U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

CARRI S. JOHNSON,	**ARB CASE NO. 08-032**
COMPLAINANT,	**ALJ CASE NO. 2005-SOX-015**
v.	**DATE: March 31, 2011**

SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG,

RESPONDENTS.

Appearances:

For the Complainant:
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For the Respondents:
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For the United States Securities and Exchange Commission, as Amicus Curiae:
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For the Chamber of Commerce of the United States of America, as Amicus Curiae:
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For the Sensible Law Institute, as Amicus Curiae:
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For David Landau & Associates, as Amicus Curiae:
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For the Government Accountability Project, National Employment Lawyers Association, and National Whistleblowers Center, as Amicus Curiae:
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For Sempra Energy Trading LLC, as Amicus Curiae:
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For Berkshire Hathaway, Inc. and FlightSafety International, Inc., as Amicus Curiae:
Paul E. Hash, Esq.; Michael J. DePonte, Esq.; ***Jackson Lewis***

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge*****, presiding en banc; Judge E. Cooper Brown, concurring.**[1]

[1] Judge Wayne C. Beyer was a member of the Administrative Review Board when the Complainant filed her appeal, but his term had ended when the en banc deliberations began and the

DECISION AND ORDER OF REMAND

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (Sarbanes Oxley or SOX), 18 U.S.C.A. § 1514A (West Supp. 2010). Section 806 and its implementing regulations at 29 C.F.R. Part 1980 (2010) protect covered employees from retaliation who, among other things, "provide information . . . or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the Securities and Exchange Commission, or any Federal law relating to fraud against shareholders.

Pursuant to a complaint initially filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), Complainant Carri S. Johnson alleged that Respondent Siemens Building Technologies, Inc. (SBT), a subsidiary of Respondent Siemens AG, wrongfully terminated her employment because she engaged in protected whistleblowing activity under Section 806. After OSHA rejected her complaint, Johnson requested a hearing before the Office of Administrative Law Judges (OALJ), which a DOL Administrative Law Judge (ALJ) held in May and July of 2006. Thereafter, pursuant to the Respondents' motion for judgment as a matter of law, the ALJ issued a decision on November 27, 2007, concluding that Respondent SBT was not a company covered by Section 806 of Sarbanes-Oxley, and accordingly dismissed the complaint with respect to both of the Respondents. Johnson timely appealed the ALJ's decision to the Administrative Review Board (ARB or Board).

For the following reasons, the Board, presiding en banc, concludes that Section 806 covers a subsidiary whose financial information is included in the consolidated financial statements of a parent company subject to the registration and reporting requirements of Sections 12 and 15(d), respectively, of the Securities Exchange Act of 1934. Accordingly, the ALJ's decision is vacated, and this case is remanded for further proceedings consistent with this Decision and Order of Remand.

BACKGROUND

Respondent SBT is a non-publicly traded subsidiary of Siemens Corporation, which in turn is a subsidiary of Respondent Siemens AG, a publicly traded company subject to the requirements of the Sarbanes-Oxley Act and to regulation by the Securities and Exchange Commission.[2] SBT hired Johnson in February 2002 as SBT's Branch Manager at its Roseville,

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decision was written. Judge Lisa W. Edwards joined the Board after the en banc panel had completed its deliberations and the opinion had been drafted, so she did not participate in this case.

[2] Section 806, 18 U.S.C.A. § 1514A(a), prohibits a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))" from retaliating against an employee who engages in whistleblower protected activity. For convenience, throughout this decision we refer to such companies as "publicly traded."

Minnesota, Fire Safety Division office She held this position until SBT terminated her employment on March 10, 2004. Complaint (Compl.) at 3; Recommended Decision and Order (R. D. & O.) at 6.

In response to her discharge, Johnson filed a timely complaint with OSHA alleging that SBT violated Section 806 of SOX when it terminated her employment because she reported fraudulent and illegal activity. Compl. at 1. Specifically, Johnson alleged that she reported discrepancies in billing practices, misrepresentations of income, overbooking jobs, and the creation of "phantom jobs" to inflate earnings; that after she reported her concerns to her supervisors, SBT began to retaliate against her with poor performance reviews; that one of her supervisors attempted to bribe her by offering to withdraw a poor performance review if she agreed to refrain from reporting any more activity; that she reported her concerns of fraud and retaliation to Siemens's District Human Resources Supervisor and later to members of a team reviewing the performance of the SBT Roseville branch; and that three days after reporting her concerns to the reviewing team, SBT terminated her employment. *Id.* at 2-3. Before OSHA, SBT countered that it terminated Johnson's employment because she failed to meet minimum job performance requirements. OSHA Order at 3. Finding no reasonable cause to believe that SBT discharged Johnson in retaliation for protected activity, OSHA rejected her complaint. Johnson requested a hearing before the Department of Labor's OALJ.

The presiding ALJ denied the Respondents' pre-hearing motions for summary disposition, and after ordering the addition of Siemens AG as a named party Respondent,[3] the ALJ held a hearing on the merits on May 15-19 and July 18-21, 2006. In the midst of the hearing proceedings, the Board issued *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*), in which the ARB held that a subsidiary acting as the agent of a publicly traded company with respect to the challenged employment decision can be held liable under Section 806.[4] In light of the Board's decision in *Klopfenstein I*, the ALJ ordered post-hearing briefing on the question of whether the Respondents, either or both, were subject to the prohibitions of Section 806. In conjunction with the briefing order, SBT filed a motion for judgment as a matter of law, asserting that Siemens AG was not a proper party and that SBT had not acted as Siemens AG's agent in terminating Johnson's employment. Following denial of an interlocutory appeal related to SBT's motion,[5]

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[3] Pursuant to Johnson's motion, the ALJ allowed the addition of Siemens AG as a Respondent because the company had been a party to the OSHA proceedings.

[4] The Board in *Klopfenstein I* remanded the case to the ALJ to apply agency theory. Following the ALJ's decision and order on remand, Klopfenstein filed a second appeal, resulting in the Board's decision in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 07-021, -022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (*Klopfenstein II*), *aff'd per curiam, Klopfenstein v. Admin. Review Bd.,* 2010 WL 4746668 (5th Cir. Nov. 23, 2010).

[5] After granting Johnson multiple extensions for filing a response to SBT's motion, the ALJ denied further extensions, and she filed an interlocutory appeal of that order with the ARB. The

the ALJ addressed the motion's merits. Concluding that SBT was not a covered employer under Section 806 because the record did not support a finding that SBT acted as Siemens AG's agent with respect to Johnson's termination, the ALJ dismissed her claims against SBT and Siemens AG. Outside of her coverage holding, the ALJ did not make any findings or conclusions of law on the primary merits of Johnson's claim. Johnson filed a timely petition for review of the ALJ's decision with the ARB.

Given the widespread significance of the issues raised, this matter was assigned for en banc review and the Board issued a briefing order requesting that the parties and amici curiae address specific questions concerning subsidiary coverage under Section 806. Subsequently, Congress enacted and the President signed into law on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). Because Section 929A of the Dodd-Frank Act amends Section 806, the Board requested parties and amici curiae to supplement their briefs by addressing what effect, if any, Section 929A has on this case and the issues presented for resolution.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under SOX, 18 U.S.C.A. § 1514A(b). The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See* 29 C.F.R. § 1980.110(a). The Board reviews the ALJ's findings of fact under the substantial evidence standard. 29 C.F.R. § 1980.110(b). The Board reviews questions of law de novo. *See Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

DISCUSSION

Relying on the Board's decision in *Klopfenstein I*, the ALJ concluded that Respondent SBT, Johnson's employer, was not covered by Section 806 of the Sarbanes-Oxley Act because neither SBT nor its employees acted as the agent of Siemens AG, SBT's parent company, with respect to Johnson's firing. R. D. & O. at 5, 7-8. The ALJ found no evidence that Siemens AG controlled SBT's employment decisions or that the company knew of or played any role in SBT's termination of Johnson's employment. *Id.* The ALJ found that Johnson complained exclusively to SBT employees about the alleged accounting irregularities and SBT's other fraudulent and illegal practices; that none of the information contained in her complaint was reported to Siemens AG; that all individuals Johnson identified as having played a role in her discharge were SBT employees; and that no evidence existed suggesting that anyone at Siemens AG was aware of her concerns about the alleged fraudulent and illegal practices, or aware of her

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Board denied the interlocutory appeal on January 19, 2007. *Johnson v. Siemens Building Techs., Inc.*, ARB No. 07-010, ALJ No. 2005-SOX-015 (ARB Jan. 19, 2007).

termination until after she was fired, or that anyone from Siemens AG was consulted or participated in the decisions at SBT leading up to and culminating in Johnson's firing. *Id.* Finally, the ALJ found that SBT and Siemens AG did not share common directors or management, and that personnel matters between the two companies were kept separate. R. D. & O. at 8. Accordingly, the ALJ held that SBT was not covered by SOX Section 806, and thus that Siemens AG could not be held liable for the actions of SBT and its employees with respect to Johnson's discharge.

