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## The Scope of Protected Activity Under Section 806 Of SOX

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## NOTES

### THE SCOPE OF PROTECTED ACTIVITY UNDER SECTION 806 OF SOX

*Timothy J. Fitzmaurice\**

*Section 806 of the Sarbanes-Oxley Act of 2002 (SOX) created a new federal anti-retaliation protection for corporate whistleblowers. Initially, the Department of Labor Administrative Review Board (ARB) and federal courts limited the scope of section 806 by holding that a whistleblower must report conduct that “definitively and specifically” relates to a violation of one of the rules, regulations, or laws listed in section 806 to engage in protected activity. Recently, however, the ARB abandoned this approach, and held that a whistleblower engages in protected activity under section 806 when she reports information that she “reasonably believes” relates to a violation of one of the rules, regulations, or laws listed in section 806.*

*The ARB’s decision to adopt the “reasonably believes” standard should be entitled to Chevron deference. However, empirical studies indicate that in cases where Chevron should apply, courts engage in ad hoc statutory interpretation nearly as often as they defer to the agency decision.*

*This Note argues that in the foreseeable event that a court neglects Chevron and engages in ad hoc statutory interpretation the reasonably believes standard should govern the scope of protected activity under section 806 for several reasons. First, the definitively and specifically standard conflicts with the text of section 806. Second, the legislative history of section 806 supports the reasonably believes standard. Third, the reasonably believes standard is more consistent with the reasonable person standard that Congress intended. Finally, the reasonably believes standard serves two important public policy goals: harmonizing the protected activity standards under SOX and the Dodd-Frank Wall Street Reform and Consumer Protection Act and helping to remedy the lack of success whistleblowers have had using section 806’s anti-retaliation protections.*

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## TABLE OF CONTENTS

INTRODUCTION.....	2043
I. UNDERSTANDING SECTION 806 OF SOX.....	2045
A. <i>The Importance of Corporate Whistleblowers</i> .....	2046
B. <i>The 2001–02 Corporate Accounting Scandals</i> .....	2046
C. <i>Section 806 of SOX</i> .....	2048
1. The Text and Legislative History .....	2049
2. Using the Text and Legislative History to Interpret Section 806.....	2052
3. Public Policy Concerns and Section 806 .....	2056
a. <i>Section 806 in Action: Less Than Advertised</i> .....	2056
b. <i>The Dodd-Frank Act’s Whistleblower Protections</i> ....	2058
D. <i>The Impact of an Administrative Agency’s Interpretation of         a Statute: Doctrinally Neat, but Practically Messy</i> .....	2059
1. Doctrinal Clarity: <i>Chevron</i> Deference to the ARB’s Interpretation of Section 806.....	2060
2. The Murky Reality: In Cases Where <i>Chevron</i> Should Apply, Courts Are as Likely to Engage in Ad Hoc Statutory Interpretation as They Are to Defer to the Agency’s Decision .....	2062
II. THE ARB’S EVOLVING INTERPRETATION OF SECTION 806 OF SOX .	2063
A. <i>The “Definitively and Specifically” Standard</i> .....	2063
B. <i>The “Reasonably Believes” Standard</i> .....	2065
III. WHY THE “REASONABLY BELIEVES” STANDARD SHOULD GOVERN THE SCOPE OF PROTECTED ACTIVITY UNDER SECTION 806 OF SOX.....	2068
A. <i>An Obvious and Fatal Flaw: The “Definitively and         Specifically” Standard Conflicts with the Text of Section         806</i> .....	2068
B. <i>The Legislative History Supports the “Reasonably Believes”         Standard</i> .....	2070
C. <i>The “Reasonably Believes” Standard Is More Consistent         with the Reasonable Person Standard that Congress         Intended</i> .....	2072
D. <i>The Dodd-Frank Act Did Not Constitute Congressional         Endorsement of or Acquiescence to the “Definitively and         Specifically” Standard</i> .....	2073
E. <i>Public Policy Perspective</i> .....	2073
CONCLUSION .....	2074

## INTRODUCTION

In 2001 and 2002, a series of corporate accounting scandals rocked American investors, and left them asking whether any company could be trusted.<sup>1</sup> Some of America's largest corporations, including Enron, Xerox, and WorldCom, reported that they had overstated their prior earnings by tens or hundreds of millions of dollars through the use of improper accounting practices.<sup>2</sup> For Enron and WorldCom, the end result was the filing of what were, at the time, the two largest bankruptcies in American history.<sup>3</sup> Subsequent investigations revealed that some companies had retaliated against employees who attempted to blow the whistle on these improper accounting practices.<sup>4</sup>

To restore investors' confidence in corporate financial disclosures,<sup>5</sup> and to address systemic weaknesses revealed by these scandals,<sup>6</sup> Congress swiftly enacted the Sarbanes-Oxley Act of 2002<sup>7</sup> (SOX). SOX established new accounting and financial reporting requirements,<sup>8</sup> and imposed harsh civil and criminal penalties for violations.<sup>9</sup> Additionally, in response to the

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1. See Alexandra Twin, *One Wild Ride*, CNNMONEY.COM (July 23, 2002, 10:52 AM), [http://money.cnn.com/2002/07/22/markets/markets\\_newyork/index.htm](http://money.cnn.com/2002/07/22/markets/markets_newyork/index.htm) (“WorldCom’s accounting problems have contributed to the plummeting of investor confidence that has shaken markets since the Enron scandal last fall.”).

2. See Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES (Aug. 26, 2002, 5:30 PM), <http://www.forbes.com/2002/07/25/accountingtracker.html>.

3. See STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., REPORT OF INVESTIGATION OF ENRON CORPORATION AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES, AND POLICY RECOMMENDATIONS, VOLUME I: REPORT 58 (Comm. Print 2003) [hereinafter JCT REPORT], available at <http://www.jct.gov/s-3-03-vol1.pdf>. Currently, the Enron and WorldCom bankruptcies are the sixth and third largest in American history, respectively. See Shira Ovide, *MF Global: Likely Among the 10 Biggest Bankruptcies Ever*, WALL ST. J. DEAL J. (Oct. 31, 2011, 10:38 AM), <http://blogs.wsj.com/deals/2011/10/31/mf-global-likely-among-the-10-biggest-bankruptcies-ever/?mod=e2tw>.

4. See Jodie Morse & Amanda Bower, *The Party Crasher*, TIME, Dec. 30, 2002–Jan. 6, 2003, at 53; Susan Pulliam & Deborah Solomon, *Uncooking the Books: How Three Unlikely Sleuths Discovered Fraud at WorldCom*, WALL ST. J., Oct. 30, 2002, at A1.

5. S. REP. NO. 107-205, at 2 (2002) (SOX was designed “to address the systemic and structural weaknesses affecting . . . capital markets which were revealed by repeated failures of audit effectiveness and corporate financial and broker-dealer responsibility”). Because “the [SOX] conference committee did not produce a report,” “the legislative history analysis of [SOX] depends largely on the report of the Senate Banking Committee [Senate Report 205].” 1 JOHN T. BOSTELMAN, *THE SARBANES-OXLEY DESKBOOK* 2-37 (2008).

6. 1 BOSTELMAN, *supra* note 5, at 2-38 (SOX was designed to “restore investor confidence by improving corporate financial reporting”).

7. See John Paul Lucci, *Enron—The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 215 (2003) (“Remarkably, the Act became law a mere seven months after Enron filed for bankruptcy.”).

8. See generally Neil H. Aronson, *Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002*, 8 STAN. J.L. BUS. & FIN. 127, 132–46 (2002). A full summary of SOX is outside the scope of this Note, but for such a summary, see generally William S. Duffey, Jr., *Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002*, 54 S.C. L. REV. 405 (2002); Brian Kim, Recent Developments, *Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235 (2003).

9. See Andrew B. Cripe, *Employee and Director Accountability to Shareholders: Doing Business for Business Owners*, 1 DEPAUL BUS. & COM. L.J. 153, 174 (2003) (“[C]ompanies and top executives should bear in mind . . . [that there are] harsh civil and criminal consequences under the Sarbanes-Oxley Act . . . .”); see also, e.g., 18 U.S.C.

discovery that some companies retaliated against employees who tried to blow the whistle on the accounting scandals that were uncovered during 2001 and 2002,<sup>10</sup> SOX prohibited corporations from retaliating against whistleblowers<sup>11</sup> in section 806 of the Act.<sup>12</sup>

To establish a prima facie case of retaliation under section 806 of SOX, a whistleblower must show that (1) she engaged in protected activity, (2) her employer knew about her protected activity, (3) she suffered an unfavorable personnel action, and (4) the “circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.”<sup>13</sup> Initially, the Department of Labor Administrative Review Board (ARB) and several federal courts limited section 806’s scope and held that to engage in protected activity a whistleblower must report conduct that “definitively and specifically” relates to a violation of one of the rules, regulations, or laws listed in section 806.<sup>14</sup> More recently, however, the ARB abandoned this standard,<sup>15</sup> holding that a whistleblower engages in protected activity when she reports information that she “reasonably believes” relates to a violation of one of the rules, regulations, or laws listed in section 806.<sup>16</sup>

The ARB’s decision to adopt the reasonably believes standard should be entitled to *Chevron* deference.<sup>17</sup> Empirical studies show, however, that the U.S. Supreme Court<sup>18</sup> does not treat *Chevron* as a decision that is entitled to

§ 1513(e) (2006) (“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.”).

10. See *supra* note 4.

11. See 148 CONG. REC. 14,447 (2002) (statement of Sen. Patrick Leahy) (“[W]e include meaningful protections for corporate whistleblowers . . . . We 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.”).

12. See Sarbanes-Oxley Act § 806(a), 18 U.S.C. § 1514A (2006).

13. 29 C.F.R. § 1980.104(b)(1) (2011).

14. See *Platone v. FLYi, Inc.*, ARB No. 04-154, slip op. at 17 (Sept. 29, 2006), *aff’d* 548 F.3d 322 (4th Cir. 2008) (holding that to engage in protected activity under section 806, a whistleblower must provide information that “definitively and specifically” relates to a violation of one of the laws, rules, or regulations listed in section 806); see also *Vodopia v. Koninklijke Philips Elecs., N.V.*, 398 F. App’x 659, 662–63 (2d Cir. 2010); *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996–97 (9th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008).

15. *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, slip op. at 18 (May 25, 2011) (holding that the “definitively and specifically” standard “has evolved into an inappropriate test”).

16. *Id.* at 19 (holding that the “critical focus” when determining whether an employee engaged in protected activity under section 806 is “whether the employee reported conduct that he or she *reasonably believes* constituted a violation of” section 806, “not whether that information ‘definitively and specifically’ described” such a violation).

17. See *infra* Part I.D.1.

18. These studies are instructive because

the Supreme Court is where any analysis of agency deference ought to begin. The Court, of course, develops deference tests that are applicable throughout the federal judiciary. Therefore, we can assume that, of all courts, its practice would

stare decisis effect.<sup>19</sup> Instead, it treats *Chevron* as a canon of statutory interpretation,<sup>20</sup> and—in cases where *Chevron* should apply—defers to an agency’s interpretation of a statute only slightly more often than it engages in ad hoc statutory interpretation.<sup>21</sup> Accordingly, although courts should be able to defer to the “reasonably believes” standard under *Chevron*, this Note argues that in the foreseeable event that a court neglects *Chevron* and engages in ad hoc statutory interpretation, it should nevertheless adhere to the reasonably believes standard.

