentiality of whistleblowers. They should not be excluded from the protection of 29 CFR § 1980.104(d).

I further suggest that 29 CFR § 1980.104(d) include new subsections that establish a procedure under which respondents would document which individuals would have access to a complainant's identifying information, and OSHA would maintain a record of each individual's acknowledgement that federal regulations prohibit the release of such information without authorization. For example, these regulations could provide as follows:

> (d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis in accordance with part 70 of this title.
>
> (1) Unless the complainant has submitted to OSHA a written waiver of confidentiality, the complainant's name, address, phone numbers, email address and other identifying information shall be kept confidential as provided in this

[1] http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/secfinalrules.pdf

paragraph (d).

(2) The notice provided in paragraph (b) above shall inform the respondent that (i) it is unlawful to disclose the identifying information of the complainant, except as authorized in this paragraph (d), and (ii) OSHA will disclose the complainant's identifying information to a designated representative of the respondent who has submitted a signed declaration provided by subparagraph (3) below.

(3) No employee of the Secretary or of the respondent shall release the complainant's identifying information to any person, except the following: (I) the complainant and the complainant's counsel; (ii) duly authorized representatives of the Secretary of Labor; (iii) representatives of the respondent who have submitted to OSHA a signed declaration acknowledging receipt of this regulation, and affirming their agreement to abide by its limitations on disclosures of the complainant's identifying information; and (iv) pursuant to a court order of disclosure made after the complainant or the complainant's counsel has received notice of the request for an order and had an opportunity to submit opposition to the request.

(4) If the respondent submits a declaration pursuant to subparagraph (3) above within the 20 days provided by paragraph (b) above, then the time for the respondent to submit written statements, affidavits and other evidence shall be extended until the 20th day after receipt of the complainant's identifying information.

Similarly, 29 CFR § 1980.107(e) could provide as follows:

(c) The Chief Administrative Law Judge, or the Administrative Law Judge assigned to the case, may modify the complainant's right of confidentiality as provided in 29 CFR § 1980.104(d) for good cause shown. Any decision modifying the complainant's right of confidentiality issued over the objection of the complainant shall consider the public interest in a confidentiality policy that encourages employees to engage in protected activity, and shall set forth specifically the reasons for the modification and shall explain how these reasons outweigh the public interest in maintaining the confidentiality of those who engage in protected activity.

These additions to Part 1980 would encourage victims of retaliation to come forward by lessening the risk that a public disclosure of their identifying information would damage their future careers. I also ask that the Department reconsider its policy of posting unredacted decisions of the ALJs and the ARB on its web page.

If Department personnel or other interested parties have any questions about our comments, they are welcome to call on me. Thank you for your attention to these matters.

Sincerely,

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