U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

AMY VAN,

COMPLAINANT,

v.

JP MORGAN CHASE & CO., et al.,

RESPONDENT.

ARB CASE NO. 2023-0018

ALJ CASE NO. 2022-SOX-00028
ALJ WILLIAM P. FARLEY

DATE: November 5, 2024

Appearances:

For the Complainant:
Thad M. Guyer, Esq. and Stephani L. Ayers, Esq.; *T.M. Guyer and Ayers & Friends*; Medford, Oregon

For the Respondent:
Michael D. Schissel, Esq. and Pamela E. Safirstein, Esq.; *Arnold & Porter Kaye Scholer, LLP*; New York, New York

Before HARTHILL, Chief Administrative Appeals Judge, and WARREN, Administrative Appeals Judge

DECISION AND ORDER REVERSING AND REMANDING

WARREN, Administrative Appeals Judge:

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX),[1] its implementing regulations,[2] and the Consumer Financial Protection Act of 2010,

[1] 18 U.S.C. § 1514A.

[2] 29 C.F.R. Part 1980 (2024).

Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (CFPA),[3] and its implementing regulations.[4] Complainant Amy Van (Complainant or Van) filed a complaint against Respondent JP Morgan Chase & Co. (Respondent or JP Morgan & Chase) alleging that JP Morgan & Chase terminated her employment and took other adverse actions against her in violation of the whistleblower protection provisions of SOX and the CFPA. On January 20, 2023, a Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Respondent's Motion to Dismiss (Order). Van appealed the matter to the Administrative Review Board (ARB or Board).

On appeal, the Board must determine whether the ALJ erred in dismissing Van's complaint. A complaint under SOX and the CFPA only needs to provide "fair notice" of the claim.[5] We agree with Van that the allegations in her July 27, 2022 Restated Complaint meet this lenient standard—she provided fair notice that she engaged in protected activity under SOX and the CFPA when she disclosed violations regarding JP Morgan & Chase's Customer Identification Program (CIP) to her supervisors and corporate management. We therefore reverse the January 20, 2023 Order and remand the case for further proceedings consistent with this decision.

BACKGROUND

On April 2, 2021, Van filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that JP Morgan & Chase violated the whistleblower protection provisions of SOX and the CFPA.[6] On July 26, 2022, OSHA issued findings that JP Morgan & Chase provided "clear and convincing evidence" that it terminated Van's employment for violating its Code of Conduct and there was therefore no reasonable cause to believe that Respondent violated the CFPA and SOX.[7]

On July 27, 2022, Van filed a request for a hearing before the Office of Administrative Law Judges (OALJ), attaching a 30-page Restated Complaint.[8] She stated that, as a Relationship Banker and Small Business Specialist, she had Financial Industry Regulatory Authority (FINRA) qualifications and received on-the-job training to understand federal regulations requiring JP Morgan & Chase to

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3 12 U.S.C. § 5567.

4 29 C.F.R. Part 1985 (2024).

5 *Evans v. EPA,* ARB No. 2008-0059, ALJ No. 2008-CAA-00003, slip op. at 9 (ARB July 31, 2012).

6 *See* OSHA Complaint (Apr. 2, 2021).

7 *See* OSHA determination letter (July 26, 2022).

8 Respondent's (Resp.) Brief (Br.) at 3.

implement and continually monitor a written Know Your Customer (KYC) process.[9] As a publicly traded company and a registered bank regulated by the Securities and Exchange Commission (SEC), JP Morgan & Chase was subject to U.S. federal banking and securities laws.[10] Van explained that the KYC process, designed to prevent financial crimes or misconduct by both customers and employees, required a CIP for the company's anti-money laundering compliance program.[11] The process also involved Customer Due Diligence (CDD) procedures aimed at preventing money laundering and financial fraud.[12] Van alleged that JP Morgan & Chase's account managers were inadequately trained in CDD procedures, often collecting customer information without conducting thorough risk assessments before opening accounts.[13]

Van asserted that she engaged in several protected activities by reporting KYC and CIP violations to her supervisors and escalating these concerns to corporate management.[14] She indicated that she disclosed possible fraud, reported other employees' mistakes, filed a Suspicious Activity Report (SAR), prevented the use of altered documents in JP Morgan & Chase's course of business, identified possible false customer identities, reported citizen issues, reported management hostility to an in-house attorney, reported the lack of regulatory enforcement, reported the unauthorized use of a messenger app and unapproved translators by employees, reported regulatory issues internally, provided evidence to the Office of the CEO, and made a report to JP Morgan & Chase's employee relations department.[15] Van detailed approximately fifteen specific instances of potential KYC and CIP violations involving JP Morgan & Chase employees and both prospective and current customers.[16]

Van claimed that, in retaliation for her making KYC-CIP protected disclosures, JP Morgan & Chase "subjected her to an increasingly hostile work environment" and launched an investigation into her for allegedly stating she wanted to harm her former supervisor.[17] She further alleged that JP Morgan & Chase placed her on paid administrative leave, changed the locks to her office,

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9 Order at 3; Restated Complaint at 3, 5.

10 Restated Complaint at 4.

11 *Id.* at 17, 19; 31 C.F.R. § 1020.220(a)(2).

12 Order at 3; Restated Complaint at 6.

13 Restated Complaint at 6.

14 *Id.* at 9; Order at 3-4.

15 Order at 4.

16 Restated Complaint at 7-14.

17 *Id.* at 14-15; Order at 4.

terminated her employment on October 30, 2020, and submitted a false statement in a U5 form with FINRA.[18] Van explained that the U5 form, a "Uniform Termination Notice for Securities Industry Registration," has prevented her from securing employment in her field since its filing.[19]

On November 7, 2022, the ALJ held a pre-hearing conference, and JP Morgan & Chase stated that the case should be dismissed.[20] On November 10, 2022, JP Morgan & Chase filed a Summary of Its Motion to Dismiss alleging that the complaint failed to state a claim upon which relief could be granted.[21] JP Morgan & Chase contended that Van failed to describe any fraudulent scheme related to wire or mail fraud that she reasonably believed occurred under SOX.[22] It also asserted that Van failed to allege that she reasonably believed that JP Morgan & Chase was engaged in unfair, abusive, and deceptive practices against its clients in violation of the CFPA or that JP Morgan & Chase violated any of the enumerated statutes within the Consumer Financial Protection Bureau (CFPB)'s jurisdiction.[23] On November 11, 2022, Van filed "Complainant's Position on the Motion to Dismiss" arguing that "[t]he Restated Complaint alleges whistleblower retaliation" under SOX and the CFPA.[24] She explained that OSHA does not apply federal court pleading standards to its complaints and that the proper pleading standard to apply was the "fair notice" pleading standard set forth in *Evans v. E.P.A.*[25] The ALJ held a hearing on the motion to dismiss on November 21, 2022.[26]

On January 20, 2023, the ALJ granted Respondent's Motion to Dismiss and determined that Van failed to allege that she engaged in protected activity covered under SOX or the CFPA.[27] The ALJ concluded that Van failed to make allegations in the Restated Complaint that met the requirements of a SOX claim.[28] He summarily determined that "the factual allegations do not meet the criteria of Section 806 claims under section: (1) 1341 mail fraud; (2) 1343 wire fraud; (3) 1344

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18 Order at 4; Restated Complaint at 15-16.

19 Restated Complainant at 16.

20 Order at 1.

21 *Id.*

22 Resp. Summary of Motion to Dismiss at 3.

23 *Id.* at 6.

24 Order at 2; *see* Comp.'s Position on Motion to Dismiss at 2.

25 Comp.'s Position on Motion to Dismiss at 1-2 (citing *Evans,* ARB No. 2008-0059, slip op. at 9).

26 Hearing Tr. at 1.

27 Order Granting Respondent's Motion to Dismiss (ALJ Jan. 20, 2023).

28 Order at 5.

bank fraud; or (4) 1348 securities fraud," and that as a result Complainant had not alleged an enumerated fraud statutes violation as defined by 18 U.S.C. § 1514A(a).[29] The ALJ likewise summarily determined that Van failed to allege that she engaged in protected activity under the CFPA "pursuant to any of the 18 laws within the Consumer Financial Protection Bureau's jurisdiction."[30] Accordingly, the ALJ dismissed Van's complaint under SOX and the CFPA. [31]

On January 26, 2023, Van appealed the ALJ's Order to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under SOX and the CFPA.[32] The ARB reviews de novo an ALJ's order on a motion to dismiss.[33] In ruling on a motion to dismiss, the ALJ and the ARB "must view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party."[34]

DISCUSSION

1. Motion to Dismiss Standard

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges allow a party to move to dismiss part or all of the matter for failure to state a claim upon which relief can be granted.[35] In *Sylvester,* the ARB held that because federal litigation materially differs from administrative whistleblower litigation within the Department of Labor, it would apply a less stringent legal standard for stating a claim in a SOX complaint filed in

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29 *Id*.

30 *Id.* at 6.

31 *Id*.

32 *See* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. §§ 1980.110(a), 1985.110(a).

33 *Bauche v. Masimo Corp.,* ARB No. 2022-0035, ALJ No. 2022-SOX-00010, slip op. at 4 (ARB Sept. 27, 2022) (citation omitted).

34 *Id.* at 5 (citing *Garvey v. Morgan Stanley,* ARB No. 2020-0034, ALJ No. 2017-SOX-00030, slip op. at 2-3 (ARB July 16, 2021)).

35 29 C.F.R. § 18.70(c).

an administrative proceeding.[36] The ARB further articulated this lower pleading standard in *Evans*, in which it established that to survive a motion to dismiss in an administrative proceeding before an ALJ, a complainant need only provide "fair notice" of their claim.[37] A complainant provides "fair notice" by articulating: "(1) some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation, and (4) a description of the relief that is sought."[38] When evaluating whether a complaint meets the "fair notice" pleading standard, the focus is "*solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised—not whether evidence exists to support such allegations."[39] Accordingly, we evaluate Van's complaint to determine whether it provided fair notice of the alleged protected activity under SOX[40] and the CFPA.[41]

2. The July 27, 2022 Restated Complaint Provided Fair Notice of Protected Activity Under SOX

A. Burdens of Proof Under SOX

The employee-protection provisions of the SOX prohibit covered publicly traded companies and certain related entities from retaliating against employees who provide information or assist in investigations related to certain fraudulent acts.[42] To establish a whistleblower claim under SOX, an employee must prove by a preponderance of evidence that (1) they engaged in protected activity; (2) the employer took adverse action against them; and (3) the protected activity was a

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[36] *Sylvester v. Parexel Int'l, Inc.,* ARB No. 2007-0123, ALJ Nos. 2007-SOX-0039, -0042, slip op. at 13 (ARB May 25, 2011).

[37] *Evans,* ARB No. 2008-0059, slip op. at 9.

[38] *Id.*

[39] *Id.* at 10.

[40] *Bauche,* ARB No. 2022-0035, slip op. at 15-18 (applying the "fair notice" pleading standard to a SOX complaint when determining whether the ALJ properly granted dismissal of the claim).

[41] When promulgating the CFPA regulations, the Department of Labor expressly rejected the heightened federal pleading standard at the complaint stage. *See* Department of Labor Rules and Regulations: Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010, 29 C.F.R. Part 1985, 81 Fed. Reg. 14,374, 14,377 (Mar. 17, 2016).

[42] *See* 18 U.S.C. § 1514A.

contributing factor to the adverse action.[43] If the employee establishes these elements, the employer may avoid liability if it can prove by clear and convincing evidence that, in the absence of the protected activity, it would have taken the same adverse action.[44]

B. Protected Activity Under SOX

An employee engages in protected activity under SOX if they provide information or otherwise assist in an investigation regarding any conduct which the employee reasonably believes to be a violation of: section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities and commodities fraud), any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of Federal law relating to fraud against shareholders.[45]

In the January 20, 2023 Order, the ALJ determined that Van failed to make allegations that "meet the requirements of a SOX claim," specifically the criteria of Section 806 claims for mail fraud, wire fraud, bank fraud, or securities fraud.[46] The ALJ, however, erroneously held Van's complaint to a higher standard than what is required at the pleading stage. To survive a motion to dismiss under 29 C.F.R. § 18.70(c), Van needed to "only allege 'some facts about the protected activity, showing some 'relatedness' to the laws and regulations of [SOX].' This is not a demanding standard."[47] Contrary to the ALJ's conclusion, Van's Restated

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[43] 29 C.F.R. § 1980.109(a); *Seguin v. Northrup Grumman Sys. Corp.,* ARB Nos. 2015-0038, -0040, ALJ No. 2012-SOX-00037, slip op. at 6 (ARB May 18, 2017) (citing *Sylvester*, ARB No. 2007-0123, slip op. at 9).

[44] 29 C.F.R. § 1980.109(b); *Seguin*, ARB Nos. 2015-0038, -0040, slip op. at 6 (citing *Menendez v. Halliburton, Inc.*, ARB Nos. 2009-0002, -0003, ALJ No. 2007-SOX-00005, slip op. at 11 (ARB Sept. 13, 2011)).

[45] 18 U.S.C. § 1514A(a)(1).

[46] Order at 5.

[47] *Gallas v. The Med. Ctr. of Aurora,* ARB Nos. 2015-0076, 2016-0012, ALJ Nos. 2015-SOX-00013, 2015-ACA-00005, slip op. at 10 (ARB Apr. 28, 2017) (quoting *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 2004-0149, ALJ No. 2004-SOX-00011, slip op. at 17 (ARB May 31, 2006)); *see also Evans,* ARB No. 2008-0059, slip op. at 9.

Complaint satisfies the standard for stating a claim that she engaged in SOX-protected activity.

i. Complainant alleged SOX-protected activity related to wire fraud sufficient to survive a motion to dismiss.

Wire fraud is defined as a scheme to defraud, or for obtaining money or property by means of fraud or fraudulent pretenses, by means of wire, radio, or television communication.[48]

In Van's Restated Complaint, she asserted that her reports of KYC-CIP violations constituted disclosures of wire fraud under SOX, as the alleged misconduct involved the "use of wires."[49] She explained that the purpose of the CIP procedures was to verify the identity of both U.S. and non-U.S. persons.[50] When verifying the identity of prospective customers through documents without photographs, the process included: (a) contacting a customer; (b) independently verifying the customer's identity by comparing the information provided by the customer with a public database or other source; and (c) obtaining a financial statement.[51] Van contended that since JP Morgan & Chase's business was conducted primarily through electronic applications, including the submission of identification forms, the majority of her CIP disclosures involved using wires, and were therefore protected under 18 U.S.C. § 1514A(a).[52] She also cited specific instances of alleged protected activity that she reasonably believed related to wire fraud under SOX.[53] For example, in paragraphs 24 to 26 of the Restated Complaint, Van noted that she discovered a non-U.S. citizen attempting to open a type of business account that was not available to non-resident foreign nationals.[54] She followed KYC-CIP procedures for verifying their identity and refused to open the requested account after determining that the paper copy of an online electricity bill provided by the customer was altered.[55] Van discovered that the customer had successfully opened a business account at another bank branch using the altered

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48 18 U.S.C. § 1343.

49 Restated Complaint at 25.

50 *Id.* at 19.

51 *Id.* at 20; 31 C.F.R. § 1020.220(a).

52 Restated Complaint at 25.

53 *Id.* at 7-14.

54 *Id.* at 7-8.

55 *Id.*

electricity bill and reported this non-compliant activity to JP Morgan & Chase's compliance officials.[56]

Van alleged that she believed her reports involved potential wire fraud because JP Morgan & Chase communicated and processed its representations about compliance with internal controls and CIP anti-money laundering requirements via telephone, internet, and facsimile transmissions.[57] She also described situations she believed involved reporting wire fraud based on suspicious funds transfers.[58]

The Board has similarly reversed dismissals of claims where complainants have sufficiently pled facts related to wire fraud under SOX. In *Johnson v. Wellpoint Companies, Inc.*, the ARB reversed an ALJ's order granting a motion to dismiss and motion for summary judgment.[59] The ARB noted that in the complaint, Johnson had alleged that she reasonably believed that Wellpoint's exclusion of open inquiries regarding state-sponsored health care plans, which were logged into the company's computer tracking system, constituted wire and mail fraud under SOX.[60] In reversing the dismissal of Johnson's claim, the ARB explained that "there was sufficient information contained in Johnson's complaint to satisfy the threshold requirements to survive a motion to dismiss under . . . *Evans*."[61] Similar to the *Johnson* complaint, Van's Restated Complaint alleged that she reasonably believed that JP Morgan & Chase's CIP violations, alleged misrepresentations of the effectiveness of its internal controls, and customers' suspicious fund transfers, were "protected under 18 U.S.C. § 1514A(a) (i.e. wire and mail fraud)" because they involved the use of wires and other electronic means.[62] Construing the evidence in the light most favorable to Van, we conclude that she has alleged that she engaged in SOX-protected activity related to wire §1343 fraud, sufficient to survive a motion to dismiss.

On appeal, JP Morgan & Chase argues that it was not reasonable for Van to believe that she was reporting wire fraud when she disclosed various KYC incidents because five of the six enumerated fraud statutes require a "belief of an intent to defraud."[63] Unlike the federal circuits in the cases cited by Respondents, however,

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56 *Id.* at 8.

57 *Id.* at 25.

58 *Id.* at 7-14, 25.

59 *Johnson v. Wellpoint Cos., Inc.,* ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 2 (ARB Feb. 25, 2013).

60 *Id.* at 2, 6.

61 *Id.* at 7.

62 Restated Complaint at 24-25.

63 Resp. Br. at 21.

the ARB does not require this "belief of an intent to defraud" when determining whether a complaint has provided fair notice of a SOX claim. Rather, the ARB requires a "reasonable belief" of a violation under SOX, which means an employee has a subjective belief that the complained-of conduct constitutes a violation of relevant law, and that the belief is objectively reasonable.[64] To satisfy the subjective component, the employee must show that they actually believed that the conduct constituted a violation of relevant law or was likely to, and to satisfy the objective component, the employee must show that "a reasonable person of similar experience, training, and factual knowledge would objectively believe that a violation has occurred."[65]

We conclude that Van sufficiently pled that she actually believed she complained of unlawful conduct when she reported various situations of potential wire fraud. For example, in paragraph 33 of the Restated Complaint, Van indicated that she filed a SAR about client L.L. because a possible wire transfer "raised her suspicion of potential money laundering."[66] She also stated that she reported JP Morgan & Chase's wire fraud and other unlawful conduct based on her "education on CIP requirements and FINRA rules and certifications."[67] For these reasons, the Board concludes that Van's Restated Complaint sufficiently described several allegations of protected activity that related to wire fraud under SOX, and these accusations may be objectively reasonable to employees with similar training and experience.[68]

ii. Complainant alleged SOX-protected activity related to the violation of an SEC rule or regulation sufficient to survive a motion to dismiss.

The whistleblower protection provisions of SOX also prohibit discrimination against an employee if they provided information or otherwise assisted in an investigation regarding any conduct which the employee reasonably believed to be a violation of any rule or regulation of the SEC.[69] The ALJ, however, failed to consider Van's allegation that she engaged in protected activity because she reasonably

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64 *Morrell v. DLH Holdings Corp.,* ARB No. 2023-0030, ALJ No. 2020-SOX-00005, slip op. at 10-11 (ARB Sept. 23, 2024).

65 *Id.*

66 Restated Complaint at 10.

67 *Id.* at 22.

68 *See Sharkey v. J.P. Morgan Chase, Co.,* 660 F. App'x 65, 68 (2d Cir. 2016) (in concluding that a complainant with similar qualifications and training had a "reasonable belief" that a client she had reported was involved in possible illegal activity, the Second Circuit considered the fact that J.P. Morgan Chase's training materials had identified a number of the client's activities as potential money laundering "red flags.")

69 18 U.S.C. § 1514A(a)(1).

believed that JP Morgan & Chase's actions violated an SEC rule that required publicly traded companies to have adequate internal controls over their financial reporting.

The Board agrees with Van that her Restated Complaint provided "detailed citations to authority" that "internal control requirements" are set forth in SEC Rule 13a-15(e), and that "Respondent failed to meet them."[70] In the Restated Complaint, Van alleged that her disclosures to JP Morgan & Chase officials "concerned a persistent pattern of violations of the account eligibility and identity authentication requirements imposed by federal banking and securities laws."[71] Despite these shortcomings, Van contended that JP Morgan & Chase's SEC filings indicated it had "disclosed all significant deficiencies in the design or operation of internal controls" and identified any "material weakness in internal controls"—which could adversely affect the preparation of its financial data.[72] The Restated Complaint alleged that the continued KYC violations were "evidence of false or reckless certifications by [JP Morgan & Chase] under Sections 302 and 404 of [SOX] that it had effective and reliable internal controls in place."[73] Van specifically pointed out that internal control requirements were set forth in SEC Rule 13a-15(e).[74]

SEC Rule 13a-15 provides that:

> (a) "Every issuer that has a class of securities registered pursuant to section 12 of the Act (15 U.S.C. 781) . . . must maintain disclosure controls and procedures (as defined in paragraph (e) of this section) and…internal control over financial reporting (as defined in paragraph (f) of this section).
> (b) Each such issuer's management must evaluate . . . the effectiveness of the issuer's disclosure controls and procedures, as of the end of each fiscal quarter. . . .
> (c) The management of each such issuer, that either had been required to file an annual report pursuant to section 13(a) or 15(d) of the Act. . . for the prior fiscal year or previously had filed an annual report with the [SEC] for the prior fiscal year . . . must evaluate . . . the effectiveness,

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70 *See* Complainant's (Comp.) Brief (Br.) at 19.

71 Restated Complaint at 17.

72 *Id.* at 25.

73 *Id.* at 26.

74 *Id.* at 27.

> as of the end of each fiscal year, of the issuer's internal control over financial reporting."[75]

Disclosure controls and procedures are subsequently defined as "controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files" are reported within the required time periods and are "accumulated and communicated to the issuer's management."[76]

The Restated Complaint specifically noted that the term "internal control over financial reporting" is defined as "a process . . . to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles." [77] Those policies and procedures include those that "provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements."[78]

In construing the alleged facts in favor of Van, we hold that the Restated Complaint sufficiently contained facts indicating that Van reported JP Morgan & Chase's continued KYC-CIP violations to management because she reasonably believed these disclosures "related" to a violation of the SEC's rule requiring internal controls. For example, Van identified situations when she emailed the Office of the CEO about the following KYC-CIP violations: (1) client Z.F.'s apparent false identity as a dual citizen; (2) an employee designating client E.W. a U.S. citizen when they were a non-U.S. citizen; and (3) the non-closure of an unauthorized account held by a non-resident.[79] We conclude that Van has sufficiently pled facts sufficient to survive a motion to dismiss, that she engaged in alleged protected activity because she reasonably believed that JP Morgan & Chase was violating SEC Rule 13a-15.[80]

Contrary to the ALJ's conclusion and Respondent's arguments, Van's July 27, 2022 Restated Complaint satisfies the "low threshold" for stating a claim that Van

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75 17 C.F.R. § 240.13a-15(a)-(c).

76 *Id.* at § 240.13a-15(e).

77 Restated Complaint at 27 (citing 17 C.F.R. § 240.13a-15(f)).

78 *Id.*

79 *Id.* at 11-12.

80 *See Klopfenstein,* ARB No. 2004-0149, slip op. at 17 (in remanding the case for the ALJ to consider Klopfenstein's SOX claim, the Board explained that his concerns that PCC Flow's conduct violated SEC Rule 13a-15 "related to a general subject that was not clearly outside the realm covered by the SOX . . . .").

engaged in SOX-protected activity.[81] Since Van's Restated Complaint pled facts describing SOX-protected activity related to wire fraud and a violation of SEC Rule 13a-15 regarding internal controls, which sufficiently meets the less stringent fair notice pleading standard, we reverse the ALJ's dismissal of her SOX claim.[82] Additionally, we remand the case to the ALJ to properly consider whether each of the alleged instances of protected activity in the Restated Complaint provided "fair notice" of Van's SOX claim and to proceed with evidentiary proceedings regarding those specific instances of alleged SOX-protected activity.

3. The July 27, 2022 Restated Complaint Provided Fair Notice of Protected Activity Under the CFPA

A. Burdens of Proof Under the CFPA

The CFPA whistleblower protection provisions prohibit covered persons or service providers from terminating or in any other way discriminating against covered employees if they have engaged in protected activity pertaining to the offering or provision of consumer financial products or services.[83] To establish a whistleblower claim under the CFPA, an employee must prove by a preponderance of the evidence that: (1) they engaged in CFPA-protected activity; (2) they were subjected to an adverse employment action; and (3) the protected activity contributed to the adverse action.[84] If the employee establishes these elements, the employer may avoid liability if it can prove by clear and convincing evidence that, in the absence of the protected activity, it would have taken the same adverse action.[85]

B. Protected Activity Under the CFPA

Under the CFPA's whistleblower protection provisions, an employee engages in protected activity if they provide or cause to be provided information to the employer relating to any act or omission that they reasonably believe to be a

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81 *See Smith v. Franciscan Physician Network,* ARB No. 2022-0065, ALJ No. 2020-ACA-00004, slip op. at 14-15 n.88 (ARB June 29, 2023) (discussing *Gallas* and describing the standard for summary judgment, as contrasted with the "low threshold required to defeat a motion to dismiss.").

82 *See McFadden v. Deutsche Bank,* ARB No. 2022-0002, ALJ No. 2021-SOX-00023, slip op. at 4 (ARB Jan. 26, 2022) (citation omitted) (noting that the "fair notice requirement is not a demanding standard.").

83 12 U.S.C. §§ 5481(5), 5567.

84 29 C.F.R. § 1985.109(a); *Horn v. Univ. of First Fed. Credit Union,* ARB No. 2018-0033, ALJ No. 2017-CFP-00003, slip op. at 4 (ARB June 18, 2020).

85 29 C.F.R. § 1985.109(b); *Childs v. Sente Mortgage,* ARB No. 2014-0043, ALJ No. 2013-CFP-00004, slip op. at 3 (ARB Oct. 29, 2015) (citing 12 U.S.C.A. § 5567(c)(3)).

violation of the CFPA or any other provision of law that is subject to the jurisdiction of, or enforceable by, the CFPB, or any rule, order, standard, or prohibition prescribed by the CFPB.[86]

In the January 20, 2023 Order, the ALJ determined that Van failed to allege that she engaged in protected activity "pursuant to any of the 18 laws within the Consumer Financial Protection Bureau's jurisdiction."[87] The ALJ, however, failed to consider whether Van alleged CFPA-protected activity pursuant to the other categories of consumer financial laws under 12 U.S.C. §5567(a). The Board agrees with Van that the "18 laws within the [CFPB]'s jurisdiction" referred to by the ALJ are only one category of federal consumer financial laws that could form the basis of protected activity under the CFPA.[88] In addition to the 18 enumerated federal consumer financial laws, the CFPA also protects activity "relating to any provision of law that is subject to the jurisdiction of the [CFPB]."[89]

C. Complainant alleged some facts related to the CFPA's prohibition against unfair, deceptive, and abusive practices sufficient to overcome a motion to dismiss

Section 5536 of the CFPA prohibits covered persons and service providers from engaging in unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[90] Therefore, to meet the fair notice pleading standard, Van's Restated Complaint must contain "some facts" about protected activity that is related to the CFPA's prohibition against engaging in unfair, deceptive, or abusive acts or practices in connection with a consumer financial product or service.[91]

Under the CFPA, an act or practice is unfair if it "(1) causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (2) such substantial injury is not outweighed by the countervailing

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86 12 U.S.C. § 5567(a); *see also* 29 C.F.R. § 1985.102.

87 Order at 6. The eighteen enumerated consumer financial laws are listed in 12 U.S.C. § 5481(12).

88 *See* Comp. Br. at 42.

89 *Childs,* ARB No. 2014-0043, slip op. at 3.

90 12 U.S.C. § 5536(a)(1)(B) ("It shall be unlawful for any covered person or service provider to engage in any unfair, deceptive, or abusive act or practice.")

91 *See Evans,* ARB No. 2008-0059, slip op. at 9; *see also* 29 C.F.R. § 1985.104(e)(2)(i) ("The complaint . . . must allege the existence of facts and evidence to make a prima facie showing as follows: (i) the employee engaged in a protected activity.")

benefits to consumers or to competition."[92] In Van's Restated Complaint, she alleged that she knew that failure to follow KYC account eligibility requirements could "*injure* the interests of customers in uninterrupted access to their money. . . ."[93] She further explained that disregarding CIP requirements could lead to the "unjustified interruption, freezing, or seizing of their account funds needed to support their families."[94] We hold that Van provided fair notice of her CFPA claim as she sufficiently pled disclosure of Respondent's alleged violation of KYC-CIP procedures because she believed customers could sustain "substantial injury" of a frozen account based on improper identity authentication practices.[95]

Van also provided "some facts" that related to the CFPA's prohibition against deceptive practices. An act or practice is deceptive if it (1) misleads or is likely to mislead the consumer; (2) if the consumer's practice, interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) if the representation, omission, act, or practice is material.[96] In Van's Restated Complaint, she alleged that she disclosed that JP Morgan & Chase was engaged in "consumer financial fraud . . . by intentionally perpetrating and acquiescing to customers and clients *being misled* as to their eligibility to open, maintain, and use their accounts."[97] Van further argued that Respondent was "*actively misrepresenting* client status and verification as U.S. persons and non-U.S. persons in order to induce them to deposit their funds with JP Morgan & Chase, and to pay for banking services" marketed by JP Morgan & Chase.[98] We conclude, therefore, that Van sufficiently pled that she disclosed Respondent's violations of CIP identity authentication procedures because she reasonably believed that JP

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92 12 U.S.C. § 5531(c)(1).

93 Restated Complaint at 6 (emphasis added).

94 *Id.* at 22.

95 *See CFPB v. Think Finance, LLC,* 2018 WL 3707911, at *1, 8 (D. Mont. Aug. 3, 2018) (in denying the defendant's motion to dismiss, the district court determined that defendant had engaged in "unfair and abusive practices" when it collected loan payments that customers did not owe).

96 *See* Investigator's Desk Aid to the Consumer Financial Protection Act of 2010 (CFPA) Whistleblower Protection Provision, at pp. 6-7; *see also CFPB v. Gordon,* 819 F.3d 1179, 1192 (9th Cir. 2016) (explaining that "an act or practice is deceptive if (1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.").

97 Restated Complaint at 22 (emphasis added).

98 *Id.* (emphasis added).

Morgan & Chase's conduct was misleading potential customers about their eligibility to open and maintain bank accounts.[99]

Lastly, Van's Restated Complaint also described activity that could be considered abusive under the CFPA. A practice is abusive if it "takes unreasonable advantage of (a) lack of understanding on the part of the consumer of the material risks, costs, or conditions of the products or service; (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (c) the reasonable reliance of the consumer on a covered person to act in the interests of the consumer."[100] Van explained in her Restated Complaint that federal regulations required that the CIP include risk-based procedures for verifying a customer's identity, which included an assessment of the "bank's size, location, and customer base."[101] Van indicated that JP Morgan & Chase had a large client base of "foreign born customers, many of whom had *significant language and cultural barriers* to *understanding account eligibility standards*."[102] She argued that instead of complying with federal regulations to consider its customer base, JP Morgan & Chase had its "employees and managers aggressively attempt to gain them as customers, despite CIP."[103] Since Van's Restated Complaint alleged facts that JP Morgan & Chase was taking unreasonable advantage of the lack of understanding on the part of its concentration of foreign born customers regarding the CIP identity eligibility requirements needed to open and maintain accounts, we conclude that Van has sufficiently pled that she engaged in CFPA-protected activity.[104]

JP Morgan & Chase contends that Van did not allege a claim under the CFPA because the "alleged KYC incidents in no way rise to the level of what OSHA itself considers to encompass 'unfair, deceptive, or abusive' acts or practices against consumers with regard to CFPA whistleblowers."[105] We reject this argument for two

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99 *See CFPB v. Certified Forensic Loan Auditors, LLC,* 2020 WL 2556417 at *2, 4 (C.D. Cal. May 20, 2020) (in denying the defendant's motion to dismiss, the district court found that the CFPB had sufficiently pled that defendants engaged in deceptive practices when they "misrepresented" the likely effectiveness of their services and qualifications of those that performed them in order to convince consumers to purchase their services).

100 12 U.S.C. § 5531(d).

101 Restated Complaint at 19 (citing 31 C.F.R. § 1020.220(a)).

102 *Id.* at 22 (emphasis added).

103 *Id.* at 19.

104 *See Think Finance, LLC,* 2018 WL 3707911, at * 8 (the district court noted that the amended complaint sufficiently pled a claim for abusive conduct under the CFPA when the complaint asserted "that borrowers lacked an understanding" of the law applicable to [d]efendants' loans" . . . .).

105 Resp. Br. at 36-37.

reasons. First, Respondent's argument would essentially require Van to demonstrate an actual violation of the CFPA to plead that she engaged in protected activity. The law, however, does not require such a showing to survive a motion to dismiss. Instead, a motion to dismiss is based "solely on the allegations in the complaint . . . not whether evidence exists to support such allegations."[106] Second, a covered employee need only allege they "reasonably believe" that the reported conduct is a violation of the CFPA or any other provision of law that is subject to the jurisdiction of the CFPB, or any rule, order, standard, or prohibition prescribed by the CFPB.[107]

When construing the evidence in the light most favorable to Van, we conclude that Van has adequately provided "some facts" about alleged protected activity that she reasonably believed were related to CFPA's prohibition about engaging in unfair, deceptive, or abusive acts or practices against consumers related to a consumer financial product or service. As Van provided fair notice of her CFPA claim, we reverse the ALJ's finding to dismiss her CFPA claim and remand the case to the ALJ to proceed with evidentiary proceedings.

CONCLUSION

For the above reasons, we **REVERSE** the ALJ's Order Granting Respondent's Motion to Dismiss and **REMAND** this matter for further proceedings consistent with this decision and order.

SO ORDERED.

IVEY S. WARREN
Administrative Appeals Judge

SUSAN HARTHILL
Chief Administrative Appeals Judge

106 *Evans,* ARB No. 2008-0059, slip op. at 10.

107 12 U.S.C. § 5567(a)(1).

CERTIFICATE OF SERVICE

ARB-2023-0018 Amy Van v. JP Morgan (Case No: 2022-SOX-00028)

I certify that the parties below were served this day.

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