UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

CARRI S. JOHNSON.	**ARB Case No. 08-032**
Complainant,	OALJ Case No. 2005-SOX-00015

against,

SIEMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG,

Respondents.

REPLY BRIEF OF CARRI S. JOHNSON

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STATEMENT OF THE ISSUE

The Board has asked the parties and amici to address the effect of the amendment of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") on July 21, 2010.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173) ("Dodd-Frank Act") provides as follows:

> **SEC. 929A PROTECTION FOR EMPLOYEES OF SUBSIDIARIES AND AFFILIATES OF PUBLICLY TRADED COMPANIES**
>
> Section 1514A of title 18, United States Code, is amended by inserting "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company" after "the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))."

SUMMARY OF THE ARGUMENT

Section 929A clarifies that subsidiaries and affiliates of publicly traded companies have been covered entities under SOX Section 806 from the time Section 806 was enacted. As such, there is no issue of retroactive application of Section 929A in the instant matter. To the extent the Board believes that retroactive application of Section 929A must be addressed in the instant matter, the Board may retroactively apply Section 929A retroactively under powers afforded the Board in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* The Board must apply the law that is in place at the time it renders its decision, distinguishing between cases on direct review and cases where the time for appeal and petitioning for certiorari has passed. Because the issue before the Board is a case of first impression—the scope of Section 806 and the application of Section 929A—the Board must apply Section 929A retroactively to the

cases on direct review before the Board involving Section 806, including Ms. Johnson's appeal.

ARGUMENT

Proper analysis of the instant matter must include consideration of the power delegated to the United States Department of Labor ("DOL") by Congress under the APA. Under the APA, Congress granted administrative agencies rulemaking power and adjudicatory power. 5 U.S.C. §§ 551 *et seq.* In determining whether the Board's action in the instant matter is "rule making" or "adjudication", the Board may consider the purpose of SOX and Section 806. *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947), at 13-14. Because the issues of the scope of Section 806 and the application of Section 929A are issues of first impression, the Board may announce a new principle and apply that principle retroactively. *See SEC v. Chenery*, 332 U.S. 194, 203 (1947) ("[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency.")

A. The Board Is Afforded Adjudicatory Power Under the APA

The procedures for adjudication are found at 5 U.S.C. § 554. The matter before the Board falls under this category—formal on-the-record adjudication. *See* Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Adrian Vermeule, *The Procedural Requirements of the APA and Interplay between Rulemaking and Adjudication, in* ADMINISTRATIVE LAW AND REGULATORY POLICY, 488-492 (2006). It is within the Board's discretion to act through adjudication or rule making. *See NLRB v. Bell Aerospace Co., Div. of Textron, Inc*., 416 U.S. 267, 294 (1974). Ms. Johnson submits

that adjudication, rather than rule making, is the approach the Board must take in this matter. This approach enables the Board to review the history and purpose of SOX, Section 806, and Section 929A:

> [Administrative agencies'] close day-to-day contact with and control by executive and legislative officials and staff may give agencies insight into the legislative purpose of statutes that outsiders, such as politically insulated judges, may not have. . . . It is more legitimate for agencies to pursu[e] [their] own conception of the public interest rather than Congress's. . . . An agency interpretation based on inputs that are off-limits to a court does merit deference as long as it constitutes an answer to the question the court is asking.

See Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, Jacob Burns Institute for Advanced Legal Studies, Benjamin N. Cardozo School of Law, WORKING PAPER NO. 267, September 2009.

The Board may announce new principles in an adjudicatory proceeding and apply those principles retroactively. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 224, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (Scalia, J., dissenting):

> [W]here legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication.

"[R]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction." *Landgraf v. USI Film Products*, 511 U.S. 244, 264, n.16, 114 S.Ct. 1483, 128 L.Ed.2d 119 (1994) (citing Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950)).

Historically, a presumption against retroactive application of a statute was based on the notion that a court or agency should not take "away or impair[] vested rights acquired under existing laws" or "create[] a new obligation, impose[] a new duty, or attach[] a new disability". *See Landgraf*, at 269. Retroactive application is permitted absent "manifest injustice". *See Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."). Where the issue at hand has been disputed from the time of the enactment of the statute, it cannot reasonably be said that parties have settled expectations or have relied on a statute to their detriment. Ms. Johnson submits that the Board must acknowledge that this is true in the instant matter. No party litigating the issue of the scope of Section 806 coverage from the time of enactment to present could have detrimentally relied on settled rights or expectations with respect to subsidiary and affiliate coverage.