Part I of this Note discusses the accounting scandals of 2001 and 2002, section 806 of SOX, how the Supreme Court uses the text and legislative history of a statute to interpret its meaning, and *Chevron*. Then, Part II analyzes the ARB’s evolving interpretation of the scope of protected activity under section 806. Finally, in Part III, this Note argues that if a court neglects *Chevron* and engages in ad hoc statutory interpretation, the reasonably believes standard is the proper interpretation of the scope of protected activity under section 806.

### I. UNDERSTANDING SECTION 806 OF SOX

Part I begins by discussing the important role that whistleblowers play in detecting corporate fraud. Then, it discusses the corporate accounting scandals of 2001 and 2002, with a particular focus on the Enron scandal and Sherron Watkins, an Enron employee who tried to blow the whistle on Enron’s improper accounting practices, but was silenced. Next, this part analyzes section 806’s text and legislative history, how the Supreme Court uses the text and legislative history of a statute to interpret its meaning, and two important public policy concerns: whistleblowers’ lack of success using section 806’s anti-retaliation protections, and the similarities and

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be particularly well-informed and . . . [that] the appeals courts look to the Supreme Court for guidance. The Supreme Court devises deference tests, defines their parameters, and provides definitive applications of those tests—all of which are binding on the courts of appeals. Lower court judges presumptively follow the Court’s lead, to the extent that a “lead” can be discerned.

William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1097 (2008).

19. See *id.* at 1128 tbl.6; Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1797 (2010) (observing that Supreme Court “Justices rarely treat *Chevron* as a precedent entitled to strict stare decisis effect”).

20. See Raso & Eskridge, *supra* note 19, at 1765 (“Deference regimes . . . are more like *canons* of statutory construction than binding *precedents*.”); *id.* at 1766 (“Like the canons, and unlike binding precedents, *Chevron* and the other formal deference regimes have the following characteristics in practice: They are flexible rules of thumb or presumptions deployed by the Justices episodically and not entirely predictably, rather than binding rules that the Justices apply more systematically.”); *id.* at 1799 (“[T]he actual fate of an agency’s interpretation depends on a cluster of variables—or *canons*—only one of which is the deference regime.”).

21. See Eskridge & Baer, *supra* note 18, at 1128 tbl.6 (showing that of the 267 cases where *Chevron* should have applied because Congress delegated lawmaking authority to the administrative agency interpreting the statute, the Court applied no deference regime in 66 decisions and invoked *Chevron* in 75 decisions).

differences between the whistleblower protections that SOX and the Dodd-Frank Wall Street Reform & Consumer Protection Act provide. This part concludes by discussing the Supreme Court's decisions regarding when federal courts should defer to an administrative agency's interpretation of a statute, and empirical studies tracking the Supreme Court's adherence to these decisions.

#### A. *The Importance of Corporate Whistleblowers*

The term "whistleblower" originates from a practice of English constables, who would blow their whistles to inform other officers that help was needed.<sup>22</sup> Today, this concept refers to "[a]n employee who reports employer wrongdoing."<sup>23</sup> Such employees are indispensable to detecting and preventing corporate fraud.<sup>24</sup> A 2007 poll found that 62 percent of corporate chief financial officers believed that the company's external auditors would not notice if they intentionally altered their company's financial statements.<sup>25</sup> Additionally, a recent study found that whistleblowers uncover 17 percent of corporate fraud cases in America—more than double the percentage that the SEC uncovers.<sup>26</sup> These statistics confirm that external monitoring is likely insufficient to detect corporate fraud, and that whistleblowers are indispensable to investigators. This was perhaps never more true than during the accounting scandals of 2001 and 2002.

#### B. *The 2001–02 Corporate Accounting Scandals*

This section briefly discusses the accounting scandals of 2001–02 as well as the market conditions that contributed to them. Then, this section details the Enron accounting scandal. It concludes by discussing the experience of Sherron Watkins, an Enron employee who tried, but failed, to blow the whistle on the company's improper accounting practices.

Fast-growing companies, like dot-com tech firms, dominated the bull markets of the 1990s, and, as a result, the potential for growth became more important to investors than a company's current financial condition.<sup>27</sup> To maintain favor with investors, traditional companies were under

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22. Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of 'Greedy,' the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1280 (2011).

23. BLACK'S LAW DICTIONARY 1734 (9th ed. 2009).

24. See S. REP. NO. 107-146, at 10 (2002) (noting that corporate whistleblowers "are the only people who can testify as to 'who knew what, and when,' crucial questions . . . in all complex securities fraud investigations").

25. *Nearly Two-Thirds of CFOs Feel They Could Intentionally Misstate Financial Statements; Only Half Aware of XBRL*, BUS. WIRE (Nov. 7, 2007, 8:00 AM), <http://www.businesswire.com/news/home/20071107005031/en/Two-Thirds-CFOs-Feel-Intentionally-Misstate-Financial-Statements>.

26. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010).

27. Duffey, *supra* note 8, at 406; Bernhard Kuschnik, *The Sarbanes Oxley Act: "Big Brother Is Watching You" or Adequate Measures of Corporate Governance Regulation?*, 5 RUTGERS BUS. L.J. 64, 68 (2008).

extraordinary pressure to consistently beat analyst expectations and increase their company's value.<sup>28</sup> This dynamic created a "culture ripe for corporate fraud"<sup>29</sup> that came home to roost in 2001 and 2002. In those years, many corporations disclosed that they had used improper accounting practices to overstate their prior earnings by tens or hundreds of millions of dollars.<sup>30</sup>

Of these scandals, none had a greater impact on the development of SOX than the demise of Enron.<sup>31</sup> Enron was founded in 1930 as a gas pipeline company.<sup>32</sup> By the late 1990s, it had completely shifted from a manager of physical assets to a provider and trader of energy resources, financial and risk management services, and electronic commerce.<sup>33</sup> During this shift, Enron's market capitalization increased from approximately \$2 billion in the mid-1980s to approximately \$70 billion in 2001.<sup>34</sup>

This success, however, was nothing more than a façade.<sup>35</sup> Through the use of difficult-to-trace partnerships and other accounting tricks,<sup>36</sup> Enron was able to conceal its debt and growing losses until November 8, 2001, when it announced that it had overstated its earnings over the previous four years by \$586 million.<sup>37</sup> Then, on December 2, 2001, Enron filed what was, at the time, the largest corporate bankruptcy in United States history.<sup>38</sup>

Shortly thereafter, a government investigation revealed that one Enron employee, Sherron Watkins, had tried to blow the whistle on Enron's improper accounting practices internally, but had been silenced.<sup>39</sup> In the spring of 2001, Ms. Watkins, then a vice president at Enron, was asked to examine the company's books to find assets that could be sold in response to the stock market decline.<sup>40</sup> During this time, Ms. Watkins uncovered

28. See Duffey, *supra* note 8, at 406; Kuschnik, *supra* note 27, at 68.

29. Duffey, *supra* note 8, at 406.

30. See *supra* note 2 and accompanying text.

31. See, e.g., HAROLD S. BLOOMENTHAL, *SARBANES-OXLEY ACT IN PERSPECTIVE 2* (Donald C. Pingleton III et al. eds., 2009–2010 ed.) (observing that "the Enron demise triggered" SOX and that "[t]here have been few if any single corporate events that had the impact on securities regulation that can match the impact of the demise of Enron Corp.").

32. JCT REPORT, *supra* note 3, at 57.

33. *Id.*

34. *Id.* at 57–58.

35. See S. REP. NO. 107-146, at 3 (2002) ("[T]hrough the use of sophisticated professional advice and complex financial structures, Enron . . . [was] able to paint for the investing public a very different picture of the company's financial health than the true picture revealed."); Greg Farrell, *Watkins Set to Take the Stand Today*, USA TODAY, Mar. 15, 2006, at 3B ("Enron achieved its stunning earnings growth through questionable accounting gimmicks.").

36. S. REP. NO. 107-146, at 2–3 (noting that Enron used "partnerships—with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance . . . to cook the books and trick both the public and federal regulators about how well Enron was doing financially").

37. John R. Emshwiller et al., *Enron Slashes Profits Since 1997 by 20%*, WALL ST. J., Nov. 9, 2001, at A3.

38. See *supra* note 3 and accompanying text.

39. See Jennifer Frey, *The Woman Who Saw Red*, WASH. POST, Jan. 25, 2002, at C1.

40. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1035 (2004).

some of Enron's "fuzzy" accounting practices.<sup>41</sup> However, she feared the ramifications of presenting her findings to Jeffrey Skilling, then Enron's chief executive officer, or Andrew Fastow, then Enron's chief financial officer.<sup>42</sup> Therefore, Ms. Watkins began searching for a new job, and planned on confronting Mr. Skilling with her findings on her last day at Enron.<sup>43</sup>

Her plans changed, however, when Kenneth Lay returned as Enron's chief executive officer on August 14, 2001, and invited employees to put any concerns about the company into a comment box.<sup>44</sup> Ms. Watkins placed an anonymous memo into the box, where she bluntly wrote that she was "incredibly nervous that [Enron would] implode in a wave of accounting scandals."<sup>45</sup> When Mr. Lay did not mention her concerns in a company-wide meeting the next day, Ms. Watkins arranged for a face-to-face meeting with him on August 22, 2001.<sup>46</sup> There, Ms. Watkins presented a longer and "more cataclysmic" memo to Mr. Lay that included an annotated partnership document where she wrote in the margin, "There it is! This is the smoking gun. You cannot do this!"<sup>47</sup> Although Ms. Watkins felt that Mr. Lay had taken her concerns seriously, it was later revealed that, on the contrary, Enron had instead asked its outside legal counsel whether, under Texas law, it could terminate corporate whistleblowers like Ms. Watkins without legal liability.<sup>48</sup> As it turns out, they could.<sup>49</sup> When she later discovered that this was Enron's reaction to her concerns, Ms. Watkins's keen response was "Talk about shoot[ing] the messenger."<sup>50</sup>

### C. Section 806 of SOX

This section begins by outlining the text of section 806. Then, it analyzes section 806's legislative history. Next, this section discusses how the Supreme Court uses a statute's text and its legislative history to interpret its meaning. Finally, this section concludes by discussing why whistleblowers have had such little success using section 806's anti-retaliation provisions,

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41. *Id.*

42. See *The Financial Collapse of Enron—Part 3: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 107th Cong. 15 (2002) (testimony of Sherron Watkins) ("I was not comfortable confronting either Mr. Skilling or Mr. Fastow with my concerns. To do so I believed would have been a job terminating move.").

43. Morse & Bower, *supra* note 4, at 53, 55.

44. *Id.*

45. Don Van Natta Jr. with Alex Berenson, *Enron's Chairman Received Warning About Accounting*, N.Y. TIMES, Jan. 15, 2002, at A1.

46. Morse & Bower, *supra* note 4, at 53, 55.

47. *Id.*

48. Cherry, *supra* note 40, at 1037 ("The legal implication of this [inquiry] is clear. Evidently, someone at a high level of the company wanted to fire Watkins because of her willingness to come forward and discuss the accounting improprieties.").

49. See S. REP. NO. 107-146, at 5 (2002).

50. Morse & Bower, *supra* note 4, at 53, 55.

and why the Dodd-Frank Act and SOX could potentially create a two-tiered whistleblower protection system.

### 1. The Text and Legislative History

The text of section 806 provides, in part, that:

No company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee *reasonably believes* constitutes a violation of [18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire, radio, or TV fraud), 18 U.S.C. § 1344 (bank fraud), or 18 U.S.C. § 1348 (securities fraud)], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . .<sup>51</sup>

This language is identical to the whistleblower provision proposed in the Corporate & Criminal Fraud Accountability Act of 2002,<sup>52</sup> which eventually became section 806 of SOX.<sup>53</sup>

The Enron scandal and Ms. Watkins's story were referenced repeatedly in the Committee Report<sup>54</sup> and in the floor statements of Senator Patrick

51. 18 U.S.C. § 1514A (2006) (emphasis added). The full text of section 806, as codified, is:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78L), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders when the information or assistance is provided to or the investigation is conducted by—

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or
- (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

*Id.*

52. Compare Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. § 6 (2002), with 18 U.S.C. § 1514A.

53. See STEPHEN M. KOHN ET AL., WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES 4 (2004).

54. See S. REP. NO. 107-146, at 3, 5, 10, 19 (2002). References in this Note to the Committee Report are to the Committee Report for the Corporate and Criminal Fraud

Leahy,<sup>55</sup> one of section 806's principal drafters.<sup>56</sup> After learning about Ms. Watkins's experience at Enron, Congress identified two key problems that they hoped section 806 would remedy. First, federal law did not protect corporate whistleblowers from retaliation; instead, whistleblowers were protected by various states laws that sometimes provided insufficient legal protection.<sup>57</sup> Second, whistleblowers were subject to a general corporate culture that discouraged and retaliated against whistleblowing.<sup>58</sup> Additionally, the Enron scandal demonstrated to Congress that corporate whistleblowers are indispensable to the discovery and prosecution of corporate fraud, and must be provided with sufficient legal protection to ensure that they will continue to aid investigators.<sup>59</sup>

Prior to the enactment of SOX, corporate whistleblowers were not protected from retaliation under federal law.<sup>60</sup> Instead, various state laws protected corporate whistleblowers.<sup>61</sup> This created a legal environment in which two whistleblowers in different states could take the same action but have very different legal protections.<sup>62</sup> Further, some state laws did not provide whistleblowers with sufficient legal protection,<sup>63</sup> a fact that was often well known to employers.<sup>64</sup> Congress believed that the current system of state law protection for whistleblowers was part of a "legal regime that, "on one hand, allowed [Enron's] conduct to take place, and, on the other, may serve as an impediment to punishing all the wrongdoers and protecting all the victims."<sup>65</sup> Accordingly, Congress sought to remedy this problem by protecting corporate whistleblowers from retaliation under federal law through section 806 of SOX.<sup>66</sup>

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Accountability Act of 2002, the whistleblower provision of which eventually became section 806 of SOX. *See supra* note 53 and accompanying text.

55. *See* 148 CONG. REC. 14,447 (2002) (statement of Sen. Patrick Leahy); *id.* at 12,318 (statement of Sen. Patrick Leahy).

56. *See id.* at 12,318.

57. *See* S. REP. NO. 107-146, at 10.

58. *See id.*

59. 148 CONG. REC. 14,447 (noting that Congress learned from Sherron Watkins's experience that "corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. . . . There is no way we could have known about [how the Enron scandal worked] without that kind of a whistleblower"); *id.* at 12,318 ("When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why.").

60. *See* S. REP. NO. 107-146, at 10.

61. *See id.* (observing that, prior to SOX, only "the patchwork and vagaries of current state laws" protected corporate whistleblowers).

62. *See id.* (observing that due to varying state laws "a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions"); *see also* *State Whistleblower Laws*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/state-whistleblower-laws.html> (last updated Nov. 2009) (describing the whistleblower protection laws of each state).

63. *See* 148 CONG. REC. 14,447 (statement of Sen. Patrick Leahy) ("Enron wanted to silence [Ms. Watkins] as a whistleblower because Texas law would allow them to do it.").

64. *See* S. REP. NO. 107-146, at 19 ("[M]ost corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law.").

65. *See id.* at 6.

66. *See id.*

In addition to lacking legal protection from retaliation under federal law prior to the enactment of SOX, corporate whistleblowers were also subject to a general corporate culture that discouraged and retaliated against whistleblowing.<sup>67</sup> This culture permitted the perpetuation of corporate wrongdoing, hampered investigations, and presented serious risks to investors.<sup>68</sup> Congress decided that this climate must be changed, and that legal protection for corporate whistleblowers under federal law could help lead the way.<sup>69</sup>

Aside from identifying legal flaws and cultural attitudes that should be changed, the Enron crisis also showed Congress that corporate whistleblowers play an indispensable role in corporate fraud investigations, because it is unlikely that the full scope of the Enron scandal would have been revealed without a whistleblower.<sup>70</sup> Accordingly, Congress believed that the whistleblower protections in section 806 were necessary to detect future corporate fraud and ensure that whistleblowers would continue to come forward and share information with investigators.<sup>71</sup>

Finally, with respect to section 806's legal standard, the legislative history explains that section 806 was intended to impose a normal reasonable person standard, as it is used in a variety of legal contexts.<sup>72</sup> Congress even cited a Third Circuit case, *Passaic Valley Sewerage Commissioners v. Department of Labor*,<sup>73</sup> as an example of the standard it intended.<sup>74</sup> In *Passaic Valley*, the court noted that “‘whistle-blower’ provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes.”<sup>75</sup> The court went on to hold that “employees must be free from threats to their job security in retaliation for their good faith assertions” of corporate wrongdoing.<sup>76</sup> Further, it noted that “an employee’s non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of in-house or external review in order to merit protection.”<sup>77</sup>

As a further analogy of the legal standard Congress intended, the legislative history also explained that section 806 was designed to provide corporate whistleblowers with legal protections under federal law that were similar to the protection provided to some government employees under the

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67. *See id.* at 19.

68. *See id.* at 5.

69. *See id.* at 10.

70. *See supra* note 24 and accompanying text.

71. *See supra* note 59 and accompanying text.

72. *See* S. REP. NO. 107-146, at 19 (2002) (noting that “reasonably believe[s]” was “intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts”).

73. 992 F.2d 474 (3d Cir. 1993).

74. *See* S. REP. NO. 107-146, at 19.

75. *Passaic Valley*, 992 F.2d at 478.

76. *Id.*

77. *Id.* at 479.

Whistleblower Protection Act<sup>78</sup> (WPA). The WPA provides that it is unlawful to retaliate against certain government employees<sup>79</sup> because they disclosed information that they “reasonably believe[] evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>80</sup> This statutory language “requires only that the whistleblower had a reasonable belief that, for example, a rule or regulation had been violated, in order for the disclosure of such violations to be protected.”<sup>81</sup>

## 2. Using the Text and Legislative History to Interpret Section 806

This section begins by discussing several empirical studies of the Supreme Court’s statutory interpretation jurisprudence, which suggest that the text of a statute and its legislative history are two of the most important tools of statutory interpretation. This section then analyzes how the Court uses the text and legislative history of a statute to interpret its meaning.

It was famously stated more than half a century ago that “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>82</sup> Many agree that this statement is as true today as it was then.<sup>83</sup> Nevertheless, several empirical studies tracking which tools the Supreme Court uses most frequently to interpret statutes indicate that the text of a statute and its legislative history are two of the most frequently cited sources of statutory meaning.<sup>84</sup> Accordingly, although it may be true that there is no coherent theory to statutory interpretation, it can be said with confidence that the text and legislative history of a statute are two of the most important tools of statutory interpretation.<sup>85</sup>

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78. See S. REP. NO. 107-146, at 19 (“Although current law [the WPA] protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies.”).

79. See 5 U.S.C. § 2105 (2006).

80. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii).

81. *Horton v. Dep’t of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995).

82. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 1169 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

83. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866 (2008) (“Scholars and judges, including Justice Scalia . . . have agreed that [Hart’s and Sacks’s statement] continues to be an ‘accurate[] descri[ption]’ of American courts.”); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1971 (2005) (observing that Hart’s and Sacks’s statement “remains true today”).

84. Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 2001 (2007) (finding that a statute’s text and the legislature’s intent were “far and away the most frequently used” tools of statutory interpretation used by the Supreme Court); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 236 tbl.1 (2010).

85. See *id.*

The Supreme Court has often stated that all statutory interpretation inquiries must begin with the language of the statute.<sup>86</sup> An analysis of the statute's language considers the statutory context<sup>87</sup> and the meaning of the statute's text, either through statutory definitions or, if undefined, through the ordinary meaning of the terms.<sup>88</sup> When there is no ambiguity in a statute's language, "the sole function of the courts is to enforce it according to its terms,"<sup>89</sup> and the Supreme Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face."<sup>90</sup> Therefore, absent some ambiguity in the statutory language, a court's statutory interpretation analysis should begin and end with the text.<sup>91</sup> For example, in two recent

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86. See, e.g., *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute." (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989))). Some have suggested that this approach is mandated by the Constitution which, "properly understood, requires judges to treat the clear import of an enacted text as conclusive." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions."); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 654 (1990) ("Justice Scalia has emphasized that any search for legislative intent through examination of legislative history is in tension with article I's structure . . .").

87. See *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011) ("As in all statutory construction cases, we begin with 'the language itself [and] the specific context in which that language is used.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))). For an example of using statutory context to interpret a statute, see *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *accord Clay v. United States*, 537 U.S. 522, 528 (2003).

88. See *Williams*, 529 U.S. at 431 ("We give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import." (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)) (second level quotation omitted)).

89. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *accord Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000).

90. *Bates v. United States*, 522 U.S. 23, 29 (1997).

91. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992))); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))). There are some indications that although this rule was often breached, it has recently taken on renewed significance. See YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf> ("It was once axiomatic that [the plain meaning rule] was honored more in the breach than in the observance. However, the Court has begun to place more emphasis on statutory text and less emphasis on legislative history and other sources 'extrinsic' to that text. More often than before, statutory text is the ending point as well as the starting point for interpretation."); see also Krishnakumar, *supra* note 84, at 235-36 tbl.1 (finding, in a study of the Supreme Court's statutory interpretation cases between 2005 and 2008 that the text or plain meaning of a statute was the most frequently cited tool of statutory interpretation).

decisions, the Court refused to read limiting language into statutes.<sup>92</sup> However, the Court has developed a recent habit of turning to the legislative history of a statute to confirm its plain meaning, even when the language of the statute is clear<sup>93</sup>—a practice that has drawn the ire of Justice Antonin Scalia.<sup>94</sup>

When a statute is unclear or ambiguous, the Court is “at liberty” to rely on legislative history to interpret the statutory language in question.<sup>95</sup> Indeed, it is “commonplace” for the Court to refer to legislative history for background information and historical context,<sup>96</sup> or to provide meaning to specific ambiguous or unclear statutory language.<sup>97</sup> However, there are many different forms of legislative history, and the Court does not give each of these sources equal weight.<sup>98</sup> Committee reports are the most authoritative source of legislative history,<sup>99</sup> and it is therefore not surprising

92. See *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010) (holding that the statute in question was clear on its face, and that, therefore, the circuit court’s decision to read limiting language into the statute was improper); *Dean v. United States*, 129 S. Ct. 1849, 1853–55 (2009) (refusing to read an unwritten intent element into the statute in question because it did not “contain words of limitation”).

