ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of: CARRI S. JOHNSON, Complainant, v. SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG, Respondents.	ARB Case No. 08-032 ALJ Case No. 2005-SOX-15

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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v.	ARB Case No. 08-032
SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG,	ALJ Case No. 2005-SOX-15
Respondents.	

BRIEF OF THE ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

Pursuant to 29 C.F.R. 1980.108(a)(1) and the Administrative Review Board's ("ARB" or the "Board") April 15, 2010 order in this case, the Assistant Secretary of Labor for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief to assist the Board in resolving an issue of first impression arising under section 806, the whistleblower protection provision, of Title VIII of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX"), 18 U.S.C. 1514A.[1]
Specifically, the Board has requested additional briefing on the

[1] This brief supersedes the Assistant Secretary's prior *amicus curiae* brief filed on March 14, 2008.

proper standard for determining whistleblower coverage of a subsidiary of a publicly traded company under section 806.

The Assistant Secretary, who implements section 806 and has a significant interest in how section 806 is interpreted, urges the Board to hold that section 806 applies to subsidiaries of publicly traded companies that file consolidated financial statements with the Securities and Exchange Commission ("SEC") pursuant to sections 12 and 15(d) of the Securities Exchange Act of 1934 ("Exchange Act"). After carefully considering the requirements under these provisions and the circumstances under which consolidated financial information is required for subsidiaries, the Assistant Secretary has concluded that this interpretation is consistent with the text of section 806 and with SOX's legislative history and broad remedial purpose. Moreover, recent developments, including congressional clarification in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Reform Act") that section 806 applies to subsidiaries of publicly traded companies, confirm that section 806 should be interpreted to encompass subsidiaries subject to consolidated financial reporting requirements under sections 12 and 15(d) of the Exchange Act.

STATEMENT OF THE ISSUE

Whether, and under what circumstances, the whistleblower protection provision of the Sarbanes-Oxley Act applies to subsidiaries of publicly traded companies.

STATEMENT OF THE CASE

A. Procedural History

Siemens Building Technologies, Inc. ("SBT") hired Carri S. Johnson in February 2002 to work as a Branch Administrator of its Roseville, Minnesota branch. See Respondent's Exhibit ("RX") 22. SBT is a non-publicly traded subsidiary of Siemens Corporation, which in turn is a non-publicly traded subsidiary of Siemens AG, a publicly traded company domiciled in Germany. See Affidavit of Daniel Hislip, submitted to the ALJ as Exhibit D to Respondent's motion for judgment as a matter of law, ¶¶ 4, 6.

On March 10, 2004, SBT terminated Johnson's employment. RX 88. Johnson filed a complaint with OSHA on June 8, 2004, alleging that she was terminated from her position at SBT in retaliation for having reported suspected fraudulent and illegal activity in booking sales and billing customers. She alleged that this termination violated SOX's whistleblower protection provision. She named SBT in her complaint.

OSHA dismissed Johnson's complaint on November 14, 2004. Although OSHA found that SBT and Siemens AG were a "company"

within the meaning of section 806 of Sarbanes-Oxley, it concluded that there was no reasonable cause to believe that SBT and Siemens AG had dismissed Johnson in retaliation for engaging in protected activity under Sarbanes-Oxley. Johnson requested a hearing before an administrative law judge ("ALJ") and moved to amend her complaint to add Siemens Corporation and Siemens AG. SBT moved for a summary decision, arguing that it could not be covered under Sarbanes-Oxley as a non-publicly traded subsidiary. It also moved for a summary decision on the merits.

On May 9, 2006, the ALJ granted Johnson's motion to add Siemens AG as a party to the case because it had been named in the proceedings before OSHA and had been served with OSHA's findings and with notices from the Office of Administrative Law Judges. The ALJ denied Johnson’s motion as to Siemens Corporation because it had never been named or served as a party. The ALJ denied SBT's two motions, ruling that the law was unsettled as to the coverage of subsidiary companies, and that there were genuine issues of fact as to the merits of the claim. The ALJ held a nine-day hearing in May and July 2006.