To date, the Board (and DOL) has taken modest steps toward resolving the issue of Section 806 coverage. This is in accord with the United States Supreme Court's view of how agencies approach new statutes like Section 806:

> Agencies, like legislatures, do not generally resolve massive problems in one fell swoop. . . . [Agencies] instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed (citing SEC v. Chenery Corp., at 202) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.") That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to the law.

Massachusetts v. EPA, 549 U.S. 497, 524, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007)

The United States Supreme Court has adopted a "firm rule of retroactivity" for cases on direct review:

> [T]his Court, in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), held that when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, the (2) it and other courts must treat that same (new) legal rule as "retroactive", applying it, for example to all pending cases, whether or not those cases involve pre-decision events.

Reynoldsville Casket Co. et al. v Hyde, 514 U.S. 749, 752 (1995) (Breyer, J. opinion of the court.

Within DOL, Administrative Law Judges ("ALJs") have dismissed complaints based on the perception that Section 806 is only applicable to publicly traded corporations and not subsidiaries and affiliates of the publicly traded corporations. These dismissals are, in essence, dismissals based on the conclusion that DOL did not have jurisdiction over the matter. Jurisdictional rulings may "never be made prospective only." *New England Power Company v. United States of America and Interstate Commerce Commission*, 392 F.2d 239, 244 (1st Cir. 1982). Because jurisdictional issues "speak to the power of the court rather than to the rights or obligations of the parties", present law governs in such situations. *See Landgraf*, at 274 (citing *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S.Ct. 554, 121 L.Ed. 2d 474 (1992) (Thomas, J., concurring opinion).

"[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *New England Power*, at 244-45 (citing *Bradley v. Richmond*

School Board, 416 U.S. 696, 711, 94 S.Ct. 2006, 20 L.Ed.2d 476 (1974)). The principle of applying the law in effect while an appeal is pending applies "with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." Id. (citing *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969).

The issue of retroactivity was addressed in *McIntyre v. Merrill Lynch, Pierce, Fenner & Smith*, 2003-SOX-23 (ALJ Jan. 16, 2004). The *McIntyre* decision presents the retroactivity issue in a clear and simple manner: could the Administrative Law Judge ("ALJ") retroactively apply SOX and Section 806 to the case at hand when SOX had not been enacted at the outset of the litigation? The ALJ concluded that Section 806 could not be applied retroactively because doing so would have created new rights for the complainant after defendants relied on the law as it was at the time of the filing of the complaint. More plainly, Section 806 did not exist at the time the *McIntyre* complaint was filed and applying Section 806 would have created a new cause of action.

No new rights, obligations, or duties are imposed by the enactment of Section 929A. Rather, Congress has "merely clarifie[d] what the law has always been all along." Brief of the Securities Exchange Commission ("SEC"), at 4-5.

B. The Board Is Afforded Rulemaking Power Under the APA

Administrative agencies may also adopt "non-legislative rules" that interpret or clarify existing regulations or statutes. *See generally Retroactive Rulemaking*, Geoffrey C. Wein, 749 HARVARD JOURNAL OF LAW & PUBLIC POLICY 750

The Securities Exchange Commission ("SEC") is charged with interpreting Section 806 and by virtue of C.F.R. § 1980.108(b), may participate as amicus curiae at any time in the proceedings, at the Commission's discretion. As such, on April 15, 2010, the Board requested the SEC's interpretation of Section 806. The SEC agreed with the "ALJ decisions in Morefield v. Exelon Services, Inc., 2004-SOX-2, (Jan. 28, 2004) and Walters v. Deutsche Bank AG, 2008-SOX-70 (Mar. 23, 2009) [that Section 806 coverage extends to a parent company's non-publicly traded subsidiaries]." Brief of the Securities and Exchange Commission ("SEC Brief"), Amicus Curiae, at 2.

Congress characterize Section 929A as a "clarifying" amendment rather than a substantive change of the law. "The Senate Report accompanying the Senate bill (S. 3217, which was incorporated into the previously passed House bill and passed by the Senate on May 20, 2010) explains that the amendment is intended as a 'clarification' made necessary by the often asserted defense that non-public subsidiaries are not covered by Section 806. The Senate Report states that the purpose of Section 929A is '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. . . . Currently, '[t]he 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." SEC Brief, at 3-4 (emphasis in the original). *See also* Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae, at 11-12, 25-26 ("SOL Brief").

Section 929A merely clarifies "what the law has been all along." SEC Brief at 4 ("[Section 929A] is intended only 'to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases (citation omitted)" . . . . To put it another way, Section 929A "merely clarifie[s] what . . . existing rights and obligations had always been." As such, retroactive application is not implicated. *See Retroactive Rulemaking*, Geoffrey C. Wein, 749 HARVARD JOURNAL OF LAW & PUBLIC POLICY 750, 754 (2007):

> Under the prevailing jurisprudence in this area, interpretive nonlegislative rules do not create new policy but merely clarify and restate what the law 'is and always has been. (citing *Orr v. Hawk*, 156 F.3d 651, 654 (6th Cir. 1998). The general judicial presumption against retroactive rulemaking has no effect against such a restatement. In these cases, the APA-based presumption [against retroactive application] is also fatally weakened. The APA-based presumption rests on the presence of the term 'future effect' in the definition of rule. (citing 5 U.S.C. § 551(4)(2000)). Because nonlegislative rules restating or clarifying existing law are either interpretive rules or non-binding general statements of policy (citing John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917-918 (2004), true nonlegislative rules cannot have any exclusively future effect. The effect of a nonlegislative rule exists either in the past and the future, in the case of an interpretive rule, or it does not exist at all, if it is a non-binding statement of policy. Challenges to nonlegislative rules nearly always result in an agency victory because, as stated earlier, courts will generally defer to agency interpretation of statutes and regulations under the principles of *Chevron*[1] and *Seminole Rock*[2], respectively.

Under the "interpretive rule" exemption set forth in 5 U.S.C. § 553(b)(3)(A), the Board may "explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."

"[A]n agency's determination that a new statement is a clarification of existing law, rather than an entirely new rule, is generally given much weight." *Heimmermann v. First Union Mortgage Corporation*, 305 F.3d 1257, 1260 (11th Cir. 2002). Such a statement is therefore not retroactive and may be applied upon the announcement of the

[1] *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).
[2] *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945).

clarification. *Id.* at 1260. "A rule simply clarifying an unsettled or confusing area of the law ... does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.' ") (quoting *Johnson v. Apfel*, 189 F.3d 561 (7th Cir.1999) (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)).

Because Section 929A "merely states what the law has been all along" Section 929A "can be relied on by complainants in pending administrative cases." SEC Brief at 5. "[C]oncerns about retroactivity are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law." SEC Brief, at 5 (citing *Piambra Cortes v. American Airlines*, Inc., 177 F.3d 1271, 1283 (11th Cir. 1999).

Alternatively, the Board could reach the conclusion that subsidiaries and affiliates are covered under Section 806 *without regard to the Dodd-Frank Act entirely* Such a conclusion could be issued in the form of a declaratory order under 5 U.S.C. § 554(e):

> [T]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Whatever the Board's decision—whether announced through its adjudicatory, rule making or declaratory powers—the decision must be afforded *Chevron* deference. *See Welch v. Chao*, No. 07-1684 (4th Cir. 2008); *Day v. Staples, Inc.*, No. 08-1689 (1st Cir. 2009).

CONCLUSION

The Board must apply Section 929A retroactively under the principles stated above. Such an application will provide certainty in the application of this remedial statute and may, for a time, provide some protection against prevailing political winds that blow at will through the executive and legislative branches.

Ms. Johnson submits that the Board may act through its adjudicative powers and issue an interpretive rule, doing so retroactively as permitted in adjudication, and through rule making, clarifying the scope and purpose of Section 806 and Section 929A through a nonlegislative rule or interpretation. The Board may also simultaneously issue a declaratory order to such effect and remand the cases on direct review, including Ms. Johnson's, for further proceedings consistent with the clarification of the scope of Section 806 and 929A.

Respectfully submitted,

Dated: August 16, 2010

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