93. See James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901 (2011) (“[T]he [Roberts] Court . . . often departs from its ‘first canon’ by relying on legislative history to confirm or reinforce what it already has concluded is the plain meaning of [the] statutory text.”); *id.* at 902 n.4 (collecting cases where the Roberts Court has used legislative history to confirm its textual statutory interpretation).

94. See *Zedner v. United States*, 547 U.S. 489, 510–11 (2006) (Scalia, J., concurring) (harshly criticizing the Court’s use of confirmatory legislative history because it “conflicts . . . with this Court’s repeated statements that when the language of a statute is plain, legislative history is irrelevant,” because while “[i]t may seem that there is no harm” in using legislative sources that “are merely in accord with the plain meaning of the Act . . . [it] has addictive consequences” and because “the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face”); see also Brudney, *supra* note 93, at 902 nn.4–6 (collecting cases in which the Supreme Court’s practice of using legislative history to confirm a statute’s plain meaning has drawn a sharp rebuke from Justice Scalia).

95. See *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154 (1932) (“In aid of the process of [statutory] construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.”). But see *Zedner*, 547 U.S. at 511 (Scalia, J., concurring) (“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute . . .”).

96. See KIM, *supra* note 91, at 42.

97. See *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 704–06 (1995) (relying on a committee report to explain the meaning of the word “take” in the Endangered Species Act); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581–82 (1995) (using legislative history to support interpreting the term “prospectus” in the Securities Act to be as limited to initial public offerings); *Reves v. Ernst & Young*, 507 U.S. 170, 179–83 (1993) (using legislative history to interpret the term “conduct” of racketeering activity in the RICO Act as limited to persons who participate in the operation or management of the enterprise in question).

98. See Eskridge, *supra* note 86, at 636–40; see also Krishnakumar, *supra* note 84, at 237 (observing that different forms of legislative history were cited with different levels of frequency).

99. See Eskridge, *supra* note 86, at 637; see also *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“[W]e have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill.”); *Statutory Interpretation and the Uses of Legislative History: Hearing Before Subcomm. on Courts, Intellectual Prop. &*

that it is also the most cited.<sup>100</sup> The next most authoritative source is a statement from the bill's sponsor.<sup>101</sup> The final compelling source of legislative history is statutory language that Congress considered but rejected.<sup>102</sup> The remaining sources of legislative history—such as floor statements by non-sponsors, the statements of non-legislative officials (for example, law professors, executive branch members, and lobbying groups), legislative silence, and subsequent legislative history—are relevant, but often not considered as important as the aforementioned sources.<sup>103</sup> For example, the Supreme Court is often unwilling to equate congressional inaction with congressional acquiescence to, or endorsement of, a judicial interpretation of a statute, unless it is quite clear that Congress was aware of the interpretation and chose not to act.<sup>104</sup>

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*the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 1, 21 (1990) (statement of James L. Buckley, former Sen. and D.C. Circuit Judge) (“[M]y understanding of most of the legislation I voted on [while a U.S. Senator] was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report.”). As former member of the U.S. House of Representatives and D.C. Circuit Court Judge Abner J. Mikva explained, “The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute.” Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 184 (1986)

100. See Eskridge, *supra* note 86, at 637; see also Krishnakumar, *supra* note 84, at 237 (observing that when at least one opinion in a case referenced legislative history, 60.9 percent of the references were to committee reports, nearly double the next closest legislative history source).

101. See Eskridge, *supra* note 86, at 638 (noting that a sponsor's statements are authoritative “because the sponsors are the Members of Congress most likely to know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation”); see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (“[R]emarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.”).

102. See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.”); accord *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987); see also *Booth v. Churner*, 532 U.S. 731, 740–41 (2001) (holding that the elimination of “the very term” relied on by the Supreme Court in an earlier case suggested that Congress desired to preclude that result in future cases); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136–37 (1985) (noting the significance of the Conference Committee's selection of the Senate's broad definition of “navigable waters,” rather than the House's narrower definition); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952) (“[T]he specific history of the legislative process that culminated in the [statute at issue] affords . . . solid ground for giving it appropriate meaning.”).

103. See Eskridge, *supra* note 86, at 639–40.

104. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (“Congress takes no governmental action except by legislation. . . . To be sure, we have sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the ‘precise issue’ presented before the Court. However, [a]bsent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.” (citation omitted) (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001))).

### 3. Public Policy Concerns and Section 806

This section discusses two important public policy considerations. First, this section analyzes the lack of success whistleblowers have had using section 806's anti-retaliation provisions, and the role that the "definitively and specifically" standard has played in curbing section 806's effectiveness. Second, this section analyzes the similarities and differences between the SOX and the Dodd-Frank Act's whistleblower protections.

#### *a. Section 806 in Action: Less Than Advertised*

There is little disagreement that, on its face, section 806 is very favorable to employees.<sup>105</sup> In practice, however, many commentators have noted that whistleblowers rarely win section 806 retaliation cases at the administrative level.<sup>106</sup>

In the most probing empirical study of section 806 claims, Professor Richard Moberly found that a narrow interpretation of protected activity was a major cause of whistleblowers' inability to make use of section 806's anti-retaliation protections.<sup>107</sup> Professor Moberly's study covered the 491 section 806 complaints that the Occupational Safety and Health

105. See *Private Sector Whistleblowers: Are There Sufficient Legal Protections? Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Labor*, 110th Cong. 40 (2007) (statement of Lloyd Chinn, Partner, Proskauer Rose) ("[T]he Sarbanes-Oxley antiretaliation provisions are very favorable as they are written today for employees. The burden of proof . . . is very low."); *accord id.* at 45 (statement of Tom Devine, Legal Director, Government Accountability Project); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 83 (2007) ("As written, Sarbanes-Oxley appears to provide strong substantive and procedural protections for whistleblowers.").

106. See Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 19–24 (2007); Moberly, *supra* note 105, at 67; Jennifer Levitz, *Whistleblowers Are Left Dangling: Technicality Leads Labor Department to Dismiss Cases*, WALL ST. J., Sept. 4, 2008, at A3 ("The government has ruled in favor of whistleblowers 17 times out of 1,273 complaints filed since 2002, according to department records. Another 841 cases have been dismissed."); Deborah Solomon, *For Financial Whistle-Blowers, New Shield Is an Imperfect One*, WALL ST. J., Oct. 4, 2004, at A1.

107. Moberly, *supra* note 105, at 90 ("I conclude that employees rarely won because OSHA and the ALJs determined that a large percentage of employees failed to prove a Sarbanes-Oxley claim *as a matter of law*, often by narrowly construing the Act's legal parameters."); *id.* at 113–14 ("In 24.1% of the cases in which an ALJ found in favor of the employer, the ALJ held that the employee did not engage in protected activity because the whistleblower's disclosure did not relate to one of [the] statutorily defined illegal activities. OSHA relied on this rationale in 18.2% of the cases in which the employer prevailed."); see also Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 832 (2007) ("[D]espite Sarbanes-Oxley being touted as a new bulwark against corporate fraud, the courts continue to weaken these whistleblower provisions. . . . [W]histleblower protections have not accomplished their intended purpose."); Rachel Beller, Note, *Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China*, 7 N.Y.U. J. L. & BUS. 873, 908 (2011) ("[T]he [Department of Labor] has interpreted section 806 in such a narrow manner that the purpose of US SOX to encourage and protect corporate whistleblowers has been seriously undermined.").

Administration (OSHA) received<sup>108</sup> between August 19, 2002 and July 13, 2005.<sup>109</sup> Of these 491 complaints, OSHA reached a final determination in 361 cases (the others were withdrawn, settled, or, in one case, sent to arbitration), and found that the employer violated section 806 only thirteen times—about a 3.6 percent win rate for employees.<sup>110</sup> Those employees who lost at the OSHA level requested review by an Administrative Law Judge<sup>111</sup> (ALJ) in 230 cases.<sup>112</sup> An ALJ reached a decision in 93 of these cases (the others were withdrawn or settled),<sup>113</sup> but found that the employer violated section 806 only six times—about a 6.5 percent win rate for employees.<sup>114</sup> To provide some context, these win rates are two to three times lower than plaintiff win rates under discrimination laws handled by the Equal Employment Opportunity Commission,<sup>115</sup> which are notoriously difficult cases to win.<sup>116</sup> Most pertinent to this Note, however, was Professor Moberly's finding that failure to engage in protected activity was the third most cited element in employer wins at both the OSHA and ALJ levels.<sup>117</sup>

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108. Although section 806 charged the Department of Labor with the responsibility to receive claims in the first instance, *see* 49 U.S.C. § 42121(b)(1) (2006), the Secretary of Labor delegated this responsibility to OSHA, *see* Secretary's Order 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002).

109. Moberly, *supra* note 105, at 87.

110. *Id.* at 96 tbl.3. Although the "win rate" in Professor Moberly's table includes cases that were settled or withdrawn prior to final adjudication by OSHA, the win rate listed in this Note does not because of the uncertainty regarding whether the settled cases had merit, particularly because OSHA and the OALJ have not provided the dollar amount of section 806 settlements. *See id.* at 97–98.

111. An ALJ is responsible for "conducting formal proceedings, interpreting the law, applying agency regulations, and carrying out the policies of the agency in the course of administrative adjudications." *See* MORRELL E. MULLINS, *MANUAL FOR ADMINISTRATIVE LAW JUDGES 2–3* (Interim Internet ed. 2001), *available at* <http://ualr.edu/malj/malj.pdf>. The Supreme Court has opined that ALJs are comparable to judges. *See Butz v. Economou*, 438 U.S. 478, 513 (1978) ("There can be little doubt that the role of the modern . . . administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.").

112. Moberly, *supra* note 105, at 96.

113. *Id.*

114. *Id.*; note that, although the "win rate" in Professor Moberly's table includes cases that were settled or withdrawn prior to final adjudication by an ALJ, the win rate listed in this Note does not because of the uncertainty regarding whether settled cases had merit, particularly because OSHA and the OALJ have not provided the dollar amount of section 806 settlements. *See id.* at 97–98.

115. *Id.* at 93.

116. *See* Michael Selmi, *Why Are Employment Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–60 (2001).

117. Moberly, *supra* note 105, at 102 (finding that failure to engage in protected activity was cited in 59 employer wins at the OSHA level (about 18.2 percent of cases) and in 20 employers wins at the ALJ level (about 24 percent of cases); only statute of limitations and causation issues were cited more often).