After the hearing, the ALJ revisited the coverage question in light of the ARB's decision in Klopfenstein v. PCC Flow Technologies Holdings, Inc., ARB No. 04-149 (ARB May 31, 2006). Based on Klopfenstein, the ALJ concluded that SBT did not act as an agent of Siemens AG when it dismissed Johnson, and therefore

it was not a covered entity under the whistleblower protection provision of SOX. Johnson v. Siemens Bldg. Tech., Inc., ALJ No. 2005-SOX-15, at 7-8 (ALJ Nov. 27, 2007). Accordingly, the ALJ dismissed Johnson's complaint on November 27, 2007. Id. Johnson filed a petition for review with the Board, and the case was accepted for review.

B. The ALJ's Decision

Relying on Klopfenstein, the ALJ concluded that SBT could be a covered entity under Sarbanes-Oxley only if it were acting as an officer, employee, contractor, subcontractor or agent of its parent company Siemens AG when it dismissed Johnson. Johnson, ALJ No. 2005-SOX-15, at 7-8. The ALJ noted that Johnson had not alleged, nor was there any evidence, that Siemens AG had knowledge of or participated in the termination decision. Id. at 5, 8. Because the evidence indicated that SBT was not acting as an agent of Siemens AG in dismissing Johnson, the ALJ concluded that SBT was not a covered entity under SOX and that Siemens AG could not be held liable for the actions of SBT or its employees. Id. at 8-9.

C. The ARB's Briefing Order

After receiving briefs from the parties and a brief *amicus curiae* from the Assistant Secretary, the Board issued an order dated April 15, 2010 in which it requested additional briefing from the parties, the Assistant Secretary, the Securities and

Exchange Commission, and any other amici curiae on the issue of subsidiary coverage. See Order Requesting Additional Briefing By The Parties And Inviting Amici Curiae, at 4 (April 15, 2010). In so doing, the Board observed that ALJs and courts have "struggled" with whether section 806 applies to subsidiaries of publicly traded companies, resulting in conflicting opinions that have "spanned the spectrum from universal coverage for subsidiaries to no coverage for subsidiaries." Id. at 2.

The Board's order summarized three general approaches to subsidiary coverage under section 806. First, the Board noted that it had embraced a common law agency theory of coverage in Klopfenstein, a SOX case which held a subsidiary of a parent company could be liable as an agent of the publicly traded parent under section 806. The Board observed that although post-Klopfenstein ALJ and court decisions reflected some variation in approach, "a common theme for those embracing agency theory is to require that the parent company knew of the employee's protected activity or participated in the adverse action affecting the terms and conditions of the whistleblower's employment for the subsidiary to be considered an agent of the parent company and thus covered under section 806." Id. at 3.

Second, the Board noted that some ALJs have applied the "integrated enterprise" or "single employer" test to section 806 cases involving subsidiaries. Id. Under this approach,

subsidiaries may be so integrated with their publicly traded parent companies that they constitute a single employer covered under section 806. Conversely, when a subsidiary and its publicly traded parent are not sufficiently integrated to constitute a single employer, section 806 does not apply to the subsidiary under the integrated enterprise test. Although an integrated enterprise determination "ultimately depends on all the circumstances of the case," Pearson v. Component Technologies Corp., 247 F.3d 471, 486 (3d Cir. 2001), the centralized control of labor relations is the most important factor. See Bristol v. Board of County Comm'rs of County of Clear Creek, 312 F.3d 1213, 1220 (10th Cir. 2002); Romano v. U-Haul Int'l, 233 F.3d 655, 666 (1st Cir. 2000).[2]

Finally, the Board discussed two ALJ decisions which held that subsidiaries are covered under section 806 without resorting to either the integrated enterprise test or agency theory. Order, at 3-4 (citing Morefield v. Excelon Servs., Inc., ALJ No. 2004-SOX-2 (ALJ Jan. 28, 2004) and Walters v. Deutsch Bank AG, ALJ No. 2008-SOX-70 (ALJ Mar. 23, 2009)). In Morefield, an early SOX case, the ALJ concluded that employees

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[2] The other factors for determining whether to treat entities as a single employer are the interrelation of operations, common management, and common ownership or financial control. See Pearson, 247 F.3d at 486; Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999).

of subsidiaries of publicly traded parent companies are covered under section 806 of Sarbanes-Oxley in light of SOX's purpose of preventing fraud and deception in the reporting of corporate value to investors. ALJ No. 2004-SOX-2, at 2. In reaching that conclusion, the ALJ reasoned that when the value and performance of a publicly traded company are based in part "on the value and performance of component entities within its organization," SOX "ensures that those entities are subject to internal controls applicable throughout the corporate structure, that they are subject to the oversight responsibility of the audit committee, and that the officers who sign the financials are aware of material information relating to the subsidiaries." Id. at 3. As a result:

> A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization.

Id.

Walters, a recent subsidiary coverage case, likewise concluded that employees of subsidiaries of publicly traded companies are covered under section 806 in light of Sarbanes-Oxley's legislative history and purpose of preventing securities

law violations and corporate fraud. ALJ No. 2008-SOX-70, at 4-21 (employee under section 806 includes "all employees of every constituent part of the publicly traded company, including subsidiaries and subsidiaries of subsidiaries which are consolidated on its balance sheets, contribute information to its financial reports, are covered by its internal controls and oversight of its audit committee, and subject to other Sarbanes-Oxley reforms imposed upon the publicly traded company").

The Board concluded in the April 15, 2010 Order that "[g]iven the variations and conflicts in interpretation and analysis of SOX whistleblower liability in cases in which the complainant is an employee of a privately owned subsidiary of a publicly held corporation, the Board will review the question of subsidiary coverage taking into consideration all legal theories that have been suggested by this Board, the ALJs, [and] the courts," as well as "any other theories advocated by the briefs filed in response to this Order." Order, at 4.

ARGUMENT

THE BOARD SHOULD CONCLUDE THAT SECTION 806 OF THE SARBANES-OXLEY ACT APPLIES TO CONSOLIDATED SUBSIDIARIES OF PUBLICLY TRADED COMPANIES.

Sarbanes-Oxley was enacted to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. See S. Rep. No. 107-146. The Act's whistleblower

protection provision furthers this statutory purpose by encouraging covered employees to disclose information that they reasonably believe constitute federal securities violations or fraud against shareholders. See 18 U.S.C. 1514A(a). Section 806 prohibits retaliation against employees for such disclosures by any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company . . . ." 18 U.S.C. 1514A(a); see also 29 C.F.R. 1980.101.

Section 806 neither expressly includes nor excludes subsidiaries of publicly traded companies, and its terms are "far from pellucid." Lawson v. FMR, LLC et al., Nos. 08-10466 & 08-10758, 2010 WL 1345153, at *9 (D. Mass. Mar. 31, 2010). The Assistant Secretary respectfully submits, however, that section 806's text, legislative history, and remedial purpose all support an interpretation that would extend coverage to any "consolidated subsidiary" (defined as a majority-owned or controlled subsidiary that is consolidated on the parent company's financial reports filed with the SEC). In proposing categorical coverage of such subsidiaries, the Assistant Secretary is cognizant that the Assistant Secretary's prior

amicus curiae brief in this matter proposed a narrower interpretation of section 806.[3] However, after further consideration of the requirements under sections 12 and 15(d) of the Exchange Act, the Assistant Secretary has concluded that the broader interpretation described in this brief is more appropriate. Three subsequent developments also have informed the Assistant Secretary's conclusion that section 806 applies to consolidated subsidiaries of publicly traded companies.

First, the decision in Walters, in which the ALJ thoroughly reviewed the legislative history and purpose behind SOX, as well as several SOX's statutory provisions, concluded that consolidated subsidiaries are covered entities within the meaning of section 806. ALJ No. 2008-SOX-70, at 23-24. Second, the Reform Act passed by Congress expressly provides that section 806 applies to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of a publicly traded company, and the Reform Act's legislative history makes clear that its amendment of section 806 constitutes a clarification, not a change, of the existing statute. See H.R. 4173, 111th Cong. Sec. 929A (2010); see also

[3] We previously suggested the integrated employer test, a widely accepted analysis for determining under various labor and employment laws whether subsidiaries should be considered the same entity as their parent company for coverage purposes.