The Board has held that a subsidiary can be covered as an agent under Section 806, but has not addressed the question of consolidated subsidiary coverage directly. *See Klopfenstein I & II*. In this case, the Board addresses the question of whether Section 806 covers non-public subsidiaries of publicly traded companies.

I. Subsidiary Coverage under Section 806

A. Statutory Language

Addressing the question of Section 806 coverage for a consolidated subsidiary, our objective is to fulfill the intent of Congress. As evidence of congressional intent we have before us such traditional sources as the language of the statute, its purposes and goals, and its legislative history. As with any issue of statutory construction, we begin our analysis with the language of the statute itself. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

On July 30, 2002, Congress enacted and the President signed into law the Sarbanes-Oxley Act of 2002. Section 806, 18 U.S.C.A. § 1514A, provides protection from retaliation to a covered employee who engages in SOX-protected activity. During the pendency of this appeal, on July 21, 2010, the President signed into law the Dodd-Frank Act. Section 929A of the Dodd-Frank Act amended Section 806 by inserting within subsection (a) the following provision: "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." Consequently, 18 U.S.C.A. § 1514A(a), as amended, currently reads in relevant part:

> (a) *Whistleblower protection for employees of publicly traded companies*. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), . . . *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company*, . . . 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. . . . [emphasis added].

In explanation of the 2010 amendment, the Senate Report accompanying S. 3217, ultimately Section 929A of the Dodd-Frank Act, stated:

> [Section 929A] amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

Senate Report 111-176 at 114 (Apr. 30, 2010) (S. 3217). Because the amending language directly addresses the issue before us, we must address the applicability of Section 929A to Johnson's case on appeal.

B. Applicability of Dodd-Frank Amendment to Pending Appeals

In construing the Dodd-Frank amendment's applicability to this case, we must first look to the language of the amending statute. Section 929A does not, itself, establish an effective date. Rather, Section 4 of the Dodd-Frank Act provides an effective date applicable to all sections unless otherwise specified:

> Except as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act.

Following *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), we view Section 4 as prescribing neither prospective nor retrospective application of Section 929A. We view "take effect 1 day after enactment" in Section 4, without more, to require that we "should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct." *Landgraf*, 511 U.S. at 280. We reject the Respondents' argument for a broader reading of the enactment date. Because we view Section 929A as silent on the issue of its temporal application, we apply the judicial default rules to determine whether a statute applies to cases pending on appeal. *Id*.

In determining whether to apply a statute to cases pending on appeal, we must balance two competing rules of statutory construction. The first rule of construction is that "a court is to apply the law in effect at the time it renders its decision." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). Against this rule, we consider a second rule of construction that "[r]etroactivity is not favored in the law," *Landgraf*, 511 U.S. at 264. While the courts have long embraced the presumption against retroactive legislation, "for just as long" courts have recognized that, in many situations, the law in effect at the time the court renders its decision

should be applied, "even though that law was enacted after the events that gave rise to the suit." *Landgraf*, 511 U.S. at 273. The application of law existing when the case was decided, however, does not violate the presumption against retroactivity unless the statute in question has retroactive effects. *Landgraf*, 511 U.S. at 269-70; *Patel v. Gonzales,* 432 F.3d 685, 690 (6th Cir. 2005).

1. Section 929A's application does not create retroactive effects

Finding no express Congressional instruction as to whether Section 929A should apply to cases pending on appeal, per *Landgraf's* instruction, we turn to the task of determining whether Section 929A, if applied, would have retroactive effect. As the Supreme Court in *Landgraf* noted:

> deciding when a statute operates "retroactively" is not always a simple or mechanical task. A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. . . . [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

511 U.S. at 268-269 (citations omitted). Further, when an amendment alters, even "significantly alters," the original statutory language, this does "not necessarily" indicate that the amendment institutes a change in the law. *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999). Certainly, Congress may amend a statute to establish new law, but it also may enact an amendment "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) (quoting *United States v. Sepulveda*, 115 F.3d 882, 885 n.5 (11th Cir. 1997)).

2. "Clarifications" do not create retroactive effects

Legislation clarifying, rather than altering, existing law "is not typically subject to a presumption against retroactivity and is applied in all cases pending on the date of enactment." *Middleton v. City of Chicago*, 578 F.3d 655, 663 (7th Cir. 2009); *Piamba Cortes*, 177 F.3d at 1283 ("concerns about retroactive application are not implicated when an amendment . . . is deemed to clarify relevant law rather than effect a substantive change in the law"). Consequently, if Section 929A is merely a clarifying amendment as indicated in the Senate report, we believe that the Dodd-Frank Amendment applies.

Courts examine several factors in determining whether an intervening statutory provision clarifies preexisting law rather than substantively changes it, including: "[1] whether the

enacting body declared that it was clarifying a prior enactment; [2] whether a conflict or ambiguity existed prior to the amendment; and [3] whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history." *Middleton*, 578 F.3d at 663-64; *see also Piamba Cortes,* 177 F.3d at 1283-84; *Liquilux Gas Corp. v. Martin Gas Sales,* 979 F.2d 887, 890 (1st Cir. 1992). Accordingly, our analysis of whether Congress sought to clarify SOX Section 806 through enactment of Section 929A of the Dodd-Frank Act begins by "look[ing] to statements of intent made by the legislature that enacted the amendment." *Brown v. Thompson*, 374 F.3d at 259.

a. Congressional intent for Section 929A to clarify existing statute

Examining Section 929A's text and title, there is no express indication that Congress intended it to clarify Section 806. The "clarification" language is found in the Senate Report accompanying the introduction of what would become Section 929A. S. Rep. 111-176, at 114. The fact that this expressed legislative intent is contained only in the Senate Report dictates that we proceed with caution in reliance upon Congress's declaration. *Middleton*, 578 F.3d at 664; *Piamba Cortes*, 177 F.3d at 1284. Accordingly, we look to additional factors to determine whether Section 929A truly clarifies preexisting law rather than substantively changes it.[6]

b. Subsidiary coverage under Section 806 was unsettled law before Section 929A

As previously noted, the second factor courts consider in determining whether an intervening statutory provision is a clarification of preexisting law, rather than a substantive change, is whether an ambiguity or conflict in interpretation existed prior to the amendment. "[C]ourts regularly view a conflict in the courts with regard to the proper interpretation of a statute . . . as an indication that Congress passed a subsequent amendment to clarify rather than change existing law."[7] "Amending legislation is perceived as clarifying, not changing, an

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[6] *Middleton*, 578 F.3d at 664. We recognize that several other sections of the Dodd-Frank Act expressly state in their respective titles or text that the provisions are "clarifications" of preexisting law, thus implicating the negative inference that Congress did not intend for Section 929A, the title and text of which are silent in comparison, to constitute a similar clarification. Specifically cited by the Chamber of Commerce are Dodd-Frank Act Sections 406, 912, 919, and 928. *See* Reply Brief of Chamber of Commerce as Amicus Curiae at 10. The other sections of Dodd-Frank wherein "clarification" is expressly stated in the Sections' respective titles or text address subject matters wholly distinct from that addressed by Section 929A. Thus, as the Supreme Court held in *Martin v. Hadix*, the negative inference does not arise. 527 U.S. 343, 356 (1999) (ruling presence of specific language in one provision generated negative inference that omission of such language in section covering similar subject matter was intentional).

