U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

RODNEY GLOSS,

COMPLAINANT,

v.

TATA CHEMICALS NORTH AMERICA,

RESPONDENT.

ARB CASE NO. 2024-0006

ALJ CASE NO. 2020-CAA-00008
ALJ LAUREN C. BOUCHER

DATE: June 18, 2025

Before JOHNSON, Chief Administrative Appeals Judge, BURRELL, Administrative Appeals Judge

ORDER REQUESTING ADDITIONAL BRIEFING BY THE PARTIES AND INVITING AMICI CURIAE

This case arises under the whistleblower protection provisions of the Clean Air Act, 42 U.S.C. § 7622, and its implementing regulations at 29 C.F.R. Part 24 as well as the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX or Section 806), as amended, and its implementing regulations at 29 C.F.R. Part 1980. This appeal to the Administrative Review Board presents, among other issues, the question of the applicable definition of "affiliate" under Section 806.

STATUTORY AND REGULATORY FRAMEWORK

Certain companies must register the shares that they issue or make available to the public for sale as required by the Securities Act of 1933. Further, publicly traded companies must, among other obligations, file periodic reporting with the Securities and Exchange Commission (SEC) to ensure fair and transparent information for investors as provided in the Securities Exchange Act of 1934. SOX's definition of covered entities incorporates these concepts:

> 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 nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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 . . .[1]

SOX was originally enacted in 2002.[2] Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) amended the whistleblower protection provision of SOX to include subsidiaries and affiliates.[3] Section 929A of Dodd-Frank does not define the term "affiliate" or "subsidiary."[4] The implementing regulations of Section 806 also lack definitions of these terms.[5]

The general definitions found in Section 2 of Dodd-Frank are applicable "except as the context otherwise requires or as otherwise specifically provided in this Act."[6] Section 2 states that "[t]he term 'affiliate' has the same meaning as in section 1813 of this title."[7] In turn, 12 U.S.C. § 1813 relays that "[t]he term 'affiliate' has the meaning given to such term in section 1841(k) of this

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1 18 U.S.C. §1514A(a).

2 116 Stat. 745, 802, Pub. L. 107-204, July 30, 2002.

3 124 Stat. 1376, 1852, Pub. L. 111-203, July 21, 2010.

4 *Id*.

5 29 C.F.R. § 1980.101.

6 12 U.S.C. § 5301.

7 12 U.S.C. § 5301(1).

title."[8] Code 12 U.S.C. § 1841(k) provides "the term 'affiliate' means any company that controls, is controlled by, or is under common control with another company."[9]

This definition of "controls," "controlled by" or "under common control with" is substantially similar to the definitions of "affiliate" found in securities regulations. For example, 17 C.F.R. § 210.1-02, the Securities Exchange Act of 1934's implementing regulations on the form and content of financial statements, define an "affiliate" as "[a]n *affiliate* of, or a person *affiliated* with, a specific person . . . that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified."[10] The regulations then state "[t]he term *control* (including the terms *controlling*, *controlled by* and *under common control with*) means 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."[11]

In addition, 17 C.F.R. § 230.144, or Rule 144 under the Securities Act of 1933, specifies that "[a]n *affiliate* of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer."[12] Courts have stated that under Rule 144 "[t]he question of whether a person is in a position of 'control' is a

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[8] 12 U.S.C. § 1813(w)(6). However, it should be noted that 12 U.S.C. § 1813(w) states that the definition of "affiliate" at 12 U.S.C. § 1813(w)(6) and other definitions within that section are "[d]efinitions relating to affiliates of depository institutions." 12 U.S.C. § 1813(w).

[9] 12 U.S.C. § 1841(k). Statute 12 U.S.C. § 1841 details the meaning of "control" as it applies in banking context: "Any company has control over a bank or over any company if— the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company; the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company." 12 U.S.C. § 1841(a)(2)(A)-(C).

[10] 17 C.F.R. § 210.1-02 (b). "The term *person* means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization." 17 C.F.R. § 210.1-02(q).