S. Rep. No. 111-176.[4] Finally, the U.S. District Court for the District of Massachusetts has broadly interpreted section 806 to protect "employees of any related entity of a public company." Lawson, 2010 WL 1345153, at *17 (emphasis added). In light of these developments, and for the reasons set forth more fully below, the Board should hold that section 806's protections extend to employees of consolidated subsidiaries of publicly traded companies.[5]

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[4] Moreover, Senators Leahy and Grassley, who authored section 806, have stated:

> We want to point out, as clearly and emphatically as we can, that there is simply no basis to assert, given this broad language [under section 806] that employees of subsidiaries of the companies identified in the statute were intended to be excluded from its protections. Moreover, as the authors of this provision, we can clearly state that it was by no means our intention to restrict these important protections to a small minority of corporate employees or to give corporations a loophole to retaliate against those who would report corporate fraud by operating through subsidiaries.

Letter from Senators Leahy and Grassley to Secretary Elaine Chao (September 9, 2008), *available at* http://employment lawgroupblog.com/wp-content/grassley-chao-sox-0909.pdf.

[5] The agency test used by the ALJ in this case or the integrated employer test previously proposed by the Assistant Secretary, however, remain valid means of determining coverage for subsidiaries that are not consolidated on the financial statements filed with the SEC.

A. The Text of Section 806 of SOX Demonstrates That Coverage Extends to Consolidated Subsidiaries of Publicly Traded Companies.

Section 806 expressly prohibits retaliation by any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . . ." 18 U.S.C. 1514A(a). The requirements of these two sections of the Exchange Act establish that section 806 applies to consolidated subsidiaries of publicly traded companies.[6]

Section 12 of the Exchange Act requires an issuer to register with the SEC any security that will be traded on a national exchange.[7] 15 U.S.C. 78l. Virtually every publicly traded company is an issuer within the meaning of the statute and is required to file a registration statement under section 12. See 15 U.S.C. 78l(g)(1); 17 C.F.R. 240.12g-1.[8] Such

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[6] The term "company" encompasses subsidiaries. See 15 U.S.C. 78c(a)(19); 15 U.S.C. 80a-2(a)(8) (under the Exchange Act, a "company" includes "a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not"); see also Black's Law Dictionary (9th ed. 2004)(same).

[7] Sarbanes-Oxley adopts the definition of "issuer" from section 3 of the Exchange Act, which in turn defines "issuer" as "any person who issues or proposes to issue any security. . . ." 15 U.S.C. 7201(a)(7); 15 U.S.C. 78c(a)(8).

[8] Registration statements must be filed by issuers that have both a class of equity securities having more than five hundred

registration statements are required to include, among other information, the articles of incorporation, bylaws, 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 U.S.C. 78l(b).[9]

Once a security is registered, the company with the registered securities must file pursuant to section 15(d) of the Exchange Act "supplementary and periodic information, documents, and reports as may be required pursuant to section 13 [of the Exchange Act]." See 15 U.S.C. 78o(d). Section 13 of the Exchange Act requires that the publicly traded parent company file annual and quarterly reports that include "consolidated balance sheets or income accounts," as well as other corporate information, for any person that it directly or indirectly "controls." See 15 U.S.C. 78m. These periodic reports include the 20-F annual report for foreign issuers (that Siemens AG files), the 10-K annual report for U.S. issuers, and the 10-Q quarterly report, see 17 C.F.R. 249.310; 17 C.F.R. 249.308a, which provide a comprehensive summary of a publicly traded parent company's performance, including consolidated financial

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shareholders of record and more than ten millions dollars in total assets. See 15 U.S.C. 78l(g)(1); 17 C.F.R. 240.12g-1.

[9] The term "person" means "a natural person, company, government, or political subdivision, agency, or instrumentality of a government." 15 U.S.C. 78c(a)(9).

information for all subsidiaries that are directly or indirectly controlled by the parent company.

Pursuant to the SEC's definition, subsidiaries are directly or indirectly controlled by the parent company if the parent company owns a majority interest in those subsidiaries. See 17 C.F.R. 210.1-02(g) (defining "control," including the terms "controlling," "controlled by" and "under common control with", as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise."). Due to the control over majority-owned subsidiaries, Congress and the SEC require that a publicly traded parent company provide the financial information (as well as other corporate information) of all its majority-owned subsidiaries in order to meet the filing obligations under sections 12 and 15(d) of the Exchange Act. In so doing, the publicly traded company is required to consolidate the financial information of such entities. See 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."); see also 17 C.F.R. 210.1-01(a)(2) (consolidated financials are required for registration statements under section 12 and annual and other reports under section 15(d)). Consolidated financial statements are generally

required because "[t]here is a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has a controlling financial interest in another entity." 17 C.F.R. 210.3A-02.