*b. The Dodd-Frank Act's Whistleblower Protections*

The Dodd-Frank Act was passed after the 2008 financial crisis in response to the perceived weakness of banking regulations, and was perhaps the most significant and wide-reaching expansion of financial regulation since the Great Depression.<sup>118</sup> The Act reached “every corner” of the banking industry,<sup>119</sup> and included barely noticed<sup>120</sup> amendments to section 806 of SOX that expanded the definition of “employer” and extended the statute of limitations.<sup>121</sup>

The Dodd-Frank Act also created new whistleblower anti-retaliation protections<sup>122</sup> for whistleblowers who report potential corporate wrongdoing directly to the Securities and Exchange Commission (SEC).<sup>123</sup> The final rules that the SEC promulgated to enforce these new whistleblower protections defined a whistleblower as a person who “possesses a reasonable belief that the information he is providing relates to a possible securities law violation.”<sup>124</sup> This “reasonable belief” standard “requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess.”<sup>125</sup> The SEC required only a “reasonable belief” because it felt that this standard struck the appropriate balance between encouraging quality tips while discouraging frivolous ones.<sup>126</sup> Additionally, the SEC stated that this

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118. See Hartmann, *supra* note 22, at 1279.

119. Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL ST. J., July 16, 2010, at A1.

120. Recent Legislation, *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC.*, 124 HARV. L. REV. 1829, 1830 (2011) (“Although the progress of the Dodd-Frank bill through the House and Senate was marked by intense industry lobbying and divisive partisan struggles, the whistleblower provisions received little attention on the road to passage.”); Bruce Carton, *Pitfalls Emerge in Dodd-Frank Bounty Provision*, SEC. DOCKET (Sept. 8, 2010), <http://www.securitiesdocket.com/2010/09/09/pitfalls-emerge-in-dodd-frank-whistleblower-bounty-provision/> (describing the whistleblower section of the Dodd-Frank Act as a “little-known sleeper section”).

121. See Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 76 Fed. Reg. 68,084, 68,085 (Nov. 3, 2011) (to be codified at 29 C.F.R. pt. 1980).

122. See Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. § 78u-6 (Supp. IV 2010)).

123. See *id.*; see also Recent Legislation, *supra* note 120, at 1830 (“[R]ather than strengthening [whistleblower anti-retaliation] protections across the board [Dodd-Frank] actually creates a two-tiered system of retaliation protection in which whistleblowers may receive stronger, more robust protection if they report directly to the SEC, but weaker, less reliable protection if they report to the company.”). Some have expressed concerns that the Dodd-Frank Act “discourages internal reporting and thus will likely undermine internal compliance and reporting systems and impede the effective functioning of the securities regulation system,” and will “leaving those who report internally either unprotected or protected only by the weaker protections of SOX.” *Id.* at 1830–32.

124. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,303 (June 13, 2011) (to be codified at 17 C.F.R. § 240.21F-2(b)).

125. *Id.* at 34,303.

126. *Id.*

standard was consistent with the approach that is followed by courts that have interpreted the anti-retaliation provisions of other federal laws.<sup>127</sup>

Although section 806 does not define the term whistleblower, its text, like the SEC's rules,<sup>128</sup> provides that employees are protected when they report conduct that they reasonably believe relates to corporate wrongdoing.<sup>129</sup> Despite this similarity, there are important differences between the whistleblower protections under section 806 and the Dodd-Frank Act. First, the Dodd-Frank Act's whistleblower protections only apply to employees who report corporate wrongdoing directly to the SEC.<sup>130</sup> Next, whistleblowers under the Dodd-Frank Act may bring their claim directly into federal court and do not have to first file a claim with an administrative agency.<sup>131</sup> Finally, Dodd-Frank whistleblowers have the opportunity to receive a portion of the monetary sanctions collected by the SEC resulting from their tip.<sup>132</sup> These distinctions have caused some concern that a two-tiered whistleblower protection system has been created.<sup>133</sup>

*D. The Impact of an Administrative Agency's Interpretation of a Statute: Doctrinally Neat, but Practically Messy*

This section begins by analyzing the Supreme Court's decisions in *Chevron* and its progeny, which suggest that the ARB's decision to adopt the "reasonably believes" standard should be entitled to *Chevron* deference. Next, this section analyzes several empirical studies of Supreme Court decisions, which indicate that the Supreme Court treats *Chevron* as a canon of statutory interpretation rather than a precedent with stare decisis effect. These studies suggest that, in cases where *Chevron* should apply, the Court is nearly as likely to engage in ad hoc statutory interpretation as it is to defer to the agency's decision.

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127. *Id.* at 34,403–04.

128. *See supra* note 126 and accompanying text.

129. *See supra* note 51.

130. *See supra* note 123 and accompanying text. By contrast, section 806 protects employees who report wrongdoing to a broader range of authorities. *See* 18 U.S.C. § 1514A(a) (2006).

131. *See* Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. § 78u-6(h)(1)(B)(i) (Supp. IV 2010)). Whistleblowers under section 806 must first file their claim with OSHA and can only remove their claim to federal court if a final administrative determination is not made within 180 days. 18 U.S.C. § 1514A(b). The opportunity to remove, however, is almost always available to whistleblowers. *See Moberly, supra* note 105, at 82 (noting that the option to remove to federal court "almost certainly will be available for employees, because it is unlikely that the entire process will be completed in [180 days]; in Fiscal Year 2005, an initial OSHA investigation itself took an average of 127 days to complete").

132. *See Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. at 34,363–71.

133. *See Recent Legislation, supra* note 120, at 1829–31.

1. Doctrinal Clarity: *Chevron* Deference to the ARB's Interpretation of Section 806

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>134</sup> the Supreme Court established a two-step framework for courts to follow when reviewing an administrative agency's interpretation of a statute.<sup>135</sup> First, the court must determine "whether Congress has directly spoken to the precise question at issue."<sup>136</sup> If so, the courts and the administrative agency "must give effect to the unambiguously expressed intent of Congress."<sup>137</sup> If, however, Congress has not spoken directly on the issue and has delegated enforcement authority to an administrative agency, then "Congress has explicitly left a gap for the agency to fill,"<sup>138</sup> and courts are not free to impose their own interpretation of the statute.<sup>139</sup> Instead, the courts must defer to the agency's interpretation, provided that it is permissible under the statute.<sup>140</sup> This is known as "*Chevron* deference."<sup>141</sup> Importantly, however, an agency interpretation of a statute only qualifies for *Chevron* deference if Congress has delegated the authority to administer the statute to the administrative agency in question.<sup>142</sup> This is established when, for example, Congress delegates the authority to formally adjudicate claims under the statute to an administrative agency.<sup>143</sup>

Congress explicitly delegated authority to enforce section 806 of SOX through formal adjudication to the Secretary of Labor,<sup>144</sup> who then delegated this authority to the ARB.<sup>145</sup> Therefore, the ARB's decision to

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134. 467 U.S. 837 (1984).

135. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 824 (2006) ("*Chevron* famously established a two-step inquiry for courts to follow in reviewing agency interpretations of law.>").

136. *Chevron*, 467 U.S. at 842.

137. *Id.* at 843.

138. *Id.* at 843-44.

139. *Id.* at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.>").

140. *Id.*

141. See, e.g., Howard L. Dorfman et al., *Presumption of Innocence: FDA's Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 FOOD & DRUG L.J. 585, 598 (2006).

142. See *United States v. Mead*, 533 U.S. 218, 226-27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication . . .").

143. See *id.* at 227.

144. See 18 U.S.C. § 1514A(b)(2)(A) (2006) (providing that section 806 claims will be governed by the procedural rules set out at 49 U.S.C. § 42121(b) (2006), which explains the Department of Labor's adjudicatory power).

145. See 67 Fed. Reg. 64,272-73 (Oct. 17, 2002).

adopt the “reasonably believes” standard should be entitled to *Chevron* deference.<sup>146</sup>

Two issues could have complicated the ARB’s eligibility for *Chevron* deference, however. First, the ARB changed its interpretation of the scope of protected activity under section 806.<sup>147</sup> The Supreme Court initially struggled to decide whether and to what extent this should impact *Chevron* deference.<sup>148</sup> At first, the Court seemed to indicate that an evolving agency interpretation had to satisfy a heightened standard to be eligible for deference.<sup>149</sup> In 2009, however, the Supreme Court held that there is no heightened standard that must be satisfied for a changed agency interpretation to qualify for *Chevron* deference.<sup>150</sup> Instead, the agency’s interpretation remains entitled to deference so long as the agency provides a reasoned explanation for its change, displays an awareness that it is changing its position, sets forth good reasons for the change, believes that the new policy is better (which can be shown simply through a conscious change of course), and demonstrates that the new interpretation or policy is permissible under the statute in question.<sup>151</sup>

Second, some jurisdictions adopted the reasonably believes standard for reasons other than *Chevron* deference, creating binding precedent that conflicts with the ARB’s current interpretation of section 806.<sup>152</sup> In 2005, however, the Court held that a jurisdiction’s prior precedent does not trump a conflicting agency interpretation of a statute that is entitled to *Chevron* deference unless that prior precedent was based on the unambiguous terms

146. See *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (affording *Chevron* deference to the “definitively and specifically” standard because Congress enabled the ARB to speak with the force of law when it explicitly delegated the authority to enforce section 806 to the Secretary of Labor, who then delegated this authority to the ARB); *Getman v. Admin. Review Bd.*, 265 F. App’x 317, 320 n.7 (5th Cir. 2008) (“We have not addressed *Chevron* deference in the context of an ARB decision on Sarbanes-Oxley. It appears that *Chevron* deference is due, as the ARB is an adjudicative body, but we leave that question for another day.”).

147. Compare *supra* note 14 and accompanying text, with *supra* notes 15–16 and accompanying text.

148. See Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114 (2011) (“Over the past three decades, the U.S. Supreme Court has struggled to find an answer” to the question of how *Chevron* deference is impacted by an agency’s decision to change its prior position).

149. See, e.g., *Motor Vehicles Mfr. Assoc. of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (“[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”).

150. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) (“We find no basis . . . for a requirement that all agency change be subjected to more searching review.”).

151. See *id.* at 1811.

152. See *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008) (holding that the court “agree[s] with the ARB’s legal conclusion that an employee’s complaint must ‘definitively and specifically relate’ to” one of the rules, regulations, or laws listed in section 806); *Vodopia v. Koniklijke Philips Elecs., N.V.*, 398 F. App’x 659, 662–63 (2d Cir. 2010) (“As numerous courts have observed . . . to qualify as protected activity, the ‘employee’s communications must *definitively and specifically* relate’” to one of the rules, regulations, or laws listed in section 806 (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996–97 (9th Cir. 2009))).

of the statute in question.<sup>153</sup> Here, the precedents that conflict with the ARB's current interpretation of section 806 were not based SOX's unambiguous terms.<sup>154</sup> Therefore, these precedents do not threaten the *Chevron* eligibility of the ARB's decision to adopt the reasonably believes standard.

## 2. The Murky Reality: In Cases Where *Chevron* Should Apply, Courts Are as Likely to Engage in Ad Hoc Statutory Interpretation as They Are to Defer to the Agency's Decision

There are only two empirical studies that have analyzed the Supreme Court's application of *Chevron*.<sup>155</sup> In the first, Professor Thomas Merrill analyzed the ninety Supreme Court decisions between the 1984 term and the 1990 term that presented the Court with a *Chevron* deference question,<sup>156</sup> and found that the Court accorded *Chevron* deference to the agency's decision slightly less often than it applied traditional statutory interpretation principles.<sup>157</sup> In the second, more comprehensive study,<sup>158</sup> which has been described as "path-breaking,"<sup>159</sup> Professor William Eskridge and Lauren Baer analyzed all of the Supreme Court's decisions that involved a federal agency interpretation of a statute between *Chevron* in 1983 and *Hamdan* in 2005.<sup>160</sup> They found that in 53.6 percent of these cases, the Supreme Court did not invoke any deference regime, and instead

153. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

154. See *supra* note 152 and accompanying text (observing that the Fifth and Second Circuits adopted the "definitively and specifically" standard because they agreed with the ARB and other courts, respectively, that had also adopted this standard, not because of the unambiguous text of section 806).

155. See Raso & Eskridge, *supra* note 19 at 1738 (2010). Although a third study by Professors Thomas Miles and Cass Sunstein examined cases where the Supreme Court cited *Chevron*, Miles & Sunstein, *supra* note 135, at 825, their study is not comprehensive because it "did not examine the larger universe of Supreme Court cases where *Chevron* was applicable but not cited," Raso & Eskridge, *supra* note 19, at 1740.

156. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–81 (1992).

157. See *id.* at 981 tbl.1 (finding that out of the ninety cases where a deference question was presented, the Court applied the *Chevron* framework in 32 cases (36 percent of the time) and applied traditional statutory interpretation principles in 34 cases (37 percent of the time)).

158. See Eskridge & Baer, *supra* note 18, at 1093–94 ("[R]elatively few studies have attempted to empirically examine the application of the *Chevron* doctrine, and none has attempted to examine the Supreme Court's *Chevron* jurisprudence systematically in light of the entire universe of potential deference cases. Those studies that have focused on *Chevron* can be described as partial or incomplete, at best. . . . Given these features, previous studies are of limited value. . . . Our study attempts to fill this empirical gap and provide a more comprehensive analysis of Supreme Court deference practice."); see also Raso & Eskridge, *supra* note 19, at 1740 ("The Eskridge and Baer study presented a more comprehensive survey of the Court's treatment of deference regimes and deference decisions [than previous studies].").

159. Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurements, and Models*, 98 CAL. L. REV. 813, 843 (2010).

160. See Eskridge & Baer, *supra* note 18, at 1094.

engaged in ad hoc judicial reasoning that mirrored the Supreme Court's standard statutory interpretation practices.<sup>161</sup> Eskridge and Baer stated that their "data provide strong empirical support for the fact that this ad hoc method of statutory interpretation exists and thrives in the administrative realm."<sup>162</sup> Further, in the 267 cases they analyzed where the agency interpretation in question was pursuant to a congressional delegation of lawmaking authority, and thus should have been entitled to *Chevron* deference,<sup>163</sup> the Supreme Court applied *Chevron* only slightly more often than it engaged in traditional statutory interpretation.<sup>164</sup> Finally, in a follow-up study, Professors Raso and Eskridge argued that this data demonstrates that the Supreme Court does not treat *Chevron* as a precedent that has stare decisis effect.<sup>165</sup>

## II. THE ARB'S EVOLVING INTERPRETATION OF SECTION 806 OF SOX

This part analyzes the ARB's evolving interpretation of the scope of protected activity under section 806 of SOX. First, it discusses the origins of the "definitively and specifically" standard and its application to section 806 by the ARB in *Platone v. FLYi, Inc.* Then, this part analyzes the "reasonably believes" standard by discussing its origins and the ARB's decision to abandon the "definitively and specifically" standard in favor of the "reasonably believes" standard in *Sylvester v. Parexel International, LLC*.

### A. The "Definitively and Specifically" Standard

The phrase "definitively and specifically" does not appear in the text of section 806.<sup>166</sup> Instead, this standard is derived from *American Nuclear Resources, Inc. v. Department of Labor*,<sup>167</sup> a Sixth Circuit case holding that to engage in protected activity under the whistleblower protection provisions of the Energy Reorganization Act<sup>168</sup> (ERA), an employee must report information that "definitively and specifically" relates to safety

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161. See *id.* at 1099 tbl.1; *id.* at 1117 ("[T]he [Supreme] Court's methodology in these no-deference cases matches what has long been the Court's standard methodology for interpreting statutes. Under this 'independent judgment of judges' methodology, the Court normally considers statutory text and the whole act; legislative history and statutory purpose; the evolution of the statute through judicial and other precedents; and substantive policy canons when it interprets statutes.").

162. *Id.* at 1118.

163. See *supra* note 142 and accompanying text.

164. See Eskridge & Baer, *supra* note 18, at 1126; *id.* at 1128 tbl.6.

165. See Raso & Eskridge, *supra* note 19, at 1764 ("[P]reliminary results also cast doubt on the strongest version of the legal model for judicial decisionmaking in agency interpretation cases: that *Chevron* and other formal deference regimes are rigorously followed as a matter of stare decisis."); *id.* at 1797 ("Justices rarely treat *Chevron* as a precedent entitled to strict stare decisis effect . . .").

166. See *supra* note 51.

167. 134 F.3d 1292 (6th Cir. 1998).

168. See 42 U.S.C. § 5841(a) (2006).

violations.<sup>169</sup> The ARB would later adopt this standard to govern the scope of protected activity for ERA whistleblower cases.<sup>170</sup>

In *Platone v. FLYi, Inc.*,<sup>171</sup> the ARB applied the “definitively and specifically” standard to section 806 of SOX.<sup>172</sup> There, Stacey Platone, the manager of labor relations at Atlantic Coast Airlines,<sup>173</sup> discovered that four union pilots were abusing the flight pay loss system—the system whereby the pilot’s union reimbursed the airline for flights that union pilots missed, but, under the collective bargaining agreement, were still paid for, to attend to union business—by picking up flights on days they knew they would be unable to work due to previously scheduled union business.<sup>174</sup> In March 2003, Ms. Platone revealed this abuse to management.<sup>175</sup> By the end of the month, she had been terminated, purportedly because of a conflict of interest stemming from her undisclosed personal relationship with a high-ranking union representative.<sup>176</sup>

Thereafter, Ms. Platone filed a SOX whistleblower complaint with OSHA, alleging that she was terminated because she had discovered “a scheme to defraud shareholders and members of the pilot’s union.”<sup>177</sup> After OSHA dismissed the complaint for failure to allege protected activity under section 806, Ms. Platone requested a hearing before an ALJ.<sup>178</sup> The ALJ held that Ms. Platone had alleged protected activity under section 806 because she reasonably believed that the scheme amounted to fraud against the shareholders.<sup>179</sup> The airline subsequently appealed the case to the ARB.<sup>180</sup>

The ARB reversed the ALJ’s decision and held that Ms. Platone had not engaged in protected activity under section 806.<sup>181</sup> The ARB observed that “[i]n defining the scope of protected activity under other Federal whistleblower protection provisions, the Board has held that an employee’s protected communications must relate ‘definitively and specifically’ to the subject matter of the particular statute under which protection is afforded.”<sup>182</sup> To support this view, the ARB cited *Kester v. Carolina Power & Light Co.*,<sup>183</sup> where it had held that under the whistleblower protection provision of ERA,<sup>184</sup> a whistleblower’s conduct must “definitively and specifically” relate to nuclear safety to constitute protected

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169. *Am. Nuclear Res.*, 134 F.3d at 1295.

170. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007 (Sept. 30, 2003).

171. ARB No. 04-154 (Sept. 29, 2006), *aff’d* 548 F.3d 222 (4th Cir. 2008).

172. *See id.* at 17.

173. *Id.* at 4.

174. *Id.* at 5–6.

175. *Id.* at 6.

176. *Id.* at 11.

177. *Id.*

178. *Id.* at 12.

179. *Id.* at 12–13.

180. *Id.* at 2.

181. *Id.* at 17.

182. *Id.*

183. ARB No. 02-007 (Sept. 30, 2003).

184. *See* 42 U.S.C. § 5841(a) (2006).

activity.<sup>185</sup> Accordingly, the ARB held that to engage in protected activity “under . . . SOX, the employee’s communications must ‘definitively and specifically’ relate to” one of the rules, regulations, or laws listed in section 806,<sup>186</sup> and dismissed Ms. Platone’s complaint.<sup>187</sup>

After the ARB’s decision in *Platone*, a number of federal courts adopted the “definitively and specifically” standard to govern the scope of protected activity under section 806.<sup>188</sup> These federal courts did not adopt this standard for the same reasons, however. One court adopted the “definitively and specifically” standard on its own because it “agreed” with the ARB’s interpretation;<sup>189</sup> another did so because it agreed with other courts that adopted the standard.<sup>190</sup> Still another accorded *Chevron* deference to the ARB’s “definitively and specifically” standard.<sup>191</sup>

### B. The “Reasonably Believes” Standard

The “reasonably believes” standard was created by courts to decide retaliation claims under Title VII.<sup>192</sup> This doctrine was developed after courts recognized that if employees were only legally protected from retaliation if their employer’s conduct actually violated Title VII—which can be difficult, if not impossible, to predict prior to formal adjudication—few employees would risk filing a Title VII claim.<sup>193</sup> Therefore, courts developed this standard to provide legal protection to employees who file a complaint based on their good faith belief that their employer’s conduct violated Title VII.<sup>194</sup>

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185. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, slip op. at 9 (Sept. 30, 2003) (holding that under the whistleblower provision of the *Energy Reorganization Act*, protected activity must “definitively and specifically” relate to nuclear safety); *see also* 42 U.S.C. § 5841(a).

186. *Platone*, ARB No. 04-154, slip op. at 22.

187. *See id.*

188. *See supra* note 14.

189. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008) (holding that the court “agree[s] with the ARB’s legal conclusion that an employee’s complaint must ‘definitively and specifically relate’ to” one of the rules, regulations, or laws listed in section 806).

190. *See Vodopia v. Koninklijke Philips Elecs., N.V.*, 398 F. App’x 659, 662–63 (2d Cir. 2010) (“As numerous courts have observed . . . to qualify as protected activity, the ‘employee’s communications must *definitively and specifically* relate’” to section 806 (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996–97 (9th Cir. 2009))

191. *See Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (“[W]e afford deference to the ARB’s interpretation of § 1514A of the Sarbanes-Oxley Act.”).

192. *See Deborah L. Brake & Joanna L. Grossman, The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 914 (2008). This point is emphasized by the concurring and dissenting opinion in *Sylvester*. *See Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, slip op. at 34–35 (May 25, 2011) (Brown, J., concurring and dissenting) (“Under this precedent, whistleblower activity that merely ‘implicates’ or ‘touches upon’ the substantive statute is protected.”).

193. *See Brake & Grossman, supra* note 192, at 914.

194. *See id.* at 914–15; *see also* Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 451 (2010) (noting that anti-retaliation laws “should simply encourage employees to come forward with information that a reasonable person with their knowledge and educational experience would believe to be a violation of the law,”

In May 2011, the ARB, sitting en banc, held in *Sylvester v. Parexel International, LLC*<sup>195</sup> that a whistleblower does not need to report conduct that “definitively and specifically” relates to a violation of one of the rules, regulations, or laws listed in section 806 to engage in protected activity.<sup>196</sup> Instead, a whistleblower engages in protected activity when she reports conduct that she “reasonably believes” violates section 806.<sup>197</sup>

In *Sylvester*, two employees of Parexel International, LLC, a publicly traded drug testing company,<sup>198</sup> filed complaints alleging that they had suffered retaliation in violation of section 806.<sup>199</sup> The employees had different jobs, but both were responsible for reporting accurate clinical data and ensuring that Parexel’s clinical testing adhered to the Food and Drug Administration’s Good Clinical Practice (GCP) standards.<sup>200</sup> In March 2006, both employees reported to their superiors that they had witnessed deviations from the GCP standards.<sup>201</sup> Then, in May 2006, one of the employees reported to her superior that she had again witnessed a deviation from the GCP standards.<sup>202</sup> In June 2006, both employees were terminated, for what Parexel claimed were personality reasons.<sup>203</sup>

In the fall of 2006, both employees filed separate complaints with OSHA, alleging that they were terminated because they had reported deviations from the GCP standards, which they claimed was protected activity under section 806.<sup>204</sup> OSHA dismissed the complaints.<sup>205</sup> Both employees appealed, but an ALJ also dismissed their claims on the grounds that they failed to establish subject matter jurisdiction because neither had engaged in protected activity under section 806.<sup>206</sup> The ARB then reversed the ALJ, holding that section 806 protects a whistleblower who reports conduct that she “reasonably believes” violates one of the rules, regulations, or laws listed in section 806.<sup>207</sup>

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and that the “reasonable belief” standard has this effect because “the easiest way to encourage [employees to come forward] is to protect a broad range of activity.”)

195. ARB No. 07-123 (en banc).

196. *Id.* at 17–19. It is worth noting that the *Platone* ARB was made up of Bush Administration appointees, while the *Sylvester* ARB was made up of judges appointed during the Obama Administration. Compare Debra S. Katz & Maura Dundon, *Commentary: Please Protect Whistleblowers*, LEGAL TIMES (Mar. 18, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429144387&slreturn=1>, with ARB Board Members, U.S. DEPT. OF LABOR ADMIN. REV. BD., <http://www.dol.gov/arb/members.htm> (last visited Mar. 23, 2012).

197. *Sylvester*, ARB No. 07-123, slip op. at 17–19.

198. *Id.* at 3.

199. *Id.* at 4.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 5–6.

204. *Id.* at 4, 6.

205. *Id.* at 7.

206. *Id.*

207. *Id.* at 17–19.

In so holding, the ARB also abandoned the “definitively and specifically” standard for two reasons.<sup>208</sup> First, the definitively and specifically standard was “inapposite to the question of what constitutes protected activity under” section 806 due to differences between section 806 and the ERA whistleblower provision, from which the definitively and specifically standard was derived.<sup>209</sup> Specifically, the ERA whistleblower protection provision contains a “catch-all” provision<sup>210</sup> to which the “definitively and specifically” standard applies, but section 806 lacks such a provision.<sup>211</sup> Instead, section 806 specifically identifies the rules, regulations, and laws that a whistleblower’s communications must relate to in order to be protected.<sup>212</sup> Second, the text of section 806 only requires that an employee “reasonably believe[]” that there has been a violation of a rule, regulation, or law listed in section 806,<sup>213</sup> and the phrase “definitively and specifically” does not appear in section 806’s text.<sup>214</sup> Thus, according to the ARB, the definitively and specifically standard “presents a potential conflict with the express statutory authority of” section 806.<sup>215</sup>

After explaining why it was abandoning the “definitively and specifically” standard, the ARB held that to determine whether a whistleblower engaged in protected activity under section 806, “the critical focus is on whether the employee reported conduct that he or she *reasonably believes* constituted a violation of federal law.”<sup>216</sup> Therefore, the issue in this case was whether the employees, “provided information to Parexel that they reasonably believed related to one of the violations listed in section 806, and not whether that information ‘definitively and specifically’ described one or more of those violations.”<sup>217</sup> Accordingly, the ARB held that the complaints should not have been dismissed.<sup>218</sup>

The ARB also explained what a whistleblower must do to engage in protected activity under the “reasonably believes” standard.<sup>219</sup> It noted that it has consistently interpreted the concept of “reasonable belief” to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable.<sup>220</sup> To satisfy the subjective prong of this test, the employee must have “actually believed” that what she complained of constituted a

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208. *Id.*

209. *Id.* at 18; *see supra* notes 166–74 and accompanying text.

210. *See* 42 U.S.C. § 5851(a)(1)(F) (2006) (prohibiting employers from discriminating against employees who participate or assist in any proceeding or action related to a violation of the Atomic Energy Act of 1954).

211. *Sylvester*, ARB No. 07-123, slip op. at 17.

212. *Id.*; *see also supra* note 51.

213. *Sylvester*, ARB No. 07-123, slip op. at 17.

214. *See id.* at 17–18. This point is explained at greater length by the concurring opinion. *See id.* at 24–27 (Corchado, J., concurring).

215. *Id.* at 18 (majority opinion).

216. *Id.* at 19.

217. *Id.*

218. *Id.*

219. *Id.* at 14–15.

220. *Id.*

violation of the relevant law.<sup>221</sup> To satisfy the objective prong, the plaintiff must show that a reasonable employee “in the same factual circumstances with the same training and experience” would also have thought that the complained-of conduct violated the relevant law.<sup>222</sup> Importantly, however, the ARB explained that section 806 protects a whistleblower even if, after further investigation, there was no violation.<sup>223</sup>

### III. WHY THE “REASONABLY BELIEVES” STANDARD SHOULD GOVERN THE SCOPE OF PROTECTED ACTIVITY UNDER SECTION 806 OF SOX

The ARB’s decision to adopt the “reasonably believes” standard should be entitled to *Chevron* deference, despite the ARB’s evolving position and the existence of contrary precedent in some jurisdictions.<sup>224</sup> Empirical studies of the Supreme Court’s decisions, however, demonstrate that when *Chevron* should apply, courts<sup>225</sup> are nearly as likely to engage in ad hoc statutory interpretation as they are to defer to the agency’s decision.<sup>226</sup> Therefore, it is foreseeable that a court asked to review an ARB decision in a SOX whistleblower case will neglect *Chevron* and engage in ad hoc statutory interpretation.

In such a circumstance, this part argues that the “reasonably believes” standard should still govern the scope of protected activity under Section 806 for several reasons. First, the “definitively and specifically” standard is inconsistent with the text of section 806. Second, the legislative history supports the “reasonably believes” standard. Third, the “reasonably believes” standard is more consistent with the reasonable person standard that Congress intended. Fourth, the Dodd-Frank Act did not constitute congressional endorsement of, or acquiescence to, the “definitively and specifically” standard. Finally, the “reasonably believes” standard effectuates important public policy goals because it will help reverse the lack of success whistleblowers have had litigating section 806 claims, and it will harmonize the protected activity standards under SOX and the Dodd-Frank Act.

#### A. *An Obvious and Fatal Flaw: The “Definitively and Specifically” Standard Conflicts with the Text of Section 806*

Any analysis of whether the “definitively and specifically” standard or the “reasonably believes” standard should govern the scope of protected

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221. *Id.* at 14. When determining what an employee “actually believed,” the ARB takes the employee’s education and sophistication under consideration. *Id.* at 14–15.

222. *Id.* at 15.

223. *Id.* at 16; *see also* *Welch v. Chao*, 536 F.3d 269, 277 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008) (“Importantly, 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.” (citation omitted)).

224. *See supra* Part I.D.1.

225. Although the empirical evidence in this Note only discusses Supreme Court decisions, it is fair to assume that this evidence is also instructive regarding lower federal courts. *See supra* note 18.

226. *See supra* notes 157, 164 and accompanying text.

activity under section 806 based on traditional statutory interpretation principles must begin, as the Supreme Court instructs, with the text of the statute.<sup>227</sup> Beginning with the text is also strongly encouraged by recent empirical studies of the Supreme Court's statutory interpretation jurisprudence that have identified the text of a statute as one of the most frequently cited tools of statutory interpretation.<sup>228</sup>

Unfortunately for the definitively and specifically standard, the text of section 806 clearly supports the reasonably believes standard for two reasons. First, the text of section 806 includes the phrase "reasonably believes," while "definitively and specifically" does not appear in the text.<sup>229</sup> This first strike against the definitively and specifically standard is as obvious as it is devastating because the Supreme Court has held that it will "ordinarily resist reading words or elements into a statute that do not appear on its face."<sup>230</sup> Second, the definitively and specifically standard would add limiting language to the statutory text of section 806, which the Supreme Court has refused to do in two recent decisions.<sup>231</sup>

Nevertheless, it is possible to justify reading the definitively and specifically standard into the text of section 806 if the ordinary meaning of the statute's language<sup>232</sup> or the statutory context support its inclusion.<sup>233</sup> One potential contextual argument in support of the definitively and specifically standard is that the criminal whistleblower protection in SOX applies to "any Federal offense,"<sup>234</sup> while section 806 was limited to particular rules, regulations, and laws.<sup>235</sup> Arguably, therefore, the definitively and specifically standard gives effect to Congress's decision to use limiting language in section 806 because this standard requires whistleblowers to engage in more specific conduct. However, the definitively and specifically standard is not needed to give effect to this distinction. To engage in protected activity under the reasonably believes standard, whistleblowers still must report conduct that relates to a violation of one of the rules, regulations, or laws listed in section 806. Accordingly, the reasonably believes standard also effectuates Congress's decision to limit the application of section 806 to particular rules, regulations, and laws.

Additionally, the ordinary meaning of the phrase "reasonably believes" does not support reading "definitively and specifically" into the text of section 806. The *Oxford English Dictionary* defines "reasonably" as "with good reason, justly, properly" and "suitably, sufficiently, fairly."<sup>236</sup> It

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227. See *supra* note 86.

228. See *supra* note 84 and accompanying text.

229. See *supra* note 51 and accompanying text.

230. *Bates v. United States*, 522 U.S. 23, 29 (1997); see *supra* note 90 and accompanying text.

231. See *supra* note 92 and accompanying text.

232. See *supra* note 88.

233. See *supra* note 87.

234. See *supra* note 9.

235. See *supra* note 51.

236. OXFORD ENGLISH DICTIONARY 291 (2d ed. 1989).

defines “believe” as “to believe in *a thing*, e.g. the truth of a statement.”<sup>237</sup> Putting these definitions together, the ordinary meaning of “reasonably believes” is a just, proper, or fair belief that something is true. Thus, section 806’s text demands that whistleblowers have a just, proper, and fair belief that some conduct violates one of the rules, regulations, or laws listed in section 806, yet the definitively and specifically standard demands much more. Indeed, the ordinary meaning of the phrase “reasonably believes” has to do with what the whistleblower thought about the conduct, while the definitively and specifically standard relates to the type of conduct the whistleblower reported. Accordingly, the ordinary meaning of the phrase “reasonably believes” also does not support reading the definitively and specifically standard into the text of section 806.

To summarize, the text of section 806 lends strong support to the reasonably believes standard. Further, neither the ordinary meaning of section 806’s language nor the statutory context support reading the definitively and specifically standard into the text of section 806. Thus, the statutory interpretation inquiry should end. The Supreme Court has stated “time and again” that its “analysis begins with ‘the language of the statute.’ And when the statutory language provides a clear answer, it ends there as well.”<sup>238</sup> However, the Court has recently begun to examine the legislative history of a statute to confirm its plain meaning, even when the statutory language is clear,<sup>239</sup> despite Justice Scalia’s vociferous protest.<sup>240</sup> Accordingly, although it appears that the statutory language demonstrates that the reasonably believes standard should govern the scope of protected activity under section 806, this Note nevertheless analyzes section 806’s legislative history as well.

#### *B. The Legislative History Supports the “Reasonably Believes” Standard*

The Supreme Court does not treat all forms of legislative history equally.<sup>241</sup> Instead, the Supreme Court has typically considered committee reports to be the most important, followed by statements made by the drafters of the legislation in question, language rejected by Congress, and, to a far lesser extent, statements by non-drafters, congressional silence, and subsequent congressional action or inaction.<sup>242</sup>

There are no grounds for considering changes in the statutory language because section 806 was enacted in the same form that it was initially proposed.<sup>243</sup> However, a significant amount of interpretive information can be drawn from section 806’s legislative history. Most notably, the

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237. *Id.* at 87.

238. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)); *see supra* note 91 and accompanying text.

239. *See supra* note 93.

240. *See supra* note 94.

241. *See supra* notes 98–103 and accompanying text.

242. *See supra* notes 98–103 and accompanying text.

243. *See supra* note 52 and accompanying text.

Committee Report and the statements of Senator Patrick Leahy, one of section 806's principal drafters,<sup>244</sup> discuss several key purposes for this provision of SOX: providing whistleblowers with protection from retaliation under federal law,<sup>245</sup> changing the corporate culture that discriminates and retaliates against whistleblowers,<sup>246</sup> and encouraging more corporate whistleblowers to come forward to aid complex corporate fraud investigations.<sup>247</sup> Accordingly, to determine whether the legislative history supports the "definitively and specifically" standard or the "reasonably believes" standard, this Note analyzes which standard is more consistent with providing whistleblowers with protection from retaliation under federal law, changing the corporate culture that discriminates and retaliates against whistleblowers, and encouraging more whistleblowers to come forward and aid corporate fraud investigations.

There is no doubt that section 806 provides whistleblowers with protection from retaliation under federal law.<sup>248</sup> Although the "definitively and specifically" standard and the "reasonably believes" standard affect the breadth of this protection, both standards maintain the protection from retaliation that section 806 created. Accordingly, both standards will ensure that whistleblowers are protected from retaliation under federal law, and this issue is moot in determining which standard the legislative history supports.

On the other hand, only the reasonably believes standard properly effectuates Congress's goal of changing the corporate culture that silences whistleblowers by discriminating and retaliating against them. Congress specifically noted its concern that employers' outside counsel often determine the precise boundaries of state law whistleblower protection.<sup>249</sup> This, in turn, feeds the corporate culture that discriminates and retaliates against whistleblowers because employers are often well aware of what types of retaliatory conduct they can engage in without violating the law. The definitively and specifically standard leaves too much room for employers to discriminate and retaliate against whistleblowers without violating the law. Indeed, in *Platone*, the whistleblower had a reasonable belief that the conduct she reported violated section 806, according to the ALJ,<sup>250</sup> but the ARB held that this was not enough to be protected under the definitively and specifically standard.<sup>251</sup> Thus, in that case, an employer was permitted to retaliate against an employee who was attempting to blow the whistle on conduct that she reasonably believed was improper. Therefore, only the "reasonably believes" standard furthers Congress's goal of changing the corporate culture that discriminates and retaliates against whistleblowers.

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244. See *supra* note 56.

245. See *supra* notes 60–66 and accompanying text.

246. See *supra* notes 67–69 and accompanying text.

247. See *supra* note 59.

248. See *supra* note 51; see also, e.g., Moberly, *supra* note 105, at 67.

249. See *supra* note 64 and accompanying text.

250. See *supra* note 179 and accompanying text.

251. See *supra* note 181 and accompanying text.

The reasonably believes standard is also more consistent with Congress's goal of encouraging whistleblowers to come forward and aid corporate fraud investigations. One could argue that the reasonably believes standard is inconsistent with this goal because it does not require whistleblowers to provide enough information to root out illegal conduct. However, Congress explained that section 806 was intended to impose the normal reasonable person standard,<sup>252</sup> and, under this standard, an employee remains protected from retaliation even if the alleged illegal conduct did not violate the law.<sup>253</sup> By clearly invoking a standard that protects employees even if the alleged illegal conduct turns out to be legal, Congress decided that the best way to aid corporate fraud investigations was to ensure that all complaints, even potentially inaccurate ones, are brought to the attention of law enforcement authorities. Accordingly, it cannot be said that Congress's intent was only to protect whistleblowers who report information specific enough to root out illegal conduct. Further, the easiest way to encourage more whistleblowers to come forward is to protect a broad range of activity,<sup>254</sup> which can be achieved by adopting the reasonably believes standard.<sup>255</sup>

In all, although either standard would provide whistleblowers with protection against retaliation under federal law, only the "reasonably believes" standard is consistent with Congress's goal of changing the corporate culture that discriminates and retaliates against whistleblowers and encouraging more whistleblowers to come forward to aid corporate fraud investigations.

*C. The "Reasonably Believes" Standard Is More Consistent with the Reasonable Person Standard that Congress Intended*

Congress "intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts" through section 806.<sup>256</sup> This reasonable person standard, according to the ARB, only requires that a whistleblower's communications "touch upon" or "implicate" the statute in question.<sup>257</sup> Also, Congress intended section 806's whistleblower protections to be similar to the protections provided under the WPA,<sup>258</sup> which only requires that a whistleblower report conduct that she "reasonably believes" constitutes government fraud or waste to engage in protected activity.<sup>259</sup>

The "reasonably believes" standard is more consistent with what Congress intended. It only requires that a whistleblower actually believe that there has been a violation of section 806 and that a reasonable person in

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252. *See supra* note 72.

253. *See supra* note 223 and accompanying text.

254. *See supra* note 194.

255. *See supra* note 194.

256. S. REP. NO. 107-146, at 19 (2002); *see also supra* note 72 and accompanying text.

257. *See supra* note 192 and accompanying text.

258. *See supra* note 78.

259. *See supra* notes 79-81 and accompanying text.

her position would have the same opinion.<sup>260</sup> Thus, a whistleblower's alleged protected activity could merely "touch upon" or "implicate" a violation of the rules, regulations, or laws listed in section 806, which is the standard that Congress intended, and satisfy the reasonably believes standard. On the other hand, by its own terms, the "definitively and specifically" standard demands more than merely touching upon or implicating section 806. Further, it is its own distinct legal standard apart from the normal reasonable person standard. Accordingly, the reasonably believes standard is more consistent with the reasonable person standard that Congress intended.

*D. The Dodd-Frank Act Did Not Constitute Congressional Endorsement of or Acquiescence to the "Definitively and Specifically" Standard*

The Supreme Court has stated that congressional inaction is "perhaps the weakest of all tools for ascertaining legislative intent," and that courts should be "loath" to presume that inaction amounts to congressional endorsement unless "the issue plainly has been the subject of congressional attention."<sup>261</sup> Here, the Dodd-Frank Act amendments to section 806 were enacted with little congressional attention.<sup>262</sup> Accordingly, the Dodd-Frank Act cannot be interpreted as congressional endorsement of or acquiescence to the definitively and specifically standard.

*E. Public Policy Perspective*

In addition to being more consistent with the text and legislative history of section 806, the "reasonably believes" standard also effectuates two important public policy goals. First, it will help more whistleblowers take advantage of section 806's anti-retaliation protections, and, second, it will harmonize the protected activity standards under SOX and the Dodd-Frank Act. Congress enacted section 806 in part because it believed that protecting corporate whistleblowers was in the public interest due to whistleblowers' critical role in uncovering and reporting corporate fraud.<sup>263</sup> However, whistleblowers have had very little success using section 806's anti-retaliation protections.<sup>264</sup> This lack of success is partly due to a narrow interpretation of the scope of protected activity.<sup>265</sup> The reasonably believes standard will significantly broaden the scope of protected activity,<sup>266</sup> and, therefore, will help whistleblowers make use of the anti-retaliation provisions under section 806, which Congress believed served an important

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260. *See supra* notes 219–28 and accompanying text.

261. *Supra* note 104 and accompanying text. The Supreme Court also seems particularly disenchanted with congressional acquiescence to, or endorsement of, administrative interpretations of statutes. *See supra* note 104.

262. *See supra* note 120.

263. *See supra* note 59.

264. *See supra* note 110 and accompanying text.

265. *See supra* notes 107, 117 and accompanying text.

266. *See supra* note 194.

public interest.<sup>267</sup> Additionally, while the “reasonably believes” standard will not entirely bridge the gap between SOX and the Dodd-Frank Act, it will help by harmonizing the protected activity standards under the two statutes.<sup>268</sup> This should allay some of the fear<sup>269</sup> that the Dodd-Frank Act has created a two-tiered whistleblower protection scheme.

#### CONCLUSION

Whistleblowers play a critical role in detecting and reporting corporate fraud.<sup>270</sup> Therefore, protecting them from retaliation is an important public policy goal.<sup>271</sup> However, despite Congress’s attempt to protect whistleblowers from retaliation under federal law through section 806 of SOX, whistleblowers have had little success using this new legal protection.<sup>272</sup> One of the major impediments to section 806’s effectiveness is the “definitively and specifically” standard, which is a narrow construction of the scope of protected activity under section 806.<sup>273</sup>

In recognition of the overwhelming evidence that the “reasonably believes” standard is the proper interpretation of the scope of protected activity under section 806, federal courts that neglect *Chevron* and review the ARB’s SOX decisions through their own ad hoc statutory interpretation should adopt the reasonably believes standard. This change would bring the scope of protected activity under section 806 in line with its text and legislative history, as well as important public policy goals.

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267. *See supra* note 59.

268. *See supra* note 124 and accompanying text (discussing the final SEC rules implementing the Dodd-Frank Act, which adopted the “reasonably believes” standard to govern the scope of protected activity).

269. *See supra* note 133 and accompanying text.

270. *See supra* notes 24–26 and accompanying text.

271. *See supra* note 59.

272. *See supra* note 106 and accompanying text.

273. *See supra* notes 107, 117.