[11] 17 C.F.R. § 210.1-02(g).

[12] 17 C.F.R. § 230.144(a)(1).

question of fact and depends on the totality of the circumstances, including an appraisal of the influence the individual has on the management and policies of a company."[13] Moreover, "[a]lthough there is no bright-line rule declaring how much stock ownership constitutes 'control' and makes one an 'affiliate' under Section 4(1), some commentators have suggested that ownership of something between ten and twenty percent is enough, especially if other factors suggest actual control."[14]

Regulation 17 C.F.R. § 230.405, or Rule 405, an implementing regulation of the Securities Act of 1933, defines an "*affiliate* of, or a person *affiliated* with, a specified person" as a "person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with" an issuer. Rule 405 has been characterized as an effort

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[13] *SEC v. Cavanagh*, 1 F. Supp.2d 337, 366 (S.D.N.Y. 1998) (citing *United States v. Corr*, 543 F.2d 1042, 1050 (2d Cir. 1976). In *SEC v. Freiberg*, 2007 WL 2692041, at *15 (D. Utah 2007), the court stated as follows:

> The affiliate inquiry is based on the totality of the circumstances, 'including an appraisal of the influence upon management and policies of a corporation by the person involved.' Affiliates are most often officers, directors, or majority shareholders-people who exercise control and influence over the company's policies or finances. In this case, the SEC presented no evidence Mr. Carmichael was involved in Gateway's governance, policies, strategies, or decisions. None of Gateway's principals testified to being influenced by Mr. Carmichael. And as the court determined, Mr. Carmichael never owned more than 5% of the outstanding stock at any one time, so he could exert no significant influence through his stock ownership. It would simply not be reasonable to find Mr. Carmichael occupied the type of control position contemplated by Rule 144. Therefore, the court has no choice but to find he did not occupy the position of an affiliate.

Id. (internal citations omitted).

[14] *SEC v. Cavanagh*, 445 F.3d 105, 113 n.19 (2d Cir. 2006) (citing Sidney Ravkind, *We New Wizards of Wall Street*, 66 TEX. B.J. 120, 126 n.32 (2003)); *see also SEC v. Longfin Corp.*, 316 F.Supp.3d 743 (S.D.N.Y. 2018). In the past, the SEC proposed to amend Rule 144 to include a bright-line test to the definition of "affiliate." *See* Securities Act Release No. 7391, 1997 WL 70601, at *4 to 5 (Feb. 20, 1997).

to "'alleviate some of the uncertainty' surrounding the definition of control."[15] As in § 210.1-02 cited above, Rule 405 defines the term "*control*" 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 securities, by contract, or otherwise."[16] The SEC defines "*voting securities*" as "securities the holders of which are presently entitled to vote for the election of directors."[17]

BACKGROUND

With this statutory and regulatory background, we turn to the facts of this case. The ALJ decided on summary judgment that Complainant's former employer, Respondent Tata Chemicals North America (TCNA), a private company, was not subject to the whistleblower protection provisions of SOX at the time of TCNA's alleged retaliatory actions against Complainant, despite its connection with Owens-Illinois, a publicly held company required to file reports under the Securities Exchange Act of 1934.[18]

For purposes of the ALJ's decision on summary judgment at issue in this appeal, it is undisputed that:

- At the time of Complainant's termination in 2019, TCNA, a private company, was a 75% majority owner of Tata Chemicals Soda Ash Partnership Holdings (TCSAP Holdings).[19]

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[15] Alex Poor & Michelle Reed, *The "Control" Quagmire: The Cumbersome Concept of "Control" for the Corporate Attorney*, 44 Sec. Reg. L.J. 101, 44 NO 2 SECRLJ ART 1 (2016).

[16] 17 C.F.R. § 230.405.