The SEC, through the Financial Accounting Standards Board ("FASB"), mandates that a publicly traded company's consolidated financial statements include the financial information of subsidiaries and other entities, such as limited liability partnerships, in which the parent company has a controlling financial interest. See Consolidation of Variable Interest Entities, Statement of Fin. Accounting Standards No. 46R (Fin. Accounting Standards Bd. 2003)(attached as Addendum A).[10] Controlling financial interest is established if the parent company has a majority voting interest or a majority equity interest in the subsidiary. Id.[11]

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[10] 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. See Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter (April 25, 2003), *available at* http://www.sec.gov/rules/policy/33-8221.htm.

[11] Publicly traded parent companies are also required to consolidate the financial information for variable interest entities (entities where the interest may decrease or increase in value), when the primary benefit (the majority of the risks and rewards) of a variable interest entity inures to the benefit of the publicly traded company. Id.

"The purpose of consolidated financial statements is to present, primarily for the benefit of the owners and creditors of the parent, 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." See Consolidated Financial Statements, Accounting Research Bulletin No. 51 (1958), as amended by Statement of Fin. Accounting Standards No. 160 (Fin. Accounting Standards Bd. 2008) (emphasis added) (attached as Addendum B). Thus, the financial information of the majority-owned or controlled subsidiaries (and majority-owned or controlled subsidiaries of those subsidiaries) are consolidated on the registration statement and annual reports, because these subsidiaries are "controlled" by and considered part of and wholly inseparable from the parent company for purposes of complying with sections 12 and 15(d) of the Exchange Act.

An understanding of these requirements leads to the conclusion that the phrase "company with a class of securities registered under section 12 . . . or that is required to file reports under section 15(d)" encompasses the publicly traded parent company and all consolidated subsidiaries of the parent company whose financial information is included on the registration statement or the periodic and annual reports. Against this statutory and regulatory backdrop – which reveals

that publicly traded companies and their consolidated subsidiaries constitute a single, unitary "company" for purposes of section 806 – the absence of an explicit reference to subsidiaries in section 806 does not exclude them from coverage. See Lorillard v. Pons, 434 U.S. 575, 580-81 (1978)("[W]here, as here, 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.").[12]

Other provisions of SOX support the conclusion that publicly traded companies and their consolidated subsidiaries constitute a single, unitary "company." For example, section 302(a)(4) of Sarbanes-Oxley provides that the corporate officers

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[12] A number of courts have concluded that section 806 does not automatically apply to subsidiaries due to "'the general principle of corporate law that a parent is not automatically liable for the actions of a subsidiary, absent a clear intent from Congress to the contrary.'" See Malin v. Siemens Med. Solutions Health Servs., 638 F. Supp. 2d 492, 500 (D. Md. September 22, 2008) (quoting Rao v. Daimler Chrysler Corp., No. 06-13723, 2007 WL 1424220, at *4 (E.D. Mich. May 14, 2007)(additional citations omitted); see also United States v. Bestfoods, 524 U.S. 51, 61 (1998). But particularly in light of Congress' recent clarification that section 806 was intended to apply to subsidiaries, it is evident that Congress has expressed "clear intent" that a parent company and subsidiary are viewed as one "company" for SOX purposes. Moreover, a parent company under Sarbanes-Oxley is not being held liable merely because it owns stock in the subsidiary. Rather, as noted, Congress intended that a parent company and its subsidiaries would be viewed as one "company" for coverage purposes.

who sign the annual and quarterly reports must certify that the publicly traded company has established and maintained internal controls and procedures that ensure that material information relating to the publicly traded company, and its consolidated subsidiaries, are made known to such officers. See 15 U.S.C. 7241(a)(4)(A), (B); see also 17 C.F.R. 229.601(31). Section 302(a)(4) of Sarbanes-Oxley also provides that the corporate officer certify that the publicly traded company has designed (or caused to be designed) internal controls over financial reporting that provide reasonable assurances regarding the reliability of the financial reporting and the preparation of financial statements for external purposes. See 15 U.S.C. 7241(a)(4)(A), (B); see also 17 C.F.R. 229.601(b)(31).[13] The SEC explains through its rulemaking authority that the parent

[13] In concluding that subsidiaries are not covered under section 806, several courts have emphasized that the specific reference to subsidiaries in SOX section 302(a)(4)(B), coupled with the absence of an express reference to subsidiaries in section 806, militates against subsidiary coverage. See, e.g., Rao, 2007 WL 1424220, at *4. Section 302(a)(4)(B) provides that certain corporate officers must certify that they "have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers." 15 U.S.C. 7241(a)(4). This language – particularly the precise reference to "the issuer and its consolidated subsidiaries" – demonstrates that there was no need to refer expressly to subsidiaries in section 806, because an "issuer and its consolidated subsidiaries" are constituent parts of a company "with a class of securities registered under section 12" of the Exchange Act or "required to file reports" under section 15(d) of the Exchange Act.

company is also required to design and implement controls related to the prevention, identification, and detection of fraud. See Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36636, 36643 (June 18, 2003) (emphasis added).

Similarly, section 404 of Sarbanes-Oxley requires that each annual report contain a statement of management's responsibility for establishing and maintaining an adequate internal control structure, the framework used by management to evaluate the effectiveness of the parent company's internal controls, and management's assessment of the effectiveness of the company's internal controls for financial reporting. See 15 U.S.C. 7262(a); see also 17 C.F.R. 229.307; 229.308. Thus, the publicly traded parent company must design and implement controls over the annual financial reporting, as well as the prevention, identification, and detection of fraud for the entire corporate structure including its consolidated subsidiaries, and those subsidiaries must implement these controls on the parent company's behalf and subject to the parent company's controls. This interconnectedness demonstrates that the publicly traded parent company and its consolidated subsidiaries comprise one "company" for Sarbanes-Oxley purposes.

Finally, section 301 of Sarbanes-Oxley supports the conclusion that section 806's prohibition against retaliation extends to consolidated subsidiaries. Section 301 requires the audit committee of each issuer to establish procedures for "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters." 15 U.S.C. 78j-1(m)(4). Such procedures would apply to the treatment of complaints by employees of subsidiaries. Section 806 should be construed to have a similar scope, since it would be peculiar to mandate procedures that facilitate the lodging of complaints regarding accounting matters but deny whistleblower protection to the employees of subsidiaries who avail themselves of those procedures. See Walters, 2008-SOX-70, at 22-23 ("'[E]mployee of a publicly traded company' in Section 806 is, for parent/[]subsidiary relationships, co-extensive with the employee coverage in Section 301 and includes, within its meaning, all employees of every constituent part of the publicly traded company, including subsidiaries and subsidiaries of subsidiaries. . . .").

In short, because consolidated subsidiaries are considered part of and wholly inseparable from the publicly traded parent company for purposes of registering the company on a securities exchange under section 12 and complying with reporting requirements under section 15(d), as well as for purposes of the

internal controls implemented by the parent company to detect fraud, such consolidated subsidiaries are part of a "company" with a class of securities or required to file reports for purposes of section 806 of Sarbanes-Oxley. See Walters, 2008-SOX-70, at 15 ("Consolidated subsidiaries are, for Sarbanes-Oxley purposes, like appendages on the hand of their publicly traded parent. . . ."); Morefield, 2004-SOX-2, at 3 ("The publicly traded entity is not a free-floating apex. . . . A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units. . . ."). Employees of consolidated subsidiaries therefore are covered under section 806's whistleblower protections.

B. Coverage of Consolidated Subsidiaries Under Section 806 Is Consistent with SOX's Legislative History.

As explained in the Senate Report for Sarbanes-Oxley, the Act was intended to encourage the disclosure of corporate fraud and "protect whistleblowers who report fraud against retaliation by their employers." S. Rep. No. 107-146, at 1. To further these objectives, section 806 provides whistleblower protections to employees of covered entities. Congress sought to provide such protections because it recognized the important anti-fraud contributions corporate whistleblowers can make and the unique role whistleblowers can play in deterring corporate fraud. See 148 Cong. Rec. S6436 (daily ed. July 9, 2002) ("When

sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why."); see also S. Rep. No. 107-46, at 9 (2002) (Corporate "insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions not only in the Enron matter but in all complex securities fraud investigations.").

Although SOX's legislative history is not conclusive on the issue of subsidiary coverage, SOX's purpose and its goal of protecting whistleblowers strongly suggest that Congress intended section 806 to sweep broadly. Indeed, Congress specifically recognized that subsidiaries play an important role in determining the financial health of a publicly traded company, and that they can be used by the parent company to deceive investors. The Senate Report details the potential that corporate fraud would be hidden behind layers of subsidiaries and partnerships and a corporate code of silence that extended beyond the publicly traded parent company. See S. Rep. No. 107-146, at 2-5 ("The [Enron] partnerships - with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance - were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially."); see also S. Rep. No. 107-146, at 4 ("The consequences of this corporate code of silence for investors in publicly traded

companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.").

The Senate report further details that Enron used its subsidiaries and partnerships to create rosy financial statements that deceived the investing public. See S. Rep. No. 107-146, at 2 ("[M]any of the most significant transactions apparently were designed to accomplish favorable financial statement results, not to achieve bona fide economic objectives or to transfer risk.") (internal citations omitted); see also S. Rep. No. 107-146, at 2 ("Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price."). The Senate report thus suggests that Congress was fully aware of the integrated role of subsidiaries for financial reporting and fraud purposes, and wanted to strengthen the reporting requirements imposed upon publicly traded parent companies and their subsidiaries through Sarbanes-Oxley reforms. See Walters, 2008-SOX-70, at 18 ("Congress expressed its concern with the operations of subsidiaries, not as separate entities, but as consolidated assets and liabilities which are susceptible to manipulation on the books of their publicly traded parents.").

Notably, the legislative history of the Reform Act underscores Congressional intent that section 806 protects

employees of subsidiaries of publicly traded companies.[14] The Senate Report for the Reform Act expressly states that the amendment to section 806 is intended solely to clarify that coverage under section 806 already extends to subsidiaries of publicly traded companies:

> [The Reform Act] [a]mends 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.

S. Rep. No. 111-176, at 114.

In short, SOX's legislative history "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." Lawson, 2010 WL 1345153, at *16. The Reform Act further reflects this concern. Moreover, since the clarification of section 806 was enacted in the Reform Act, it may be applied retroactively. See Brown v. Thompson,

[14] The Reform Act, H.R. 4173, as reported by Conference Committee, was passed by the House on June 30, 2010 and by the Senate on July 15, 2010. It will now go before the President for his signature. If signed, the Reform Act will become law.

374 F.3d 253, 258-59 (4th Cir. 2004)(clarifying amendment merely clarifies existing law and may be applied retroactively); Abkco v. Music, Inc., 217 F.3d 684, 691 (9th Cir. 2000)("Normally when an amendment is deemed clarifying, rather than substantive, it is applied retroactively.") (internal citations omitted); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.")(internal citations omitted); see also Stone & Webber Eng'g Corp. v. Herman, 115 F.3d 1568, 1576 (11th Cir. 1997)(the Secretary's interpretation under the whistleblower provisions of the Energy Reorganization Act was reasonable as reflected by the legislative history of the 1992 amendments that made clear that Congress intended to codify what it thought the law already protected). Interpreting the text of section 806 to cover consolidated subsidiaries thus would be consistent with legislative intent.

C. Subsidiary Coverage Effectuates SOX's Broad Remedial Purpose.

At its inception, section 806 was viewed as one of the most protective anti-retaliation provisions ever drafted by Congress. See S. Rep. No. 107-146, at 9 (listing organizations "who have called this bill the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to

the nation's financial markets.") (internal quotations omitted). Congress recognized that employees are more likely to come forward if the law protects them from a corporate culture that punishes whistleblowers. See S. Rep. No. 107-146, at 17 ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."); see also Walters, 2008-SOX-70, at 10 ("Worker protection in Section 806 is not an end in itself, it is simply a method designed to encourage insiders to come forward without fear of retribution."). Unless consolidated subsidiaries of publicly traded companies are covered under section 806, only a fraction of corporate employees would likely be protected from retaliation by section 806 because many publicly traded companies structure their organization primarily through subsidiaries and partnerships where there typically is no centralized control of labor or employment decisions.

The SEC's investigation of Berkshire Hathaway, Inc. ("Berkshire") and its subsidiaries for fraud illustrates the consequences of a narrow approach to subsidiary coverage. See Berkshire Hathaway, Inc., 2009 Annual Report (Form 10-K) (February 26, 2010), *available at* http://www.sec.gov/Archives /edgar/data/1067983/000119312510043450/0001193125-10-043450-index.htm. Berkshire is a holding company with approximately 70 wholly-owned subsidiaries engaged in diverse business

activities, including domestic and foreign-based insurance. Id. Although the entire corporate enterprise has approximately 233,000 employees, approximately 20 people are directly employed at Berkshire's headquarters in Omaha, Nebraska. As a result, the vast majority of employees of Berkshire's subsidiaries likely would not receive any protection under an agency or integrated enterprise interpretation of section 806, including employees who might have assisted the SEC and U.S. Department of Justice in investigations of Berkshire subsidiary General Re's transaction with American International Group, Inc. that ultimately resulted in a $80 million settlement and criminal sanctions. Id.[15]

Similarly, the facts of this case also demonstrate the consequences of adopting a narrow approach to subsidiary coverage. The family of companies under the Siemens AG umbrella had approximately 773 consolidated subsidiaries as of September 30, 2004, of whom 106 were majority-owned or controlled subsidiaries based in the United States. See Siemens AG, Annual Report 2004, List of Subsidiaries and Associated Companies for Siemens Worldwide, *available at* http://www.siemens.com/investor

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[15] In fact, complaints of retaliation have been dismissed by DOL against employees of Berkshire's subsidiaries on the theory that subsidiaries are not covered under Sarbanes-Oxley. See, e.g., Gereon v. Flightsafety Int'l and Berkshire Hathaway, Inc., 2008-SOX-40 (ALJ Sept. 21, 2008).

/en/financials/annual_reports.htm. Siemens AG was required to consolidate the financial information for all of Siemens AG's majority-owned or controlled subsidiaries, including the financial information for SBT. See Siemens AG, Annual Report (Form 20-F), at F1-F72 (November 29, 2004), *available at* http://www.siemens.com/investor/en/financials/sec_filings.htm ("Consolidated Financial Statements present the operations of Siemens AG and its subsidiaries (the Company or Siemens)"). Moreover, Siemens AG was required to implement internal controls to ensure accurate financial reporting and report on the effectiveness of those controls on its annual report in 2004. Id. at 120.

Notwithstanding Siemens AG's status as a large publicly traded company subject to the requirements of section 15(d) of the Exchange Act and the internal controls of sections 302 and 404 of Sarbanes-Oxley, Siemens AG has argued that few, if any, employees of Siemens AG or its consolidated subsidiaries would be protected under section 806.[16] This is because Siemens AG denies that it maintains centralized control over the labor and

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[16] Siemens AG is a multinational company whose headquarters are based in Germany. At least one court has held that the whistleblower protection provision of SOX does not extend protection to foreign employees working abroad. See Carnero v. Boston Scientific Corp., 433 F.3d 1, 7-8 (1st Cir. 2006). Thus, under this theory, any employees working for the publicly traded Siemens AG or consolidated subsidiaries outside the United States may not be protected under the whistleblower provision.

employment decisions of its consolidated subsidiaries, including those of SBT, see Affidavit of Daniel Hislip, ¶ 7, and also denies that it is ever involved in such decisions. Id. If this is true, any employees working for one of the 106 consolidated subsidiaries within the United States would not be protected under a narrow interpretation of the SOX whistleblower provision even if they blew the whistle on corporate fraud or federal securities violations.

For a statute whose primary purpose is protecting the investor by encouraging employees "who can disclose what happened and why" to come forward with information, a narrow interpretation of section 806 may leave many employees within the overall corporate structure at Siemens AG and other publicly traded companies without protection for disclosing information about possible federal securities violations or fraud against shareholders. As noted, the text of section 806 and its legislative history reveal that Congress never intended this result.

CONCLUSION

For the foregoing reasons, the Assistant Secretary respectfully requests that this Board hold that all consolidated subsidiaries of publicly traded companies are covered by section 806 of the Sarbanes-Oxley Act, and that the whistleblower protections set forth in section 806 therefore apply to employees of such subsidiaries, including complainant Carri Johnson.

Respectfully submitted,

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I certify that true and correct copies of the foregoing Brief of the Assistant Secretary of Labor for the Occupational Safety and Health Administration As Amicus Curiae were served on the following individuals on this 16th day of July, 2010:

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