[7] *Brown v. Thompson,* 374 F.3d at 259 n.2 (citing *ABKCO Music, Inc., v. LaVere*, 217 F.3d 684, 691 (9th Cir. 2000)), *Piamba Cortes*, 177 F.3d at 1283-84, and *Plyler v. Moore*, 129 F.3d 728, 736 n.10 (4th Cir. 1997)); *Brown v. Marquette Savings & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982) (A "dispute or ambiguity, such as a split in the circuits, [is] an indication that a subsequent amendment is intended to clarify, rather than change, the existing law.").

original statute's intended meaning when a conflict of statutory interpretation has arisen."[8] Where the pre-amendment law is found to be clearly settled, however, as was the situation in *Zarcon, Inc. v. NLRB,* 578 F.3d 892, 896 (8th Cir. 2009), courts refuse to find an intervening law or amendment "clarifying" in the absence of express congressional command found within the text of the intervening enactment.[9]

The issue of subsidiary coverage before Dodd-Frank was far from settled law. Prior to its recent amendment, Section 806 neither expressly included nor excluded from coverage "consolidated subsidiaries" of publicly traded companies. As a result, the statutory text has been labeled "far from pellucid" with respect to the scope of its intended coverage. *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 152 (D. Mass. 2010). Significant conflicts have developed in the case law interpreting pre-amendment Section 806's coverage of subsidiaries. Department of Labor's ARB, its ALJs, and the federal courts have been deeply divided over the subsidiary coverage issue under Section 806. Opinions have ranged from near universal subsidiary coverage to no coverage for subsidiaries.[10] In lieu of or in conjunction with common law agency, ALJs have also applied the "integrated enterprise" or "single employer" test to Section 806 cases involving subsidiaries.[11]

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8 *Porter v. Commissioner*, 856 F.2d 1205, 1209 (8th Cir. 1988).

9 *See also Summers v. U.S. Dep't of Justice,* 569 F.3d 500 (D.C. Cir. 2009). *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), is cited in support of the argument that Section 929A removes a defense presently available to subsidiaries of publicly traded companies, and thus if Section 929A applied to pending cases, it would effect a substantive change in the law having an impermissible retroactive effect. As to the argument relying upon *Hughes Aircraft,* that Section 929A removes a presently available defense, we do not find the argument persuasive. Unlike the legislative amendment at issue in *Hughes Aircraft*, Section 929A does not extinguish settled law by removing express language from an existing statute. *Id.* at 945-46.

10 *See, e.g.*, *Morefield v. Exelon Servs., Inc.*, ALJ No. 2004-SOX-002 (Jan. 28, 2004) (ALJ viewed subsidiaries, for SOX purposes, as "an integral part of the publicly traded company, inseparable from it for purposes of evaluating the integrity of its financial information"); *Hughart v. Raymond James & Assocs.*, ALJ No. 2004-SOX-009, slip op. at 45 (Dec. 17, 2004) (subsidiary coverage under Section 806 rejected in the absence of evidence demonstrating that the subsidiary acted as its parent company's agent with respect to the challenged employment action); *Grant v. Dominion E. Ohio Gas*, ALJ No. 2004-SOX-063 (Mar. 10, 2005) (rejecting subsidiary coverage; while discussing potential applicability of agency and alter ego theories of liability); *Dawkins v. Shell Chem.*, ALJ No. 2005-SOX-041 (May 16, 2005) (parent company not a named party and no evidence to pierce the corporate veil under alter ego theory); *Bothwell v. Am. Income Life*, ALJ No. 2005-SOX-057 (Sept. 19, 2005) (non-publicly traded companies are not covered employers); *Andrews v. ING N. Am. Insur. Corp.*, ALJ Nos. 2005-SOX-050, -051 (Feb. 17, 2006) (rejecting agency theory as basis for holding subsidiary liable); *Walters v. Deutsch Bank AG*, ALJ No. 2008-SOX-070 (Mar. 23, 2009) (returning to a broad theory of coverage for subsidiaries).

11 *See, e.g., Carciero v Sodexho Alliance*, ALJ No. 2008-SOX-012 (Feb. 19, 2009); *Merten v. Berkshire Hathaway, Inc.*, ALJ No. 2008-SOX-040 (Oct. 21, 2008) (rejecting Section 806 subsidiary

In 2006, the ARB addressed for the first time the question of whether a non-public subsidiary of a publicly traded parent company was subject to the prohibitions of Section 806. In *Klopfenstein I*, the Board held a subsidiary can be an agent under a common law agency theory and that the parent company need not be a named party.[12] Notwithstanding the Board's ruling in *Klopfenstein I*, ALJ decisions continued to diverge on the question of subsidiary coverage – both with respect to application of the agency factors present in *Klopfenstein* and with regard to whether common law agency theory is the only acceptable basis for holding a subsidiary liable under Section 806.[13]

In light of the disparate treatment by Department of Labor ALJs and the ARB, courts have also varied in their interpretation of whether, and to what extent, privately owned subsidiaries of publicly held corporations are covered under Section 806. Several district courts have held that coverage is limited to the publicly traded company and agents acting on the company's behalf with respect to the challenged employment action.[14]

In the retroactivity analysis, courts consider ambiguity and conflict in the preexisting interpretation of a statute an indication that the amendment to the text was intended to clarify the preexisting text rather than create a substantive change in the law with new legal consequences. As the preceding discussion demonstrates, ALJs and the courts have varied in both theory and application concerning the scope of subsidiary coverage under Section 806.

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coverage under both common law agency theory and the "integrated enterprise" test); *Perez v. H&R Block, Inc.*, ALJ No. 2009-SOX-042 (Dec. 1, 2009).

[12] The Board reaffirmed its decision in *Klopfenstein I*, with some clarification, following subsequent appeal of the ALJ's decision upon remand in that matter. *See Klopfenstein II*, ARB Nos. 07-021, -022.

[13] *See, e.g.*, *Teutsch v. ING Group, N.V*, ALJ No. 2005-SOX-101, -102, -103 (Sept. 25, 2006) (rejecting argument that a non-publicly traded subsidiary is covered under Section 806 "merely because it has a publicly traded parent"); *Savastano v. WPP Group, PLC*, ALJ No. 2007-SOX-034 (July 18, 2007) (subsidiary found not to have acted as agent of parent company with respect to challenged employment action); *Andrews v. ING N. Am. Ins. Co.*, ALJ Nos. 2005-SOX-050, -051 (Jan. 8, 2009) (on remand, agency must pertain to the employment action at issue).