[17] *Id.*

[18] Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision (Summary Decision) at 24-38. https://www.oalj.dol.gov/DECISIONS/ALJ/CAA/2020/GLOSS_RODNEY_D_v_TATA_CHEMICALS_NORTH_2020CAA00008_(JUL_15_2022)_094901_ORDER_PD.PDF See also Decision and Order Denying Complaint at: https://www.oalj.dol.gov/DECISIONS/ALJ/CAA/2020/GLOSS_RODNEY_D_v_TATA_CHEMICALS_NORTH_2020CAA00008_(NOV_17_2023)_120604_CADEC_PD.PDF

[19] Summary Decision at 25.

- Private company TCSAP Holdings was the majority partner of TCSAP, also a private company.[20]
- In 2019, the Andover Group, a private wholly owned subsidiary of Owens-Illinois, a publicly held company, owned 25% of TCSAP Holdings.[21]
- TCNA was required to obtain Owens-Illinois' approval for unbudgeted capital requests exceeding $250,000 and for forward exchange contracts.[22]
- Owens-Illinois sold its 25% interest in TCSAP Holdings to Valley Holdings, a parent holding company of TCNA at the end of 2019.[23]
- Owens-Illinois' 2018 United States Securities and Exchange Commission Form 10-K (Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934) lists TCSAP among its "Equity Investments" and "affiliates."[24]

Complainant argues he raised a genuine issue of material fact that TCSAP is an affiliate of Owens-Illinois, and is thus covered by Section 806, because in 2019:

- Owens-Illinois held one of four seats on TCSAP's Operating Committee. TCNA held the remaining 3 seats;
- Owens-Illinois had oversight over TCSAP's management and policies; and,
- Owens-Illinois had veto-rights over the approval of budgets, forecasts, capital, and spending of TCSAP.

REQUEST FOR ADDITIONAL BRIEFING

Since the enactment of Section 929A of Dodd-Frank, the ARB and federal courts have delineated subsidiary and contractor coverage under Section 806 of SOX but have not addressed the limits of "affiliate" coverage under Section 806 in detail.

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20 *Id.* .

21 *Id.*

22 *Id.* at 33.

23 *Id.* at 25 n.38

24 *Id.* at 36.

Given the scarcity of case authority bearing on this precise issue, the Board invites additional briefing on the applicable definition of "affiliate" under Section 806. The Board requests additional briefing from the parties as well as from the Assistant Secretary for Occupational Safety and Health.[25] The Board further invites briefing from the Securities and Exchange Commission and any amici curiae interested in filing a brief.[26] The following questions should be addressed in response to this Order:

(1) What guidance should the Department of Labor follow when evaluating whether an entity "controls, or is controlled by, or is under common control with" another entity for the purposes of construing "affiliate" status under Section 806's whistleblower protection provision? Specifically, is the case law arising under Rule 144 and Rule 405 appropriate for Section 806? If so, is there a bright-line rule that can be applied, or would the same totality of circumstances apply for construing "control"?

(2) If the inquiry is the "totality of circumstances," what are the practical implications for governance going forward under an open-ended test?

(3) Are Owens-Illinois' use of the "equity method of accounting" and its inclusion of TCSAP as an "equity affiliate" in the "Notes to Consolidated Financial Statements" in Owen-Illinois' FORM 10-K indications that TCSAP meets the definition of an "affiliate whose financial information is included in the consolidated financial statements" of Owens-Illinois under Section 806?

All briefs shall be filed and received by the Administrative Review Board on or before **August 4, 2025.** Reply briefs may be filed by the parties and shall be received by the Board on or before **September 3, 2025.**

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[25] "At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as amicus curiae at any time at any stage of the proceeding." 29 C.F.R. § 1980.108(a)(1).

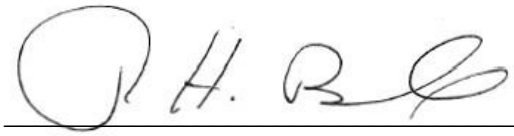
[26] "The Securities and Exchange Commission, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at the Commission's discretion." 29 C.F.R. § 1980.108(b).

The following formatting guidelines apply to briefs filed with the Board:

- 12-point, 10 character-per-inch type or larger font
- Double-spaced
- Minimum of one-inch margins
- Printable on 8.5- by 11-inch paper

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge