

# SARBANES-OXLEY WHISTLEBLOWER PROTECTION UPDATE

## Administrative Review Board Holds that Termination of Employee for Disclosing Confidential Corporate Information May Be Unlawful

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The Department of Labor's Administrative Review Board (ARB) held last week that an employee's misconduct in distributing confidential corporate information must be balanced against the objectives of federal whistleblower "bounty" programs, and that an employer accordingly might not be able lawfully to discharge or discipline the employee for distributing such information. The case is *Vannoy v. Celanese Corp.*, ARB No. 09-118 (Sept. 28, 2011).

### Background

Celanese hired Vannoy as a contract employee to help the company reconcile employee expense reimbursement requests and payments. Celanese later hired Vannoy as a full time Program Administrator for the expense reimbursement program after it became apparent that the company's credit card reimbursement system had weaknesses. In addition, Celanese retained a consultant to analyze the expense reimbursement program, who recommended a new system for handling employee business expenses. Celanese replaced the credit card program with an electronic reimbursement system in December 2006.

For reasons not made clear in the ARB's decision, Vannoy filed an internal concern under Celanese's Business Conduct Policy soon thereafter, in February 2007. The concern was that the company's former credit card reimbursement system posed a financial risk to the company. At the same time, Vannoy hired an attorney to represent him in pursuing a bounty under the IRS' Whistleblower Rewards Program. Vannoy's complaint to the IRS centered on the alleged failure of employees to submit sufficient documentation for reimbursement requests, and he ultimately sent the IRS 33 documents containing confidential and proprietary information. Among other things, Vannoy emailed a document "containing 1,600 unique social security numbers of current and former Celanese employees to the personal e-mail account" of his domestic partner, presumably so that he could then give it to his lawyer. The data Vannoy distributed also included employee home addresses and credit card numbers.

Vannoy understood that the information was confidential, knew he did not have permission to distribute it, and knew it violated a confidentiality agreement he signed and company policies designed to guard against such disclosures. Celanese found out and suspended him without pay pending an investigation. Celanese soon thereafter laid Vannoy off due to a previously announced company plan to outsource Vannoy's entire department to Hungary.

### The ARB Decision

Vannoy filed a whistleblower complaint challenging his suspension and termination under the Sarbanes-Oxley Act (SOX). An administrative law judge sized up the case and granted Celanese's motion for summary dismissal. In its recent decision, the ARB reversed that ruling. Significantly, the ARB held that a trial is required to weigh Celanese's interests in enforcing its policies protecting confidential information against the objectives of the IRS' bounty program: *"There is a clear tension between a company's legitimate business policies protecting confidential information and the whistleblower bounty programs created by Congress to disclose confidential company information in furtherance of enforcement of tax and securities laws.... Congress intended to encourage federal agencies to seek out and investigate independently procured, non-public information from whistleblowers such as Vannoy to eliminate abuses in the tax realm under the IRS Whistleblower program and now in the securities realm with the SEC Whistleblower program.... Under the terms of the SEC's whistleblower bounty program, Congress anticipated that the whistleblower would provide independently garnered insider information..."*

The ARB held that "Vannoy's allegations must be viewed in light of these significant enforcement interests" and observed that Vannoy "procured employee data ... as part of his efforts to facilitate his complaint with the IRS as to Celanese's accounting practices." The "crucial question[s]" for the ALJ at trial, the ARB stated, are "whether the information that Vannoy procured from the company is the kind of 'original information' that Congress intended to be protected under either the IRS or SEC whistleblower programs" and whether the "manner of the transfer of information" was protected by SOX.

The ARB also held that Vannoy engaged in protected activity even though his concerns had nothing to do with shareholder fraud. Vannoy's internal complaint under the Business Conduct Policy asserted that the company had misstated its financial records and underestimated its tax burden. According to the ARB, his "complaints concerning Celanese's business practices, assertions as to misstated financial records, and shortcomings in the company's 'accounting controls' support the reasonableness of his belief that the company was engaging in accounting misconduct in violation of SOX." Without explaining the precise language in SOX that protected Vannoy's conduct, the ARB concluded that Vannoy's concerns "related to noncompliance with federal securities laws and fraud generally." The ARB also held that a complaint to the IRS can be a protected activity under SOX.

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