[14] *See, e.g., Brady v. Calyon Secs. (USA),* 406 F. Supp. 2d 307, 317-319 (S.D.N.Y. 2005) (agency coverage with respect to challenged employment action); *Rao v. Daimler Chrysler Corp.*, 2007 WL 1424220, at *5 (E.D. Mich. May 14, 2007); *Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492, 499-502 (D. Md. 2008); *Lawson*, 724 F. Supp. 2d at 161 (employees of any related entity of a publicly traded company are protected under Section 806 from retaliation by their employer).

c. Section 929A is a reasonable interpretation of Section 806

A third factor courts consider in determining if an amendment is a clarification is whether the amendment is a reasonable interpretation of the prior statute and its legislative history. Dodd-Frank Section 929A's amended language adds consolidated subsidiaries to the definition of covered entities under the preexisting statute. For the following reasons, we believe that interpreting consolidated subsidiaries as part of the publicly traded company for purposes of Section 806 coverage is a reasonable interpretation of Section 806's preexisting text.

i. Section 806's Purpose

Section 806 was part of a comprehensive bill ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. In furtherance of these purposes, Congress added whistleblower protection provisions to the Corporate and Criminal Fraud Accountability Act of 2002. Congress viewed the incorporation of the Corporate and Criminal Fraud Accountability Act into Sarbanes-Oxley as "crucial" to "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146 at 2 (May 6, 2002). Section 806 furthers Sarbanes-Oxley's goals by protecting employees against retaliation who disclose information they reasonably believe constitutes a violation of a rule or regulation of the Securities and Exchange Commission (SEC), various forms of fraud, and fraud against shareholders.

ii. SEC filing requirements reinforces interpretation of "company" to include consolidated subsidiaries

Section 806 prohibits retaliation against an employee by any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))." A company trading on a national exchange must register under Section 12. A registration statement under Section 12 includes the registering company's balance sheets and profit and loss statements for "any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer."[15] Once a company is registered under Section 12, it must file periodic reports under Section 13.[16] Section 15(d) of the Exchange Act expressly requires the filing of numerous reports that include consolidated subsidiaries, and similar periodic reports are required under Section 13. Section 13 periodic reports filed with the SEC may include "consolidated balance sheets or income accounts" for any entity that it directly or indirectly controls.[17] Given the long-established requirement to include consolidated

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[15] 15 U.S.C.A. § 78*l*(b) (Westlaw 2011). "Person" is defined under the Exchange Act to include companies and corporations. *See* 15 U.S.C.A. §§ 78*c*(a)(9) (Westlaw 2011).

[16] 15 U.S.C.A. § 78*m*(b)(1) (Westlaw 2011); 17 C.F.R. § 240.13a-1 *et seq*. (Westlaw 2011).

[17] 15 U.S.C.A. § 78*m*(b)(1).

subsidiaries in periodic reporting, it seems very reasonable to assume that Congress broadly used the term "company" to include "consolidated subsidiaries" within its meaning.

Under the rules and regulations of the SEC and the Financial Accounting Standards Board (FASB),[18] majority-owned subsidiaries, as controlled entities, are generally consolidated with the parent company's financials for purposes of registration and periodic reporting.[19] The purpose of consolidated financial statements "is to present, primarily for the benefit of the owners and creditors of the parent [company], the results of operations and the financial position of a parent and all its subsidiaries as if the consolidated group were a single economic entity." FASB, Accounting Research Bulletin No. 51 (1959), as amended.[20] For purposes of financial reporting, these subsidiaries are considered part of the parent company for the purposes of complying with sections 12 and 15(d) of the Exchange Act. OSHA Amicus Brief at 17.

Understanding the requirements of Exchange Act Sections 12 and 15(d) leads to the conclusion that Section 806's coverage of a "company with a class of securities registered under section 12 . . . or that is required to file reports under section 15(d)" encompasses subsidiaries of a publicly traded parent company whose financial information is included in the consolidated financial information filed by the parent company as part of its registration statement or periodic reports. Indeed only by effectively viewing publicly traded companies and their subsidiaries as one and the same for Section 806 coverage purposes can the critical role that Congress envisioned for whistleblowers be achieved.

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[18] The FASB is a private organization whose standards govern the preparation of consolidated financial statements and have been officially recognized as authoritative by the SEC. Rule 4-01(a)(1) of SEC Regulation S-X, 17 C.F.R. § 210.4-01(a)(1) (Westlaw 2011) (now International Accounting Standards Board). *See* SEC Release No. 33-8221 (Apr. 25, 2003), *Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter*, *available at* http://www.sec.gov/rules/policy/33-8221.htm.

[19] SEC Amicus Brief, at 6-9; *see* Rule 3A-02 of Regulation S-X, 17 C.F.R. §§ 210.3-01(a) and 210.3A-02 (consolidation for controlled entities including subsidiaries). According to these regulations, a parent company must consolidate into its financial reports the financials of its majority-owned subsidiaries and disclose its consolidation principles. 17 C.F.R. § 210.3-01 (consolidated balance sheets); 17 C.F.R. § 210.3A-02(a) ("Generally, registrants shall consolidate entities that are majority owned and shall not consolidate entities that are not majority owned."). A subsidiary is considered directly or indirectly controlled by the parent company if the parent company owns a majority voting interest in the subsidiary. 17 C.F.R. § 210.1-02(g). *See In re Mutual Funds Inv. Litig.*, 566 F.3d 111, 130-131 (4th Cir. 2009), for discussion of what suffices to constitute "control" under Sections 15 and 20(a) of the Securities Exchange Act.

[20] Accounting Research Bulletin No. 51, as amended by Financial Accounting Statement (FAS) No. 94, and FAS No. 160 (2007).

iii. Legislative history supports subsidiary coverage

Sarbanes-Oxley's legislative history buttresses the conclusion that Section 806 includes subsidiary coverage. Principal sponsors of Sarbanes-Oxley and Section 806 viewed protecting whistleblowers as crucial means for assuring that corporate fraud and malfeasance would be publicly exposed and brought to light from behind the corporate veil. As Senator Sarbanes, principal sponsor of Sarbanes-Oxley, explained:

> Senator Leahy and his colleagues on the Judiciary Committee have moved ahead to provide additional protections and remedies for corporate whistleblowers that I think will help to ensure that employees will not be punished for taking steps to prevent corporate malfeasance.[21]

Senator Leahy, principal sponsor of the Corporate and Criminal Fraud Accountability Act (and thus SOX Section 806), similarly explained:

> [W]e include meaningful protections for corporate whistleblowers, as passed by the Senate. 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. . . The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.[22]

Notwithstanding the central role that Congress intended whistleblowers play in assuring that the purpose and goals of Sarbanes-Oxley are met, the Respondents and several amici curiae argue that SOX's legislative history nevertheless favors the conclusion that Congress intended Section 806 coverage of publicly traded corporations to the exclusion of non-publicly traded subsidiaries, citing language in the Senate Judiciary Committee report and floor comments by Senators Leahy and Sarbanes.[23] We find several of the cited passages to be taken out of context,

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[21] 3 Documents before the Committee on Banking, Housing, and Urban Affairs United States Senate, 107th Cong., 2d Sess., on the Legislative History of Sarbanes-Oxley Act of 2002, at 1299 (July 10, 2002) (hereinafter, 3 Documents on Legislative History of SOX).

[22] 148 Cong. Rec. S7358 (July 25, 2002). *See also* 3 Documents on Legislative History of SOX at 1294.

[23] *E.g.*, Chamber of Commerce of the United States, the Equal Employment Advisory Council, and David Landau & Associates, LLC., citing S. Rep. No. 107-146, at *13 (Section 806 "would provide whistleblower protection to employees of publicly traded companies"); 148 Cong. Rec. S7351 (July 25, 2002) (Sen. Sarbanes) ("[L]et me make very clear that [the Act] applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. . . . It is not applicable to private companies, who make up the vast majority of companies across the country."); 3 Documents on Legislative History of SOX at 1254 (July 9, 2002) (Sen. Dodd) ("We

or to just as easily support the conclusion that the passages reflect a distinction drawn between publicly traded companies (including their subsidiaries) and privately owned companies unaffiliated with a public entity. While the passages obviously reflect Congressional concern that the legislation apply to publicly traded companies, they also suggest that Congress merely intended to exclude small private companies (that do not file statements with the SEC and that are not ultimately responsible to shareholders and the investing public) from Section 806's burdens.

As previously discussed, Congressional concern for protecting investors necessarily encompasses subsidiaries of publicly traded companies to the extent that subsidiary financials are part of the content of the financial reports required pursuant to Sections 12, 13, and 15(d) of the Securities Exchange Act. SOX's purpose in this regard, coupled with the importance Congress attached to whistleblower protection in assuring full public disclosure, strongly suggests that Congress intended Section 806 to sweep broadly. Congress recognized the important role that subsidiaries could play in deceiving investors and in affecting the financial health of publicly traded companies.[24] Given this legislative history, it would make little sense to conclude that employees of non-public subsidiaries of publicly traded companies are not protected by Section 806.[25] In this regard, we find the SEC, in its amicus brief, has succinctly described the intent of Congress:

> Interpreting Section 806 not to cover consolidated subsidiaries would mean that whether a whistleblower was protected would turn on whether he worked for the parent or an unincorporated

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excluded the overwhelming majority of businesses that are private entities, that have no filing requirements with the SEC.").

[24] In his remarks on the Senate floor at the time of SOX's passage, Senator Leahy, co-author of Section 806, noted Enron's "hidden corporations" whereby Enron was "hiding hundreds of millions of dollars of stockholders' money in their pension funds." 148 Cong. Rec. S7358 (July 25, 2002). The Senate Report accompanying Sarbanes-Oxley's passage, in detailing the potential for hiding corporate fraud, cited Enron's layers of subsidiaries and partnerships that "under a code of corporate silence" were "used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially." S. Rep. No. 107-146, at 2-5. Many of Enron's "most significant transactions," the Senate Report noted, "apparently were designed to accomplish favorable financial statement results, not to achieve bona fide economic objectives, or to transfer risk," further noting Enron's use of "thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price." *Id.* at 2.

[25] Nor would it make any sense, as the SEC points out, that "Section 806 explicitly covers contractors and subcontractors, entities that are less under the control of the parent than a consolidated subsidiary and that would seem less likely to be the source of misreporting with respect to the parent's financials than would a subsidiary." SEC Amicus Brief at 11. We agree with the SEC that "[i]f Congress wanted these more attenuated entities to be covered, we believe it is logical to conclude that it wanted subsidiaries to be covered as well." *Id.*

> division rather than for a subsidiary, even though the consequences of his reporting misconduct would be exactly the same in both situations. It seems quite unlikely that Congress intended that outcome. Nor would it make sense to exclude from whistleblower protection the employees most likely to know of misstatements in consolidated financial statements, such as misstatements concerning inventory and sales at subsidiaries where inventory is maintained and sales staff is actually located.

SEC Amicus Brief at 11.

For the reasons above, construing Section 806 to include subsidiaries is a reasonable interpretation of the pre-amendment text. We further note that absent Dodd-Frank's amendment for subsidiary coverage in Section 929A, we would nonetheless hold that subsidiaries for the same reasons are covered under pre-amendment Section 806's term "company." We consider this construction to fit with the remedial purposes of Section 806 and its intended purpose of protecting whistleblowers and investors by encouraging disclosure throughout the corporate structure.[26]

We conclude that Section 929A is a clarification of Section 806 and does not create retroactive effects. Section 929A's addition of subsidiary coverage merely makes "what was intended all along ever more unmistakably clear." *United States v. Montgomery Cnty.*, 761 F.2d 998, 1003 (4th Cir. 1985). Because the amendment by Section 929A does not create retroactive effects, it applies to Johnson's case on appeal. Accordingly, we hold that, at a minimum, the SOX whistleblower provision covers a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements. The record suggests that SBT is a consolidated entity of Siemens AG, but we do not find the record before us to conclusively establish that fact.[27] The ALJ and parties on remand can address SBT's status as a consolidated entity in accordance with this order and, if so, determine the issue of liability under the facts presented at hearing.

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[26] It is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967)). A basic and fundamental rule of statutory construction is to construe a remedial statute to serve its underlying purpose to address the harm it was designed to remedy. 2A N. SINGER & J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 45.5 (7th ed. 2007).

[27] While there is evidence of record suggesting that SBT is a consolidated subsidiary of Siemens AG within the meaning of Section 806, Complainant's Exhibit (CX) 346; Respondent's Exhibits (RX) 204, 205 (Aff. of Daniel Hislip), the determination of that question, based upon an appropriate finding of fact(s) subject to such further evidentiary development as may be warranted, is reserved to the ALJ upon remand.

C. Agency under Section 806

Given the ALJ's agency basis for concluding that SBT is not a covered entity, we briefly address the issue of agency coverage under Section 806. Section 806 provides "No company . . . or any officer, employee, contractor, subcontractor, or *agent* of such company, . . . may . . . discriminate . . . ." 18 U.S.C.A. § 1514A(a)(emphasis added). The Act's legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies. The legislative history discusses not only Congress's objective of protecting whistleblowing by employees of a publicly traded company, but protecting as well employees of certain private firms that work with, or contract with, publicly traded companies.[28]

Construing the factors recognized in *Klopfenstein* as necessary for establishing agency under Section 806, the ALJ in this case held that SBT was not a covered "agent" under SOX. As previously mentioned, *supra* at p. 5, the ALJ found no evidence that Siemens AG controlled employment decisions at SBT, knew of. Johnson's concerns about accounting irregularities, or played any role in the termination of her employment. Under the facts of *Klopfenstein*, the ALJ held that SBT was not acting as Siemens AG's agent and thus SBT was not covered as an "agent" under Section 806.

We conclude that the ALJ read too narrowly the Board's holding in *Klopfenstein*. The ALJ, by exclusively focusing on the agency factors upon which the Board's ruling in *Klopfenstein* turned, failed to consider alternative bases and factors upon which common law agency might be established. In light of our conclusion that a consolidated subsidiary is covered under Dodd-Frank, and the indication in the record that SBT was a consolidated subsidiary at all relevant times, we decline to discuss further subsidiary coverage under agency law.

II. Siemens AG

In dismissing Johnson's complaint, the ALJ held that Respondent Siemens AG could not be held liable for the actions of Respondent SBT or its employees given her determination that SBT was not, and had not acted as, an agent of Siemens AG with respect to Johnson's discharge from employment. Our ruling today holds that a consolidated subsidiary is covered under Section 806 and remands for the ALJ to determine if SBT (1) was consolidated with Siemens AG at the time of the termination and, if so, (2) whether it unlawfully retaliated against Johnson. Accordingly, given that our ruling reopens the claims against SBT, we feel that the parties should have an opportunity to address whether our ruling affects the dismissal of the claims against Siemens AG, consistent with this Decision and Remand Order. We render no opinion as to the claims against Siemens AG.

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28 *See* S. Rep. 107-146, at 4-5, 11 (Congressional expression of concern with not only the misconduct perpetrated by Enron Corporation, a publicly traded company, but also the "accounting firms, law firms and business consulting firms [*i.e.*, private contractors, subcontractors, and agents] who were paid millions to advise Enron.").

CONCLUSION

An employee of a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements is protected against retaliation where the employee engages in whistleblower protected activity under Section 806. Because whether SBT was a consolidated subsidiary of Siemens AG at the time of the termination is uncertain on the record before us, we leave that finding for consideration on remand. If SBT was a consolidated subsidiary, the ALJ must then determine the issue of liability. We also leave open for remand whether our ruling today affects the dismissal of the claims against Respondent Siemens AG.

Accordingly, the ALJ's Decision and Order is **REVERSED** and **VACATED**. This matter is **REMANDED** for further proceedings consistent with this Decision and Remand Order.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I concur with my colleagues in holding that a subsidiary of a publicly traded corporation subject to the registration and reporting requirements of the Securities Exchange Act of 1934 is covered under 18 U.S.C. § 1514A (Section 806). For the reasons set forth in the majority's opinion, I agree that an employee of a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements is protected against retaliation where the employee engages in whistleblower activity protected under Section 806. I write separately to address the issue of agency coverage, which formed the basis for the ALJ's conclusion that SBT was not a covered entity subject to the prohibitions of Section 806. The majority expresses its opinion that the ALJ failed to consider alternative grounds upon which agency coverage under Section 806 can be established, but declines to address the basis upon which this conclusion is reached in light of our ruling with respect to subsidiary coverage. I join with my colleagues in their conclusion, but I am also of the opinion that an explanation is warranted.

I also write separately to address what I consider the key factor in determining whether Section 929A merely constitutes a clarification of preexisting law, rather than a change in that law: whether the Dodd-Frank amendment is consistent with a reasonable interpretation of pre-amendment Section 806. While I agree with the majority's textual interpretation of Section 806 within the context of the securities laws the whistleblower protection provision was designed to

help enforce, nonetheless I have decided to more fully address this subject because of the importance of this interrelationship to a proper construction of the coverage provisions of Section 806.

A. Agency Coverage

Citing the factors recognized in *Klopfenstein*[29] as sufficient for establishing common law agency in an employment law context, the ALJ in the instant case held that SBT was not a covered employer under SOX. The ALJ found no evidence that Siemens AG controlled employment decisions at SBT, knew of Ms. Johnson's concerns about accounting irregularities, or played any role in the termination of Johnson's employment. Finding no evidence in the record that SBT, or anyone employed by SBT, was acting as an agent of Siemens AG in terminating Ms. Johnson's employment, the ALJ held that neither SBT nor Siemens AG (SBT's parent company) were liable under Section 806 for SBT's termination of Johnson's employment.

In finding the subsidiary in *Klopfenstein* to have acted as an agent of the publicly traded parent company with regard to the challenged employment action therein at issue, the Board focused on the common law factors relevant to a determination under employment law of the existence of "actual" agency authority.[30] However, "actual authority" is not the only basis upon which common law agency may be found in an employment or labor law context.[31] Common law agency contemplates at least two other basis for attributing legal consequences of one party's actions to another party, *i.e.*, "apparent authority" and "respondeat superior."[32] By exclusively

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[29] *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*); *but see also*, *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 07-021, -022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (*Klopfenstein II*), *aff'd per curiam, Klopfenstein v. Admin. Review Bd.,* 2010 WL 4746668 (5th Cir. Nov. 23, 2010).

[30] "An agent acts with actual authority when, at the time of taking the action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." RESTATEMENT (THIRD) OF AGENCY § 2.01.

[31] The Restatement defines common law agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01.

[32] "Apparent authority" is defined by the Restatement as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT (THIRD) OF AGENCY § 2.03. Under "respondeat superior," the principal will be held liable for the actions of its agent or subordinate where those acts are committed within the scope of the relationship, regardless of whether the action was undertaken at the request or direction, or with the knowledge of the principal, based on a theory of vicarious liability. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04.

focusing on the agency factors upon which the Board's ruling in *Klopfenstein* turned, the ALJ in the instant case failed to consider these alternative bases for establishing agency within an employment law context.

At the same time, the ALJ failed to heed the significance of *Klopfenstein's* recitation of the Supreme Court's admonition that the Restatement's common law principles of agency merely serve as "a useful beginning point for a discussion of general agency principles." *Klopfenstein I,* ARB No. 04-149, slip op. at 14 (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 755 (1998)). *Burlington* involved a question of agency liability under Title VII of the Civil Rights Act of 1964. Although the Supreme Court began its examination with reference to common law agency principles, the Court recognized that "common-law principles may not be transferable in all their particulars to Title VII" and that "other considerations might be relevant as well." *Burlington,* 524 U.S. at 764 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986)). Consequently, in fashioning an appropriate test of vicarious liability under Title VII, the Court construed common law agency principles taking into consideration both the express language of Title VII and the policy and underlying purposes of the act. *Burlington*, 524 U.S. at 764-765.

The Board's reference to *Burlington Industries* was not to suggest that a departure from the common law of agency is warranted in construing Section 806 of SOX. Rather, it was recognition on our part that any reasonable interpretation of Section 806 must be consistent with Congress's identification of Sarbanes-Oxley as a securities law.[33] As the SEC persuasively argues in its amicus brief before the Board (SEC Amicus Brief, at 18-22), Sarbanes-Oxley is not predominantly a labor law but a law intended to prevent securities fraud.[34] Such laws, the Supreme Court has repeatedly recognized, "should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). Thus, while the Board in *Klopfenstein* recognized agency coverage within an employment law context, Section 806's distinction as an antifraud provision designed to facilitate SOX's overall purpose of protecting investors and capital markets necessarily requires that Section 806 be construed as also extending coverage to, and imposing liability for retaliation upon, agents of a publicly traded company engaged in securities related activities.[35]

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33 Pursuant to 15 U.S.C. § 7201(15), Sarbanes-Oxley is identified as a "securities law" within the meaning of 15 U.S.C. § 78*c*(a)(47).

34 The SEC argues that the language of Section 806 must necessarily be analyzed taking into consideration the purpose and intent of SOX and the security laws SOX is meant to enforce. SOX was enacted, the SEC asserts, "to address the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures of auditing effectiveness and corporate financial and broker-dealer responsibility in recent months and years." SEC Amicus Brief, p. 12 (quoting S. Rep. No. 107-205, at 2). As a consequence, the SEC emphasizes, Congress necessarily "made whistleblower protection central to the Act." SEC Amicus Brief, p. 13.

35 Based on the broad scope of the Sarbanes-Oxley Act, as well as its inclusion within the definition of "securities laws" pursuant to 15 U.S.C. § 7201(15), "securities related activities" or

The Board has previously recognized this distinction and the significance of coverage under Section 806 within a securities law context. *See, Kukucka v. Belfort Instruments Co.*, ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008) (recognizing in dicta that an employee of a contractor, subcontractor or agent of a publicly traded company could be protected by Section 806); *Gale v. World Fin. Grp.*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008) (evidence showing that complainant's employer served as agent of public company in promoting sale of securities products sufficient to establish coverage under Section 806);[36] *Kalkunte v. DVI Financial Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009) (contractor held jointly liable – together with publicly traded company – for retaliatory discharge of employee of the public company where contractor, through its own employees, made decisions affecting employee/complainant's employment). However, in none of these opinions did the Board provide definitive clarification on this matter, thereby diminishing the precedential value of this recognition. *See, e.g., Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 155-156 (D. Mass. 2010). Thus, a thorough discussion is warranted of the basis for recognizing that Section 806 extends its prohibition against whistleblower retaliation to any officer, employee, contractor, subcontractor or agent of a publicly traded company engaged, on behalf of the public company, in securities related activities, and protects employees of any entity engaged in such activities from whistleblower retaliation by such entity regardless of whether the retaliation is or is not rendered on behalf of the public company.

Fundamentals of statutory construction support the conclusion that liability for retaliation against whistleblowing extends to an agent of a publicly traded company engaged in securities related activities *independent* of whether or not the infringing entity acts as the agent of the public company with respect to the challenged adverse employment action. In addition to prohibiting whistleblower retaliation by publicly traded companies and their subsidiaries, Section 806 subjects to liability for retaliation "any officer, employee, contractor, subcontractor, or agent of such company." Provisions throughout Sarbanes-Oxley consistently apply to entities operating in one or more of these capacities on behalf of publicly traded companies,[37] a clear

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"securities related matters" to which reference is herein made includes activities or matters related to the laws identified as "securities laws" under 15 U.S.C. § 78(c)(47): the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*), the Sarbanes-Oxley Act of 2002, the Trust Indenture Act of 1939 (15 U.S.C. § 77aaa *et seq.*), the Investment Company Act of 1940 (15 U.S.C. § 80a-1 *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. § 80b-1 *et seq.*), and the Securities Investor Protection Act of 1970 (15 U.S.C. § 78aaa e*t seq.*).

[36] The ARB decision in *Gale*, ARB No. 06-083, slip op. at 3 n.15, identified the respondent as part of the publicly traded company's efforts selling "insurance products" within the United States. However, the ALJ more accurately identified the respondent's agency activity on behalf of the company as the promotion of "securities products." *Gale v. World Fin. Grp.*, ALJ No. 2006-SOX-043, slip op. at 7 (June 9, 2006).

[37] Title I of Sarbanes-Oxley establishes a "Public Company Accounting Oversight Board" tasked with overseeing and regulating independent accounting firms retained by public companies. *See* 15 U.S.C. § 7211(a)(11). Title II of the Act imposes rules ensuring the independence of outside

indication that Congress understood that in order to achieve the Act's overall purposes Section 806 necessarily had to extend whistleblower protection to the employees of all entities involved in securities related activities on behalf of a publicly traded company (including compliance with Sarbanes-Oxley), regardless of whether the retaliation is undertaken by the entity independently or on behalf of the public company.

Use of the term "any" preceding the listing of the several entities identified in Section 806 is further indication that Congress intended the clause "officer, employee, contractor, subcontractor, or agent" to be interpreted in an all-encompassing sense. *See United States v. Thompson*, 685 F.2d 993, 996 (6th Cir. 1982); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976). Furthermore, it is an elementary canon of construction that a statute should be interpreted so as not to render any word or part meaningless. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Principles of statutory construction direct that a statute be construed such that no word is rendered superfluous, and that all language in a statute be given operative effect. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficenica*, 524 F.3d 54, 59 (1st Cir. 2008). In construing a statute we are thus obliged to give effect, if possible, to every word Congress used. *United States v. Menasche,* 348 U.S. 528, 538-539 (1955). Moreover, canons of construction "ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979).

To interpret "agency" under Section 806 as limited to imposing liability in only those situations where an entity acts as a publicly traded company's agent in an employment/labor law context would fly in the face of the foregoing canons of statutory construction, for such an interpretation would effectively render the words "officer, employee, contractor, subcontractor" superfluous. If liability under Section 806 required in every instance that the challenged adverse action bear an employment law nexus to a publicly traded company, regardless of the entity involved, then employment law agency theory would cover any adverse action undertaken by a company's officer, employee, contractor or subcontractor -- as the company's agent. There would be no need for Congress to identify in Section 806 any entity other than "agents" of a publicly traded company. In only one manner of construction do we find that no word within the

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auditors. *See* 15 U.S.C. § 78j-l. Title III, entitled "Corporate Responsibility," imposes rules on others besides the public company, such as attorneys retained to represent the companies. *See* 15 U.S.C. § 7245. Title IV of the Act, governing enhanced financial disclosure requirements, similarly imposes obligations on others besides public companies. Title V defines codes of conduct and conflict of interest disclosure requirements applicable to outside securities analysts. *See* 15 U.S.C. § 78o-6. Title VI provides the SEC with authority to censure or bar from practice securities professionals, brokers, investment advisors, and dealers. *See,* 15 U.S.C. § 78d-3, 15 U.S.C. § 78o, 14 U.S.C. § 80b-3. Title VII requires the Comptroller General and the SEC to report on securities violations by securities professionals and on whether investment banks and financial advisors assisted public companies in manipulating earnings or in otherwise disguising their financial condition. Title VIII and IX of the Act contain broadly applicable provisions imposing criminal liability for securities fraud and obstruction of justice. *See* 18 U.S.C. § 1348, 18 U.S.C. §§ 1512, 1513, 1519, 1520.

phrase "any officer, employee, contractor, subcontractor, or agent" is rendered meaningless: by viewing, as the ALJ did in *Walters v. Deutsche Bank,* ALJ No. 2008-SOX-070 (Mar. 23, 2009), Sarbanes-Oxley as, above all else, an anti-fraud measure and Section 806 as an aid in SEC enforcement of the Securities Exchange Act.

Sarbanes-Oxley's legislative history lends additional support to construing the prohibitions of Section 806 as covering officers, employees, contractors, subcontractors or agents of a publicly traded company where the entity is engaged in securities related activities on behalf of the company. As noted in *Lawson,* "The legislative history of SOX makes clear that Congress was concerned about the related entities of a public company becoming involved in performing or disguising fraudulent activity, and wanted to protect employees of such entities who attempt to report such activity." 724 F. Supp. 2d at 160. The Act's legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies. The legislative history discusses not only Congress's objective of protecting whistle blowing by employees of a publicly traded company, but protecting as well employees of private firms that work with, or contract with, publicly traded companies. *See* S. Rep. 107-146, at 4-5 (Congressional expression of concern with not only the misconduct perpetrated by Enron Corporation, a publicly traded company, but also the "accounting firms, law firms and business consulting firms [*i.e*., private contractors, subcontractors, and agents] who were paid millions to advise Enron."). *See also*, S. Rep. 107-146, at 11 (citing the serious misconduct in which Enron's contractors (*e.g*., its accounting firm Arthur Anderson) engaged, including stifling their own employees' attempts at "blowing the whistle," and noting that among the contributors to the fraud were "the well paid professionals who help create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns").

A final source for interpreting Section 806 coverage within a securities law context protecting employees of related entities as well as employees of public companies is the Department of Labor (OSHA) regulations implementing SOX's whistleblower protection provision. The regulations provide for the filing of a complaint alleging retaliation in violation of Section 806 by any "employee who believes that he or she has been discriminated against by a [publicly traded] company or company representative. . . ." 29 C.F.R. § 1980.103(a). The regulations define "employee" as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. "Company representative" is defined as "any officer, employee, contractor, subcontractor, or agent of a company." *Id*. OSHA, in promulgating the regulations, commented that the foregoing is consistent with Section 806 because the statute "protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies." *Procedures for the Handling of Discrimination Complaints under Section 806*, 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004).

We are well aware of the lower court decisions that have reached a contrary conclusion. Nevertheless, the rationale adopted by the courts is unpersuasive. In each instance, the court was concerned that viewing "agency" as applicable to anything other than an employment/labor law context would result in expansion of Section 806's coverage protection far beyond Congress's intent. In *Brady v. Calyon Secs.,* 406 F. Supp. 2d 307 (S.D.N.Y. 2005), the court refused to

impose liability for whistleblower retaliation on a securities broker for publicly traded companies for fear that doing so would result in the adoption of "a general whistleblower protection provision governing the employment relationships of any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company, even as to employees who had no relation whatsoever to the publicly traded company." 406 F. Supp. 2d at 318. For similar reasons, in *Malin v. Siemens Med. Solutions Health Servs.,* 638 F. Supp. 2d 492 (D. Md. 2008), agency liability was rejected in the absence of a showing that the agent acted on behalf of the public company with respect to the alleged retaliation. *See also Rao v. Daimler Chrysler Corp.,* 2007 WL 1424220 (E.D. Mich. 2007) (not reported) (general agency relationship between the public parent and non-public subsidiary insufficient to implicate whistleblower provisions of Section 806).

Assuredly, Section 806 does not go so far as to create a general whistleblower protection provision imposing liability on any private company or entity acting as an agent of a publicly traded company with respect to any matter whatsoever. However, a proper construction of the scope of agency coverage outside of the employment law context is more limited. Outside of the employment law context, an entity will be held independently liable as a covered agent under Section 806 where it is established that the entity engaged in retaliatory conduct was serving as the public company's agent with respect to securities related matters.

In terms of what a whistleblower must prove to establish the agency relationship referenced in Section 806, distinguishing SOX as predominantly an antifraud measure is significant. Construed as an antifraud provision, rather than an employment or labor law, it is sufficient, as an example, to establish that the retaliating entity exists as an agent of the publicly traded parent company "for purposes of producing accounting or financial information which is consolidated into the parent's financial reports, or that an agent or contractor facilitated fraud like the subsidiaries, off-the-books special purpose entities (SPEs), and the accounting firms that helped precipitate the financial collapse of Enron, the key corporate figure in the legislative history of Sarbanes-Oxley." *Walters,* ALJ No. 2008-SOX-070, slip op. at. 7-8. In such instances, the focus for coverage purposes is "on the agent's role in preparing financial data or its participation in fraud or deception." *Id.*

Construing Section 806 as extending coverage to an agent of a publicly traded company engaged, on behalf of that company, in securities related activities, thereby imposing liability for whistleblower retaliation upon such an entity, is not to say that Section 806 precludes an employment law agency analysis for purposes of finding the publicly traded company liable (or for holding the agent liable in such a context, as was the case in *Klopfenstein*). At the same time, an employment law agency analysis does not preclude inquiry under Section 806 into whether the entity charged with retaliation exists as an agent of a publicly traded company for securities related purposes, nor does it bar the imposition of liability upon an agent acting in such capacity where it independently retaliates against a whistleblower in violation of Section 806.

B. Section 929A is a reasonable interpretation of pre-amendment Section 806

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the

statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citations omitted). *See, e.g., United States v. American Trucking Ass'ns,* 310 U.S. 534, 542-44 (1940) ("To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation."). Statutory construction is a "holistic endeavor" for "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme" as when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (citations omitted). Thus, as the majority has recognized, within the statutory context and regulatory backdrop of 18 U.S.C. § 1514A (Section 806) we find valuable insight into the scope of the whistleblower protection provision's intended coverage.

Section 806 did not originate as an isolated piece of legislation, but as part of a comprehensive bill aimed at assuring that the financial implosion and mushrooming disasters of Enron, Worldcom, and Arthur Anderson never again occurred. This comprehensive bill, which bundled together a large number of diverse and independent statutes, was enacted by Congress in 2002 (as the majority notes) to protect investors and capital markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. *See* S. Rep. 107-205 (July 3, 2002), at 2. In furtherance of these purposes, Congress included within Sarbanes Oxley, at Title VII, the provisions of the Corporate and Criminal Fraud Accountability Act of 2002. As explained in the accompanying Senate Report, Congress viewed the incorporation into Sarbanes-Oxley of the Corporate and Criminal Fraud Accountability Act, including Section 806, as critical to restoring trust in U.S. financial markets. *See* S. Rep. 107-146 (May 6, 2002), at 2.

Pre-amendment Section 806 expressly prohibits retaliation against employees who engage in protected whistleblower activity by any "company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor or agent of such company." By this express language the whistleblower protection coverage of Section 806 is thus linked to the Securities Exchange Act provisions that require companies to register and file financial reports with the SEC.[38]

Under Section 12 of the Exchange Act, virtually every publicly traded company, as an "issuer" within the meaning of the Exchange Act,[39] is required to register with the SEC any

38 *See also* Section 3(b)(1) of the Sarbanes-Oxley Act (15 U.S.C. § 7202(b)(1)), mandating that violations of any provision of Sarbanes-Oxley "be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*) or the rules and regulations issued there under."

39 15 U.S.C.A § 7201(7) defines the term "issuer" to mean: "an issuer (as defined in section 78*c* of this title), the securities of which are registered under section 78*l* of this title, or that is required to file reports under section 78*o*(d) of this title, or that files or has filed a registration statement that has

security that will be traded on a national exchange. 15 U.S.C. § 78*l*. Once a security is registered, the registering company must file, pursuant to section 15(d) of the Exchange Act, 15 U.S.C. § 78*o*(d), "supplementary and periodic information, documents, and reports as may be required pursuant to Section 13 [of the Exchange Act]." Section 13 of the Exchange Act requires that the publicly traded parent company file periodic reports that include, inter alia, "consolidated balance sheets or income accounts" for any entity that it directly or indirectly controls. 15 U.S.C. § 78*m*. These periodic reports, which include (among other reports) the 20-F annual report for foreign issuers, the 10-K annual report for U.S. issuers, and the 10-Q quarterly report,[40] provide a comprehensive summary of a publicly traded parent company's performance including consolidated financial information for all subsidiaries that are directly or indirectly controlled by the parent company.

As the SEC explains in its amicus brief, the financial statements required to be filed under the Exchange Act treat a reporting company's consolidated subsidiaries as part of the reporting company. Financial results of subsidiaries that are controlled by a reporting company are required to be consolidated with the reporting company's submissions to the Commission. SEC Amicus Brief, at 6-9.[41] The purpose of the consolidated financial statements "is to present . . . the results of operations and the financial position of a parent and all its subsidiaries as if the consolidated group were a single economic entity." FASB Consolidated Financial Statement, Account Research Bulletin No. 51 (1958), as amended by Statement of Financial Accounting Standards Board 2008).[42] Thus, as the Solicitor of Labor's amicus brief notes, the financial information of majority-owned or controlled subsidiaries are consolidated on the registration statement and annual reports because these subsidiaries are controlled by, and thus considered part of and wholly inseparable from, the parent company for the purposes of complying with sections 12 and 15(d) of the Exchange Act. *See* OSHA Amicus Brief, at 17.

Understanding the requirements of Sections 12 and 15(d) of the Exchange Act leads, as both the SEC and the Solicitor of Labor have argued in their respective amicus briefs, to the inescapable conclusion that Section 806's coverage encompasses subsidiaries of a publicly

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not yet become effective under the Securities Act of 1933 (15 U.S.C.A. 77*a et seq.*), and that it has not withdrawn."

40 *See* 17 C.F.R. §§ 249.310 and 249.308a.

41 In accordance with its authority under Sections 12, 13, and 15(d) of the Exchange Act, the SEC has promulgated rules requiring an issuer of securities to consolidate within its financial reporting the balance sheets and income accounts of entities that the issuer directly or indirectly controls, including subsidiaries. *See* Rule 3A-02 of Regulation S-X, 17 C.F.R. §§ 210.3-01(a) and 210.3A-02. Under these regulations, a parent company must consolidate into its financial reports the financials of its majority-owned subsidiaries. 17 C.F.R. § 210.3-01; 17 C.F.R. § 210.3A-02(a).

42 As the majority has noted, the FASB is a private organization whose standards govern the preparation of consolidated financial statements and which have been officially recognized as authoritative by the SEC. *See* Rule 4-01(a)(1) of SEC Regulation S-X, 17 C.F.R. § 210.4-01(a)(1).

traded parent company whose financial information is included in the consolidated financial information filed by the parent company as part of its registration statement or periodic reports. Other provisions of Sarbanes-Oxley lend further support to the conclusion that publicly traded parent companies and their consolidated subsidiaries constitute a single, unitary company for Section 806 purposes. Sections 302(a)(4) and 404 of SOX, 15 U.S.C. §§ 7241(a)(4) and 7262(a), provide that a publicly traded parent company design and implement controls for the entire corporate structure including the company's consolidated subsidiaries governing both financial reporting required under section 15(d) of the Exchange Act and the prevention, identification, and detection of fraud. Sections 302(a)(4) and 404 further require that subsidiaries implement these controls on the parent company's behalf. *See also* 17 C.F.R. §§ 229.601(31), 229.307, 229.308, and 68 Fed. Reg. 36636, 36643 (June 18, 2003). Similarly, section 301 of SOX, 15 U.S.C. § 78j-1(m)(4), supports the conclusion that Section 806's prohibition against retaliation extends to consolidated subsidiaries. Section 301 requires the publicly traded parent company's audit committee to establish procedures for "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters." Such procedures necessarily apply to the treatment of complaints by employees of subsidiaries. We thus agree with the Solicitor of Labor (OSHA Amicus Brief, at 20-22) that it would be peculiar indeed for SOX to mandate procedures designed to facilitate whistleblower complaints regarding accounting matters, including matters pertaining to a consolidated subsidiary, without affording the employees of such subsidiaries Section 806 whistleblower protection where an employee avails him/herself of the procedures mandated by section 301.

Against this statutory and regulatory backdrop, by which the publicly traded parent company and its consolidated subsidiaries are considered a single, unitary company, the absence of an explicit reference to subsidiaries in Section 806 does not, as ALJs and several district courts have held, exclude subsidiaries from coverage. As the Supreme Court has noted, "where Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). Rather than exclude subsidiaries from coverage, Section 806's statutory and regulatory backdrop evidence a congressional presumption that consolidated subsidiaries of publicly traded companies are subject to Section 806's prohibitions against retaliation, and that employees of such subsidiaries who engage in whistleblower protected activities are thereby protected**.**

For the foregoing reasons, in addition to those set forth by my colleagues with respect to subsidiary coverage, I concur in the remand of this case to the Office of Administrative Law Judges for further proceedings consistent with this decision and order of remand.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge