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 26, 2026

Appearances:

For the Complainant:
Rodney Gloss; *Pro Se*; Loveland, Colorado

***For the Respondent*:**
Michael J. Volpe, Esq., Trevor L. Bradley, Esq., Daniel S. Alter, Esq., and Sarah A. Fucci, Esq.; *Broadfield US LLP*; New York, New York

For the Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:
Jonathan Berry, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jennifer L. Huggins, Esq., and Alice B. Catlin, Esq.; *United States Department of Labor*; Washington, District of Columbia

Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL and KIKO, Administrative Appeals Judges

DECISION AND ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This case arises under the whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622, and its implementing regulations at 29 C.F.R. Part

24 (2025), as well as the anti-retaliation provisions of 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 (2025). On October 25, 2019, Complainant Rodney Gloss filed a complaint with the Occupational Safety and Health Administration (OSHA) in which he alleged that Respondent Tata Chemicals North America (Respondent, TCNA, or Respondent TCNA) discriminated against him and discharged him for engaging in activity protected under SOX and the CAA. OSHA dismissed the claim and Complainant requested a hearing before an Administrative Law Judge (ALJ). There were several proceedings before the ALJ, who ultimately dismissed Complainant's claim.[1] Complainant appeals the ALJ's July 15, 2022 Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision and Decision and Order Denying Complaint to the Administrative Review Board (ARB or Board). For the reasons that follow, we affirm the ALJ's determinations regarding Complainant's CAA claims, we vacate and reverse the ALJ's determination that Respondent was not a SOX-covered entity, we vacate and reverse the ALJ's determination that Complainant did not engage in SOX-protected activity, and we remand for further proceedings.

BACKGROUND

Tata Chemicals Limited, a company headquartered in Mumbai, India,[2] owns Valley Holdings Inc., the private holding company of Respondent TCNA.[3] Respondent is a private company with a location in Sandy, Utah.[4] Respondent mines trona ore, which it processes into soda ash at a surface refining plant in Green River, Wyoming.[5] The plant's twenty-four baghouses control the emission of particulate matter generated by the soda ash production.[6]

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[1] As detailed later in this decision, the earlier proceedings included a prior ALJ grant of summary decision and an ARB Order of Remand.

[2] August 19, 2020 OSHA Determination Letter at 1.

[3] Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision (Summary Decision) at 25.

[4] August 19, 2020 OSHA Determination Letter at 1.

[5] JX 1 at 1. The soda ash is used to produce glass, baking soda, laundry detergent, paper, and textiles. RX 6 at 1.

[6] JX 1 at 2.

From March 2018 to September 2019, Respondent employed Complainant as Vice President of Finance and Corporate Controller.[7] Complainant was based at TCNA's Sandy, Utah office, where he oversaw accounting and finance matters in coordination with TCNA's parent company in Mumbai.[8] H. Scott Ellis (Ellis), then Respondent's CEO and President, was Complainant's supervisor.[9]

In 2018 and 2019, during Complainant's employment at TCNA, Respondent owned 75% of Tata Chemicals (Soda Ash) Partners Holdings (TCSAP Holdings).[10] Publicly held company Owens-Illinois, via its private, wholly owned subsidiary Andover Group, Inc., owned the remaining 25% of TCSAP Holdings.[11] TCSAP Holdings owned 99% of Tata Chemicals (Soda Ash) Partnership (TCSAP).[12] Respondent TCNA operated the Green River plant via TCSAP.[13]

1. Complainant's Alleged Protected Activities

A. Environmental Citations, Baghouse Investigation, and Report to KPMG Auditors

In June 2018, Respondent received 46 legacy citations from the Wyoming Department of Environmental Quality ("WDEQ") with the potential for fines amounting to approximately $6 million.[14] The citations centered upon Respondent's environmental reporting failures and the malfunctioning of the equipment in the baghouses.[15] Negotiation of the amount of fines to be levied against Respondent due

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[7] Decision and Order Denying Complaint (D. & O.) at 6.

[8] August 19, 2020 OSHA Determination Letter at 1.

[9] D. & O. at 5-6.

[10] Summary Decision at 25. Subsequent to Complainant's termination, Owens-Illinois's 25% ownership of TCSAP Holdings was sold to Valley Holdings, a private holding company of TCL. *Id.* at 25 n.38

[11] *Id.* at 25.

[12] *Id.* at 25 n.36. TCSAP LLC owns 1% of TCSAP. *Id.*

[13] *Id.* at 25.

[14] D. & O. at 6.

[15] *Id.*

to these 46 legacy citations occurred over a period of years and did not conclude until the WDEQ and Respondent entered into a consent decree in June 2021.[16]

Separate and apart from the 46 legacy citations, WDEQ and Respondent each conducted their own investigations of potential baghouse issues from 2018 through the 2021 consent decree.[17] Ellis directed Respondent to investigate its baghouse equipment and possible misreporting of dust emissions in July 2018.[18] In October 2018, Respondent voluntarily filed an "Initial Notification of Potential Violations" with the WDEQ in which it disclosed that it may have violated Wyoming air quality laws and regulations. Respondent informed the WDEQ that the possible violations could have resulted from soda ash production continuing despite the baghouse equipment ceasing to operate due to malfunctioning or maintenance and outlined planned steps to fix the issues.[19] From October 2018 through October 2019, Respondent submitted additional letters to the WDEQ describing the baghouse equipment issues and its progress in remediating them.[20]

Complainant states that in early January 2019, Ellis told him that Ellis was initiating a new environmental investigation into a specific instance of probable fraud, as well as other potential fraud.[21] Complainant alleges the investigation concerned employees altering the dates on prior reports that had shown compliant dust emissions in the baghouses so that they appeared to correspond to periods when the dust emissions had in fact been excessive.[22] Complainant states that he and Ellis then discussed a plan to investigate these potential frauds and to self-report the investigation and its findings to the WDEQ.[23]

Respondent had engaged KPMG to conduct audits of its consolidated balance sheets and that of its subsidiaries.[24] At a quarterly review meeting in January 2019,

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16 *Id*. at 7.

17 *Id*. at 6-7; Hearing Transcript (Tr.) at 392.

18 D. & O. at 6.

19 *Id*.; RX 6 at 2.

20 D. & O. at 6-7.

21 Amended Complaint (Am. Compl.) at 2.

22 *Id*.

23 *Id*. at 6.

24 JX 9 at 1.

Complainant informed Respondent's external auditors at KPMG that Respondent was investigating a new instance of dust emission reporting fraud which could potentially lead to fines for Respondent.[25] Complainant states Ellis reprimanded Complainant for this report to KPMG and for his characterization of what had occurred with the baghouse reporting as "fraud."[26] Complainant states that Ellis's tone was hostile and that he instructed Complainant to provide as little information as possible to the KPMG auditors.[27]

Complainant states that in approximately mid-May 2019, Ellis informed him that the investigation had been completed, the fraudulent reporting had been self-reported to the WDEQ, and that the WDEQ had closed the matter without imposing any fines.[28] Complainant reported the information Ellis relayed to him on the status of the WDEQ investigation to the auditors.[29] Complainant alleges that he had asked Ellis for a copy of TCNA's mid-May 2019 self-report to the WDEQ which resulted in the waiver of fines, and that Ellis ignored his request.[30]

Complainant and Ellis submitted a letter to KPMG dated May 30, 2019, which stated that as of the year ending March 31, 2019, they had disclosed to KPMG known instances of legal or regulatory non-compliance or suspected non-compliance to be considered in preparing consolidated financial statements as well as known deficiencies in the design or operation of internal control over financial reporting.[31] The May 30, 2019 letter also indicated that there was no known or suspected fraud involving management, including employees with a significant role in internal controls.[32]

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[25] D. & O. at 7. Complainant stated he informed KPMG's auditors that the new instance of fraud related to employees redating old, compliant dust emission reports, which could result in fines, and that the next steps would be to "wait for the investigation to be completed, self-file a report, and see how the DEQ responds." Tr. at 33-34.

[26] D. & O. at 7. Ellis testified he told Complainant he needed to retract the term "fraud" from his report on the investigation to KPMG. Tr. at 270-71.

[27] Am. Compl. at 14.

[28] *Id.* at 3.

[29] *Id.*

[30] *Id.*

[31] *Id.*; JX 9 at 2.

[32] Am. Compl. at 3; JX 9 at 2.

Complainant relates that in July 2019, ahead of the First Fiscal Quarter (FQ1) review, KPMG asked him for an update on the investigation into the environmental misreporting.[33] After Complainant referred the auditors to Ellis for more information, Ellis sent KPMG a letter in late July conveying resolution of the environmental issue.[34] Complainant viewed the letter as misleading in its failure to state whether the fraudulent dust-emission reports had been resolved and as an obfuscation of potential WDEQ fines and the resulting financial reporting requirements.[35] Complainant represents that he then made a second request for a copy of Respondent's mid-May 2019 self-report to WDEQ, which was again ignored.[36]

Complainant describes that in late August 2019, he became more concerned that the fraudulent dust-emission reports had not been properly investigated or reported to the WDEQ.[37] He states that on approximately August 30, 2019, in preparation for the FQ2 KPMG review, he asked Ellis for copies of both the investigation report and the 2019 WDEQ self-report filing yet again.[38] Ellis did not respond to this request.[39]

B. <u>Cancellation of Consulting Contract in Retaliation for Whistleblowing</u>

In January 2019, Complainant states Ellis directed that the consulting contract of a retired TCSAP Account Manager be cancelled.[40] The retired account manager had previously reported that management had overstated production through March 2018 via an ethics hotline (and was therefore, according to Complainant, a whistleblower).[41] Complainant claims he engaged in protected activity when he objected to Ellis's instruction to block the contract and that Ellis

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33 Am. Compl. at 3.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 4.

40 *Id.* at 7.

41 *Id.*

wanted the account manager eliminated because of his former whistleblower status.[42] Complainant relays that his objection to Ellis's directive was ignored.[43]

C. <u>Maintenance of Quarterly Accrual of WDEQ Fines</u>

On June 5, 2019, following a meeting with the WDEQ, Ellis advised Complainant by email that TCSAP would likely face elevated penalties for past violations and recommended increasing the existing accrual by $250,000 per quarter beginning immediately.[44] When Complainant asked whether this was in addition to the $600,000 that Respondent had already accrued and for how long the quarterly increases should continue, Ellis confirmed that it was and stated that the total liability would exceed $1 million, and that the quarterly accrual should remain in place at least through Q3 2020.[45] As of June 17, 2019, however, Ellis had removed the $500,000 in WDEQ fines projected for September and December from the summary accounting model containing the accruals.[46]

Complainant states he disagreed with Ellis's decision to remove the projected fines and insisted that the $250,000 accrual be left on the books for the FQ1 ending June 30, 2019, on the basis that there was too much evidence supporting the accrual.[47] Complainant asserts he told Ellis that the remaining estimated $750,000 in additional accruals would be addressed at a later date, but before September 30, 2019, for the purposes of the FQ2 financial reports.[48]

D. <u>Respondent's Non-Compliance with Certification of Bank Loan Documentation</u>

Respondent was in the process of securing a loan. Complainant states he was responsible for certifying to TCNA's lenders that it had provided all required

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42 *Id.* Complainant's Amended Complaint does not provide a date for his objection to the contract's cancellation. *Id.*

43 *Id.*

44 CX 38.

45 *Id.*

46 CX 40.

47 Am. Compl. at 4-5.

48 *Id.*

financial reports for the fiscal year ending March 31, 2019.[49] The loan documents required both consolidated and consolidating financial statements, without defining the term "consolidating" statements.[50] Around June 1, 2019, Complainant asked the bank to interpret the term, but the bank declined to do so.[51]

Complainant emailed John Mulhall, TCL's CFO and his second supervisor, and informed him that the bank recommended a clarifying amendment as it appeared that TCNA had not filed the required consolidating statements previously.[52] Mulhall replied that "[c]onsolidating and consolidation should read as the same thing. What we have not, and never would do, is file the consolidating entries – these are never shown anywhere."[53] Complainant states that as a result he negotiated an amendment to the loan agreement which clarified the term.[54] Complainant states he did so to avoid bank fraud.[55] Complainant alleges Ellis reprimanded him for raising the issue to the lender bank.[56]

E. Complainant Prepared an Actuarial Model for Accrual of Liabilities

Complainant states that around June 2019, Respondent's medical and dental insurer provided Respondent's Incurred-But-Not-Billed Report (IBNR) which estimated TCSAP's outstanding employee medical benefit liabilities as of March 31, 2019, and after the FY19 financial statements had been finalized.[57] Because the amount exceeded estimates, Complainant states he developed an in-house actuarial model to calculate the liability.[58] He states he submitted the model to TCL's

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49 *Id*. at 5.

50 *Id*.

51 *Id*.

52 JX 13.

53 *Id*.

54 Am. Compl. at 5.

55 *Id*.

56 *Id*. Ellis emailed Complainant that "NO reasonable person" would have called the bank about the unclear term. CX 54.

57 Am. Compl. at 6.

58 *Id*.

accounting team, including to TCL's CFO John Mulhall, who approved the model subject to KPMG's review.[59]

Complainant alleges that during at least two meetings that took place in July and August 2019, Ellis challenged the need for the IBNR accrual and directed that it be removed.[60] Ellis also criticized Complainant for submitting the IBNR model to TCL's accounting team.[61] In response, Complainant informed Ellis the accrual was required under Generally Accepted Accounting Principles (GAAP).[62] Complainant states he ignored Ellis and used the model as approved by TCL and KPMG and recorded the required liability of between $500,000 and $600,000 in the financial reports.[63] He believes that as the accrual was a required material liability per U.S. GAAP, omitting it would have distorted the financial statements and constituted financial fraud.[64]

2. Bonus Reduction, Termination, and Denial of Severance

Around June 15, 2019, Complainant alleges Respondent singled him out and halved his FY19 bonus without explanation.[65] According to Complainant, he asked Ellis to explain the bonus reduction and Ellis replied that he and the Board disliked Complainant's "style of communication."[66]

On September 4, 2019, Ellis terminated Complainant's employment and gave him a separation agreement which offered one month's severance in exchange for his waiver of legal claims against Respondent.[67] Complainant believed he was terminated to conceal the lack of a proper WDEQ filing, the failure to record related fines, and to retaliate against him for pressing for environmental compliance, anti-

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59 *Id.*

60 *Id.*

61 *Id.*; JX 15.

62 JX 15.

63 Am. Compl. at 6.

64 *Id.*

65 *Id.* at 3.

66 *Id.* Complainant believed Ellis referred to his communications with KPMG, among other communications. *Id.*

67 D. & O. at 8; Tr. at 79.

fraud compliance, and sound internal controls.[68] On September 5, 2019, Complainant emailed Ellis a proposal for increased severance and detailed his legal claims.[69] Complainant and Ellis discussed the possibility of Complainant helping his successor settle into his new role with Respondent.[70]

On September 10, 2019, Complainant emailed Ellis proposed changes to the severance offer after consulting with an attorney.[71] Ellis replied that Complainant was to confer with Respondent's attorney regarding his counterproposals.[72] The parties' respective attorneys exchanged emails concerning Complainant's severance and legal claims.[73]

Meanwhile, Complainant went on a pre-approved vacation abroad from September 13 to September 27, 2019.[74] Complainant's successor began his employment with Respondent on September 16, 2019, and that same day, while Complainant was on vacation, Ellis deactivated Complainant's TCNA email account.[75] Respondent paid Complainant through September 30, 2019.[76]

After Respondent requested a fifteen-day extension to respond to Complainant's severance and settlement proposals on October 10, 2019, Complainant filed a complaint with TCL alleging ethics violations and retaliation.[77] Respondent informed Complainant it was willing to continue negotiating severance but rejected his proposal for nine months of severance.[78]

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68 Am. Compl. at 4.

69 D. & O. at 8.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.* at 9.

78 *Id.*

3. Procedural History

A. OSHA Complaint

On October 25, 2019, Complainant filed a complaint with OSHA under the CAA.[79] OSHA determined that Complainant had not engaged in protected activity under the CAA.[80] Complainant subsequently filed an amended complaint on March 26, 2021, in which he alleged Respondent cut his bonus, terminated his employment, denied him severance, subjected him to a hostile work environment, and harassed him post-termination in violation of the CAA, SOX, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[81] Complainant alleged these adverse actions were in retaliation for his multiple protected activities.

B. Office of Administrative Law Judges Hearing

On September 19, 2020, Complainant filed timely objections to OSHA's dismissal with the Office of Administrative Law Judges (OALJ). On May 26, 2021, the ALJ granted Respondent's motion for summary decision after finding that Respondent was not a covered employer under SOX and that Complainant had not engaged in protected activity under the CAA.[82] Complainant appealed that decision to the ARB on May 28, 2021.[83]

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[79] Summary Decision at 1.

[80] August 19, 2020 OSHA Determination Letter.

[81] Amended Complaint at 2, 13-16. In a May 26, 2021 Order Granting Respondent's Motion for Summary Decision, the ALJ determined that Respondent was not a covered person under Dodd-Frank on the basis that Respondent is not a provider of consumer financial products. *Gloss v. Tata Chem. N. Am.*, ALJ No. 2020-CAA-00008, slip op. at 5 (ALJ May 26, 2021) (Order Granting Respondent's Motion for Summary Decision). As Complainant did not dispute that determination in his May 28, 2021 appeal of that decision before the Board, it is unnecessary to address his Dodd-Frank claims. *Gloss v. Tata Chem. N. Am.*, ARB No. 2021-0039, ALJ No. 2020-CAA-00008, slip op. at 5 (ARB Oct. 22, 2021) ("Complainant appeals the summary decisions for the SOX and CAA claims.").

[82] *Gloss,* ALJ No. 2020-CAA-00008, slip op. at 8.

[83] Petition for Review, ARB No. 2021-0039 (seeking review of the ALJ's Order Granting Respondent's Motion for Summary Decision, ALJ No. 2020-CAA-00008 (May 26, 2021)).

C. ARB Order of Remand

On October 22, 2021, the Board issued an order vacating the ALJ's summary decisions on the SOX and CAA claims.[84] The Board remanded for the ALJ to evaluate whether Respondent was a company covered by 18 U.S.C. § 1514A(a) via Respondent's or TCSAP's relationship with a public company.[85] It noted this was a genuine issue of material fact as Respondent conceded a public company owned 25% of TCSAP.[86] The Board instructed the ALJ to review whether any such relationship "results in consolidated financial statements under the applicable accounting rules of the public company" to render Respondent TCNA a "subsidiary or affiliate whose financial information is included in the consolidated financial statements of [any of the public] companies" and thus a covered company under SOX.[87] The remand order also required the ALJ to address all of Complainant's alleged protected activities under the CAA, including his attempts to ascertain whether Respondent cured the fraudulent environmental reporting and to compel Respondent to self-disclose the prior fraudulent reports to WDEQ.[88]

D. ALJ Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision

On remand, the ALJ again entertained Respondent's motion for summary decision on the question of coverage under SOX. On July 15, 2022, the ALJ issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision. The ALJ concluded Respondent was entitled to judgment as a matter of law with respect to the following: (1) Respondent was not a company subject to SOX's whistleblower protection provision as it was not an affiliate whose financial information was included in the consolidated financial statements of a public company; (2) Complainant had not engaged in SOX-protected activity; (3) Complainant's CAA claims of retaliatory bonus reduction, hostile work environment, and termination were filed more than 30 days after the dates on which Complainant received notice of these adverse actions and were thus

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84 *Gloss v. Tata Chem. N. Am.*, ARB No. 2021-0039, ALJ No. 2020-CAA-00008 (ARB Oct. 22, 2021).

85 *Id.* at 6-7.

86 *Id.*

87 *Id.*

88 *Id.* at 8.

untimely; (4) Complainant's CAA claim of retaliatory bonus reduction (in the complaint filed on October 25, 2019) was too remote for equitable modification principles to apply as the bonus reduction occurred in June 2019; and (5) Complainant failed to set forth facts establishing his CAA claims of a hostile work environment and post-termination harassment.[89]

In the Summary Decision, the ALJ determined the following issues would proceed to a hearing on the merits: (1) whether equitable estoppel applied to Complainant's retaliatory termination claim under the CAA; (2) whether Complainant engaged in CAA-protected activity which was a motivating factor in the decision to terminate his employment or deny his severance; and (3) whether Respondent would have fired Complainant absent any CAA-protected activity.[90]

On August 1, 2022, Complainant filed a petition for review of the ALJ's July 15, 2022 Summary Decision on Complainant's SOX claim and CAA claims of retaliatory bonus reduction, hostile work environment, and post-termination harassment.[91] The Board dismissed Complainant's interlocutory appeal after finding the ALJ's grant of summary decision did not meet the collateral order exception to allow the Board's review prior to the ALJ's final, post-hearing decision on the remaining issues in Complainant's CAA claim.[92]

E. ALJ Decision and Order Denying Complaint

After holding evidentiary hearings on August 10 and 12, 2022, the ALJ issued a Decision and Order Denying Complaint on November 17, 2023.[93] The ALJ concluded: (1) Complainant's claim of retaliatory termination under the CAA was untimely; (2) there were no grounds for equitable modification of the filing deadline for that claim; (3) Respondent's denial of Complainant's severance was not an adverse action; and (4) Complainant had not engaged in protected activity under the CAA.[94]

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[89] *Id.* at 38, 53.

[90] *Id.* at 53.

[91] *Gloss v. Tata Chemicals N. Am.*, ARB No. 2022-0054, ALJ No. 2020-CAA-00008, slip. op. at 2 (ARB Sept. 20, 2022) (Order Dismissing Interlocutory Appeal).

[92] *Id.* at 3-5.

[93] D. & O. at 2.

[94] *Id.* at 43.

On November 22, 2023, Complainant filed with the Board a timely petition for review of the ALJ's July 15, 2022 Summary Decision on his SOX-related claims and some CAA claims and the ALJ's November 17, 2023 order denying the remaining portion of Complainant's CAA claims on the merits. Both parties submitted briefs to the Board.

F. ARB Order Requesting Additional Briefing by the Parties and Inviting Amici Curiae

On June 18, 2025, the Board issued an Order Requesting Additional Briefing by the Parties and Inviting Amici Curiae. The Board sought briefing on the applicable definition of "affiliate" under SOX's whistleblower provision as its implementing regulations and Section 929A of Dodd-Frank (which amended SOX) do not define the term.[95] The Board recognized that several statutory and regulatory provisions defined "affiliate" as an entity which "controls, or is controlled by, or is under common control with" another entity but that their associated tests for "control" varied.[96] The Board asked that briefs from amici and the parties address: (1) which guidance the Department of Labor should follow when evaluating "control" for the purposes of construing "affiliate" under Section 806; (2) the practical implications of adopting a "totality of [the] circumstance" test; and (3) the significance of the fact that Owens-Illinois's 2019 SEC Form 10-K indicated TCSAP was an "affiliate."[97] The Department of Labor's Assistant Secretary for Occupational Safety and Health and the parties submitted briefs in response to the order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to review ALJ decisions and issue agency decisions in cases arising under SOX and the CAA.[98]

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95 Order Requesting Additional Briefing by the Parties and Inviting Amici Curiae at 2.

96 *Id.* at 2-5.

97 *Id.* at 7.

98 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

The Board conducts de novo review of an ALJ's grant of summary decision.[99] Summary decision is appropriate when the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[100] In reviewing an ALJ's grant of summary decision, the Board views the evidence and makes all reasonable inferences in the light most favorable to the non-moving party.[101] While the Board reviews all conclusions of law de novo, it will affirm the factual findings of the ALJ if they are supported by substantial evidence.[102]

DISCUSSION

SOX's whistleblower protection provision, or Section 806, was enacted as part of Sarbanes-Oxley's broader effort to strengthen corporate accountability, increase disclosure, and improve the accuracy and transparency of financial reporting and auditing following the corporate scandals of late 1990s and early 2000s.[103] Its purpose was to restore investor confidence by helping detect, prevent, and prosecute corporate malfeasance.[104]

In particular, SOX provides that a covered employer may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because the employee provides information "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and

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99 *Jahanbin v. Boeing Co.*, ARB No. 2024-0035, ALJ No. 2023-AIR-00023, slip op. at 3-4 (ARB Mar. 13, 2025) (citation omitted).

100 29 C.F.R. § 18.72(a) (2025).

101 *Jahanbin,* ARB No. 2024-0035, slip op. at 4 (citation omitted).

102 *Midamba v. Verizon Wireless Texas, LLC*, ARB No. 2019-0052, ALJ No. 2016-SOX-00003, slip op. at 2 (ARB Feb. 18, 2021) (citing 29 C.F.R. § 1980.110(b)) (remaining citations omitted).

103 *See Johnson v. Siemens,* ARB No. 2008-0032, ALJ No. 2005-SOX-00015, slip op. at 12 (ARB Mar. 31, 2011); Nancy M. Modesitt, Janie F. Schulman & Daniel P. Westman, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 4-3–4-6 (3d ed. 2015).

104 *See Johnson*, ARB No. 2008-0032, slip op. at 12.

Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . ."[105]

SOX is governed by the burdens of proof set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[106] To prevail, a SOX complainant must establish by a preponderance of the evidence that: (1) complainant engaged in activity that SOX protects; (2) respondent took an adverse action against him or her; and (3) the protected activity was a contributing factor in the adverse action.[107] If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[108]

Claims under the CAA and SOX are adjudicated similarly but involve different standards. Under the CAA's employee protection provisions, an employer may not "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engaged in protected activity.[109] To prevail in a retaliation case under the CAA, a complainant must prove by a preponderance of the evidence that he engaged in protected activity and that the protected activity was a motivating factor in the adverse employment action taken against him.[110] If a complainant meets this burden of proof, the respondent may avoid liability if it proves by a preponderance of the evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[111]

The discussion section of this opinion is contained in three parts. In the first part, we conclude that the ALJ erred in granting summary decision to Respondent on Complainant's SOX claims because Respondent is not covered under SOX. For the reasons set out below, we conclude that Respondent is covered under SOX.

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105 18 U.S.C. § 1514A(a)(1).

106 *Id.* § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)).

107 *See* 29 C.F.R. § 1980.109(a) (implementing regulation of 49 U.S.C. § 42121).

108 *Id.* § 1980.109(b).

109 42 U.S.C. § 7622(a).

110 29 C.F.R. § 24.109(b)(2).

111 *Id.*

In the second part, we address the ALJ's SOX protected activity holdings. The ALJ erred both in her legal analysis regarding SOX protected activity as well as her conclusion that Complainant did not create a genuine issue of material fact that he engaged in protected activity under SOX. We further conclude that Complainant did engage in protected activity under SOX.

In the third part, we conclude that the ALJ did not err in ruling that Complainant's CAA claim was untimely. The ALJ's factual determinations that equitable modification principles did not apply are supported by substantial evidence. As part of this analysis, we affirm the ALJ's ruling that Complainant has failed to raise a genuine issue of material fact that he was subjected to a hostile work environment.

Part I: Respondent Is Covered Under SOX

In summary decision proceedings, the ALJ determined that Respondent was not covered under SOX because it was not an affiliate of a publicly traded company.[112] We disagree. For the reasons set out below, we conclude Respondent is covered as an affiliate of a publicly traded company.

We begin by identifying the corporate structure involving Respondent and a publicly traded company. In 2018 and 2019, during Complainant's employment at Respondent, Respondent owned 75% of Tata Chemicals (Soda Ash) Partners Holdings (TCSAP Holdings).[113] Owens-Illinois, through a wholly owned subsidiary, owned the remaining 25% of TCSAP Holdings.[114] TCSAP Holdings owned 99% of

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112 Summary Decision at 32-38.

113 *Id.* at 25.

114 *Id.* at 25. Owens-Illinois Inc., SEC Form *10-K Year Ended December 31, 2018*, at 1 (Feb. 14, 2019), *available at* https://www.sec.gov/Archives/edgar/data/812074/000155837019000652/oi-20181231x10k.htm ("Owens-Illinois 2018 10-K"). The parties relied upon the contents of the Owens-Illinois 2018 10-K in their respective filings with the ALJ for and against summary decision. Motion for Summary Decision and Memorandum of Points and Authority in Support at 35 n. 27; Complainant's Response to Respondent's Motion for Summary Decision and Memorandum at 10-11. The ALJ took judicial notice of the Owens-Illinois 2018 10-K in her Summary Decision at 36 n.48. We take judicial notice of the full Owens-Illinois 2018 10-K here. *See Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212-13 (10th Cir. 2012) (stating a court may take judicial notice of the contents of an administrative agency's publicly available files that are not subject to reasonable dispute); O-I Glass, Inc. SEC Form

Tata Chemicals (Soda Ash) Partnership (TCSAP).[115]

This complicated ownership structure is directly relevant to whether Complainant can prevail because SOX's prohibition against retaliation applies only to covered employers. SOX's whistleblower protection provision provides that:

> No 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)) 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),[1] 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 . . . .[116]

Prior to 2010, SOX's language did not expressly provide coverage for subsidiaries and affiliates. Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) clarified SOX to expressly include subsidiaries and affiliates with the following language:

> 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"**

10-K Year Ended December 31, 2019, at 1 (Feb. 21,2020), *available at* https://www.sec.gov/ix?doc=/Archives/edgar/data/0000812074/000155837020001125/oi-20191231x10keddfad.htm ("Owens-Illinois 2019 10-K").

115 Summary Decision at 25 n.36.

116 18 U.S.C. § 1514A(a).

> after "the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))."[117]

For Complainant's case to proceed, he must show that Respondent is covered under SOX. Respondent is a private company, not publicly traded under Section 12 or required to file under Section 15(d) of the Exchange Act. Owens-Illinois, however, is publicly traded. The issue here is whether Respondent is an affiliate of Owens-Illinois through the shared ownership of TCSAP Holdings and TCSAP. While Board precedent has dealt with the question of subsidiary coverage, the matter of affiliate coverage is one of first impression before the Board.

1. Respondent Is an Affiliate of Owens-Illinois

The ALJ found "no genuine dispute that neither TCNA nor TCSAP is an affiliate of Owens-Illinois within the meaning of Section 806" because Owens-Illinois lacked a sufficient level of control over either company.[118] She found that without a "controlling interest" over TCSAP, she could not infer that Owens-Illinois had the power to direct TCSAP's or TCNA's management and/or policies "through voting share, contract, or otherwise, directly or indirectly."[119] The ALJ assumed that the "power to direct or control [ ] management and/or policies" requires majority ownership, majority representation on a board of directors, "the power to direct [ ] management and policies in general," or an "exclusive" power to approve company decisions.[120]

The ALJ then concluded that as a matter of law Owens-Illinois lacked the requisite level of control over TCSAP despite: (1) its 25% ownership interest in TCSAP through Andover; (2) a "Signature Authority Policy" whereby Owens-

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117 Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (July 21, 2010) (emphasis added).

118 Summary Decision at 34. The ALJ cited 17 C.F.R. § 210.1-02(b)'s definition of "affiliate" ("a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified") and 17 C.F.R. § 210.1-02(g)'s definition of "control" ("The 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"). Summary Decision at 33.

119 *Id.* at 34.

120 *Id.* at 33-34.

Illinois's approval was required for TCNA's unbudgeted capital requests exceeding $250,000 and for forward exchange contracts; and (3) Complainant's assertion that TCSAP's four-member operating committee included one member from Owens-Illinois.[121] The ALJ disagreed with Complainant that shared involvement over management review, budgeting, spending, taxes, and GAAP-compliant financial statements was sufficient for a control relationship between Owens-Illinois and TCSAP.[122]

We conclude that the ALJ erred as a matter of law in her analysis. We begin with a legal definition of affiliate and two observations relevant to that definition. First, Section 929A of the Dodd-Frank Act, clarifying SOX via an amendment, does not define "subsidiary" or "affiliate." Nor does Section 929A pinpoint or reference any other provision containing these definitions.[123] While 929A does not provide a definition for either term, the general definitions section of the Dodd-Frank Act at Section 2 supplies definitions for both terms.[124]

Second, the Dodd-Frank Act as a whole is generally directed at banking institutions, and many of the definitions in Section 2 are clearly directed at this subject matter. The subsection at issue, Section 929A, however, is amending SOX's employee protection provision, a subject area steeped in employment law and securities law.

These two observations bring into play competing rules for interpreting "affiliate" under SOX. Under the first rule of interpretation, one ordinarily concludes that unless the language of a statute states otherwise, Congress intends the definitions contained in a general definitions section to "establish meaning wherever the terms appear in the same Act."[125] According to this rule, the general definition of "affiliate" carries throughout the Dodd-Frank Act, including 929A. The second rule presumes that "Congress is knowledgeable about existing law pertinent

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121 *Id.*

122 *Id.* at 34.

123 Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (July 21, 2010).

124 *Id.* § 2, 124 Stat. at 1386-90 (codified at 12 U.S.C. § 5301).

125 *United States v. Yochum* (*In re Yochum)*, 89 F.3d 661, 666 (9th Cir. 1996) (citation omitted); *see also Lawson v. Suwannee Fruit & S.S. Co.,* 336 U.S. 198, 201 (1949) (noting that "[s]tatutory definitions control the meaning of statutory words, of course, in the usual case.").

to the legislation it enacts."[126] Under this rule, Congress is presumed to know SOX's pre-amendment context and its clarifying language is presumed to have been intentional and competent to address the subject matter of the legislation it was amending or clarifying.

2. Definition of "affiliate": Bank Holding Company Act

The first rule of interpretation applies the definitions from a statute's main definitions section to terms which appear but are undefined in a later section.[127] Here, definitions are absent from Section 929A of Dodd-Frank, but Section 2 provides as follows:

> As used in this Act, the following definitions shall apply, *except as the context otherwise* requires or as otherwise specifically provided in this Act.
> (1) AFFILIATE.—The term "affiliate" has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).[128]

Section 2(1)'s definition of "affiliate" routes us to the Federal Deposit Insurance Act (12 U.S.C. § 1813).[129] The Federal Deposit Insurance Act, in a section entitled "Definitions relating to affiliates of *depository institutions,*"[130] provides that "[t]he term 'affiliate' has the meaning given to such term in section 1841(k) of this title."[131] Section 1841 of Title 12 takes us to the Bank Holding Company Act, which states that "the term 'affiliate' means any company that **controls, is controlled by, or is under common control with another company**."[132]

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126 *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (citation omitted).

127 *In re Yochum*, 89 F.3d at 666.

128 Pub. L. No. 111-203, § 2, 124 Stat. at 1386 (emphasis added).

129 *Id*. Section 2 also provides that the term "subsidiary" has "the same meaning[ ] as in section 1813 of this title." *Id.* § 2(18)(A), 124 Stat. at 1390.

130 12 U.S.C. § 1813(w).

131 *Id*. § 1813(w)(6).

132 *Id*. § 1841(k) (emphasis added). This three-part definition of "affiliate" is rooted in the 1930s transformation of banking and securities law and appeared in the Investment Company Act of 1940. 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation*, § 22:33 (8th ed. Nov. 2025 update); *see also* Vincent Carosso, WASHINGTON AND WALL

3. Definition of "Control": Bank Holding Company Act

The definition of "affiliate" found in the Bank Holding Company Act at 12 U.S.C. § 1841(k) is only useful if one has a working definition of "control." "Control" is not a term used in SOX as amended, so we again are left with the question of which authority to follow for its definition. Section 2 of Dodd-Frank does not define the term, but the Bank Holding Company Act has a definition applicable to banks and depository institutions. Under the Bank Holding Company Act, **a company controls another company if it directly or indirectly owns 25 percent of voting shares, controls the election of directors or trustees, or has a controlling influence over the management policies of the company.**[133] The

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STREET: THE NEW DEAL AND INVESTMENT BANKERS, *1933-1940.* 44 Bus. Hist. Rev. 425, 427-45 (1970).

[133] The Bank Holding Company Act provides as follows:

> (2) Any company has control over a bank or over any company if—
>
> (A) 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;
>
> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
>
> (C) 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.
>
> (3) For the purposes of any proceeding under paragraph (2)(C) of this subsection, there is a presumption that any company which directly or indirectly owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or company does not have control over that bank or company.
>
> (4) In any administrative or judicial proceeding under this chapter, other than a proceeding under paragraph (2)(C) of this subsection, a company may not be held to have had control over any given bank or company at any given time unless that company, at the time in question, directly or indirectly owned, controlled, or had power to vote 5 per centum or more of any class of voting securities of the bank or company, or had already

Bank Holding Company Act thus presents several bases for determining "control," which are further elaborated in its implementing regulations.[134] The Federal Reserve System provides additional subregulatory guidance on "control" through the decisions and interpretations of the Board of Governors.[135]

4. Securities Rules: An Example of "Except as the Context Otherwise Requires"

We now turn to the securities regulations for interpreting "affiliate" under SOX. This framework becomes salient in light of the sentence which qualifies the definition for "affiliate" within Dodd-Frank's general definitions at Section 2: "the following definitions shall apply, *except as the context otherwise requires* or as otherwise specifically provided in this Act . . . ."[136]

Congress enacted Section 929A of Dodd-Frank in 2010 to clarify that SOX's anti-retaliation provision applies to employees of privately owned subsidiaries and affiliates of publicly traded companies.[137] The amendment demonstrates that Congress was aware of the interpretive difficulties which arose in the application of

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> been found to have control in a proceeding under paragraph (2)(C).

12 U.S.C. § 1841(a).

134 The Bank Holding Company Act's implementing regulations comprehensively outline "Rebuttable presumptions of control of a company" at 12 C.F.R. § 225.32 as well as "Rebuttable presumption[s] of noncontrol of a company" at 12 C.F.R. § 225.33.

135 See archived *Supervision & Regulation Letters, Board and Reserve Bank Actions, and Enforcement Actions & Legal Developments* on the Board of Governors of the Federal Reserve System website: https://www.federalreserve.gov/supervisionreg.htm (last visited June 11, 2026). The Federal Reserve Regulatory Service's interpretations of "control" under Regulation Y (12 C.F.R. Part 225) can be found at https://www.federalreserve.gov/frrs/regulations/board-interpretations-of-regulation-y.htm#17 (last visited June 11, 2026).

136 Pub. L. No. 111-203, § 2, 124 Stat. at 1386 (emphasis added). "The term 'affiliate' has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)." *Id.* A section entitled "Definitions relating to affiliates of *depository institutions*" states: "The term 'affiliate' has the meaning given to such term in section 1841(k) of this title." 12 U.S.C. § 1813(w)(6) (emphasis added).

137 S. Rep. No.111-176, at 114 (2010).

SOX as originally enacted.[138] Further, and as the Board has previously held, the 2010 amendment did not create a substantive change in the SOX, but merely clarified its coverage of affiliates and subsidiaries.[139] The language of the amendment itself thus orients us to securities law as the appropriate "context" for the applicable definition of "affiliate," and in turn, of "control."

Indeed, the amended language is grounded in securities law: "a subsidiary or affiliate whose financial information is included in the consolidated financial statements[140] of [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))]."[141] The language providing coverage for a "subsidiary" or an "affiliate" is inextricably tied to these entities' inclusion in the consolidated financial statements of a company with a class of securities registered under 15 U.S.C. § 78*l* or that is required to file reports under 15 U.S.C. § 78*o*(d).[142] Thus, applying the second rule of interpretation, Sections 2 and 929A of Dodd-Frank call for defining "subsidiary" and "affiliate" within the securities law context.

A. Registration and Filing Requirements Under Securities Laws

As stated, the Securities Exchange Act of 1934 (the Exchange Act) is the pertinent statute here.[143] Generally, the Securities Act of 1933 deals with the registration of securities while reporting obligations fall under the Exchange Act. Section 12 of the Exchange Act provides the procedure for companies to register their securities so they may be traded on the national securities exchanges.[144] As

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[138] *See Johnson,* ARB No. 2008-0032, slip op. at 9-15, 16 (noting that while under the 2002 SOX, interpretations of the scope of subsidiary coverage were disparate and unsettled, Section 929A's express "addition of subsidiary coverage merely makes what was intended all along ever more unmistakably clear") (citation and internal quotation marks omitted).

[139] *Johnson*, ARB 2008-0032, slip op. at 8-11.

[140] *See* Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) § 810-10-10-1 (stating that "consolidated financial statements are usually necessary for a fair presentation if one of the entities in the consolidated group directly or indirectly has a controlling financial interest in the other entities . . . .").

[141] 18 U.S.C. § 1514A(a).

[142] *Id.*

[143] *Id.*

[144] 15 U.S.C. § 78*l*.

part of this registration process, Section 12(b) requires companies (issuers) to disclose material financial information, including that of companies they directly or indirectly control.[145]

Public companies that are registered under Section 12 or that are required to file reports under Section 15(d) of the Exchange Act must file periodic reports in accordance with Section 13.[146] These periodic reports include forms filed with the Securities and Exchange Commission (SEC), such as Forms 10-K (filed at the end of the registrant's fiscal year), 10-Q (filed quarterly), and 8-K (a current report filed within four days of a significant corporate occurrence).[147]

Section 12 of the Exchange Act is implemented by, among other regulations, Regulation 17 C.F.R. § 240.12b-2, which regulates compliance "for statements and reports filed pursuant to sections 12, 13 or 15(d) of the [Exchange Act]."[148] Regulation § 240.12b-2 contains general definitions, including a definition which states that an "affiliate" is **"a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified."**[149] The regulation goes on to define control,

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145 An application filed by an issuer with the exchange shall contain "[s]uch information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer . . . ." 15 U.S.C. § 78*l*(b)(1).

146 "The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth . . . and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer . . . ." 15 U.S.C. § 78m(b)(1).

147 17 C.F.R. §§ 240.13a-1 (Form 10-K), 240.13a-13 (Form 10-Q), § 240.13a-11 (Form 8-K).

148 *Id.* § 240.12b-2.

149 *Id.* (emphasis added). Similarly, 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." *Id.* § 230.144(a)(1) (emphasis original). 17 C.F.R. § 230.405, or Rule 405, also 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 or is controlled by, or is under common control with" an issuer. *Id.* § 230.405 (emphasis original). This definition is

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 securities, by contract, or otherwise."**[150] Regulation S-X, or 17 C.F.R. Part 210, governs these financial statements with the SEC, and defines "affiliate" and "control" nearly identically to 17 C.F.R. § 240.12b-2.[151]

B. *Accounting Rules for Consolidated Financial Statements*[152]

The question before us is whether Respondent is an affiliate whose financial information is included in the consolidated financial statements of a public company. As identified above, the securities laws cited in Section 806 have their own definitions of "affiliate" and "control."[153] These regulatory definitions are supplemented by accounting rules and standards, which further guide our adjudication of the issue of "affiliate" and "control" as those standards are necessary for compliance with rules regarding reporting to the SEC.

Under accounting rules, an entity is a subsidiary of a publicly traded parent company when the publicly traded company controls more than 50% of the entity's

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essentially identical to the common definition of affiliate in the Bank Holding Company Act. 12 U.S.C. § 1841(k).

150 17 C.F.R. § 240.12b-2 (emphasis added). See also Rule 405, which provides that "[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 securities, by contract, or otherwise." *Id.* § 230.405 (emphasis original); *see S.E.C. v. Kern*, 425 F.3d 143, 149 (2d Cir. 2005) (applying Rule 405's definition of control to the Rule 144 context in acknowledging the definitions of "affiliate" in both provisions are "identical").

151 "An *affiliate* of, or a person *affiliated* with, a specific person is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." 17 C.F.R. § 210.1-02(b) (emphasis original). "The 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." *Id.* § 210.1-02(g) (emphasis original).

152 *Id.* § 210.1-01(b) ("The term *financial statements* as used in this part shall be deemed to include all notes to the statements and all related schedules") (emphasis original).

153 15 U.S.C. §§ 78*l*, 78*o*(d).

stock.[154] If the entity is a subsidiary of a public parent company, this relationship affects the parent company's SEC filings. The parent company must consolidate, or combine, its financial information with that of its majority-owned subsidiaries into one report, or consolidated financial statement.[155]

Importantly for this case, "control," and hence "affiliate" status, is not limited to 50% or more ownership. Publicly traded companies may also be required to include financial information concerning their affiliates who are less than 50% owned in their consolidated financial statements.[156] Public companies often account for affiliates or investees by including their financial information in the notes to the consolidated financial statements under the "equity method" of accounting.[157]

For our purposes and as we explain below, the use of the equity method of accounting is presumed indicative of the control necessary to satisfy coverage under SOX—that is, to establish an entity's status as an "affiliate" whose financial information is included in the consolidated financial statements of a public company. A central component of the equity method is whether the public company

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[154] FASB ASC 810-10-15-8.

[155] FASB ASC 810-10-15-10(a).

[156] Section 12(b) of the Exchange Act, at 15 U.S.C. § 78*l*(b)(1), requires an issuer to include in its application for registration on a national securities exchange the material information "as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer . . . ." The "affiliate" definition at 17 C.F.R. § 240.12b-2, which is applicable to "statements and reports filed pursuant to sections 12, 13 or 15(d) of the [Exchange] [A]ct," provides that "[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified."

[157] For instance, 17 C.F.R. § 210.4-08(g) specifies that:

> [t]he *summarized information* as to assets, liabilities and results of operations as detailed in § 210.1-02(bb) shall be presented *in notes to the financial statements* on an individual or group basis for: (i) Subsidiaries not consolidated; or (ii) *For 50 percent or less owned persons accounted for by the equity method* by the registrant or by a subsidiary of the registrant, if the criteria in § 210.1-02(w) for a significant subsidiary are met. 17 C.F.R. § 210.4-08(g)(1) (emphasis added).

exercises "significant influence" over the investee or affiliate.[158] For completeness and transparency, accounting standards provide that a public company that has the capacity to exercise significant influence over the operating and financial policies of an "investee" may include the latter's financial information in its consolidated financial statements using the equity method.[159]

Accounting standards develop the test for significant influence.[160] Significant influence can exist even when the public company's percentage of ownership interest in the investee is between 20-50%.[161] Significant influence may be demonstrated when the public company influences the "operating or financial decisions of the investee."[162] It can consist of the ability to exercise influence over the "operating and financial policies of an investee," including through representation on the board of directors, participation in the policy making process, involvement in transactions, shared managerial personnel, technological dependency, and other factors.[163]

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158 "The SEC relies on the Financial Accounting Standards Board ('FASB') to adopt the principles that govern accounting standards for SEC filings." *Garcia v. Hetong Guo*, No. CV-15-1862-MWF-MRWx, 2016 WL 102213, at *7 (C.D. Cal. Jan. 7, 2016) (citation omitted). FASB ASC 323-10-15-3 describes the equity method of accounting to investments in common stock and in-substance common stock whereby the investor has the ability to exercise *significant influence* over operating and financial policies of an investee *even though the investor holds 50% or less* of the stock. While the circumstances here do not necessarily involve stock ownership, "many of the provisions of [FASB ASC 323-10] would be appropriate in accounting for investments" in the partnerships, joint ventures, and limited liability entities discussed in FASB ASC 323-30 as well. FASB ASC 323-30-15-3.

159 FASB ASC 323-30-15-3; 17 C.F.R. § 210.4-08(g)(1).

160 FASB ASC 323-10-15-6.

161 FASB ASC 323-10-15-8.

162 FASB ASC 323-10-05-5.

163 FASB ASC 323-10-15-6:

> [the] "[a]bility to exercise significant influence over operating and financial policies of an investee may be indicated in several ways, including the following: a. Representation on the board of directors; b. Participation in policy-making processes; c. Material intra-entity transactions; d. Interchange of managerial personnel; e. Technological dependency; f. Extent of ownership by an investor in relation to the concentration of other shareholdings (but substantial or majority ownership of the voting stock of an investee by another investor does not

Further, significant influence is presumed when there is a direct or indirect investment of 20% or more in the voting stock of an investee, yet is presumed absent when an investment is less than 20% of the voting stock of an investee (unless such ability can be demonstrated).[164] However, the ownership of 20% or more of the investee's stock cannot give rise to the presumption of significant influence over the operating and financial policies of the investee when an inquiry into the facts and circumstances shows predominant evidence of the inability to exercise it.[165]

> necessarily preclude the ability to exercise significant influence by the investor).

164 FASB ASC 323-10-15-8:

> An investment (direct or indirect) of 20 percent or more of the voting stock of an investee shall lead to a presumption that in the absence of predominant evidence to the contrary an investor has the ability to exercise significant influence over an investee. Conversely, an investment of less than 20 percent of the voting stock of an investee shall lead to a presumption that an investor does not have the ability to exercise significant influence unless such ability can be demonstrated. The equity method shall not be applied to the investments described in this paragraph insofar as the limitations on the use of the equity method outlined in paragraph 323-10-25-2 would apply to investments other than those in subsidiaries.

165 FASB ASC 323-10-15-10. Indications of such inability include:

> a. Opposition by the investee, such as litigation or complaints to governmental regulatory authorities, challenges the investor's ability to exercise significant influence.
>
> b. The investor and investee sign an agreement (such as a standstill agreement) under which the investor surrenders significant rights as a shareholder. (Under a standstill agreement, the investor usually agrees not to increase its current holdings. Those agreements are commonly used to compromise disputes if an investee is fighting against a takeover attempt or an increase in an investor's percentage ownership. Depending on their provisions, the agreements may modify an investor's rights or may increase certain rights and restrict others compared with the situation of an investor without such an agreement.)

To summarize: the equity method of accounting is utilized when a publicly held company possesses the ability to exercise significant influence over an investee.[166] The test for significant influence equates with the securities standard for "control."[167] This standard provides that when the private company or investee controls, is controlled by, or is under common control with the publicly held company, these two entities are "affiliates."[168]

We thus conclude that when a publicly traded company holds a 20-50% ownership interest in a private investee and includes that investee's financial information in its consolidated financial statements *or* in the notes to its consolidated financial statements using the equity method of accounting, the company acknowledges it wields significant influence (i.e., control) over the functioning of the investee and that thereby the entity is its "affiliate" under SOX.[169]

C. Owens-Illinois's Consolidated Financial Statements

As we set out above, an entity treated as an "affiliate" in a publicly traded company's consolidated financial statements with the SEC is an "affiliate" covered by the anti-retaliation provisions of SOX.[170] For the fiscal year which ended on December 31, 2018, Owens-Illinois filed a Form 10-K as part of its annual reporting

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> c. Majority ownership of the investee is concentrated among a small group of shareholders who operate the investee without regard to the views of the investor.
>
> d. The investor needs or wants more financial information to apply the equity method than is available to the investee's other shareholders (for example, the investor wants quarterly financial information from an investee that publicly reports only annually), tries to obtain that information, and fails.
>
> e. The investor tries and fails to obtain representation on the investee's board of directors. FASB ASC 323-10-15-10.

166 FASB ASC 323-10-15-3; FASB ASC 323-30-15-3.

167 17 C.F.R. § 240.12b-2; FASB ASC 323-10-15-6.

168 17 C.F.R. § 240.12b-2. As noted above, the banking standard is the same. 12 U.S.C. § 1841(k).

169 18 U.S.C. § 1514A(a).

170 *Id.*

obligations pursuant to Section 13 of the Securities Exchange Act of 1934.[171] Owens-Illinois's 2018 10-K states it "use[d] the equity method of accounting for investments in which it ha[d] a significant influence and generally an ownership interest of 20% to 50%."[172] The 10-K presents Owens-Illinois's "Consolidated Results of Operations," "Consolidated Comprehensive Income," "Consolidated Balance Sheets," "Consolidated Share Owners' Equity," and "Consolidated Cash Flows" with each section indicating the reviewer is to "[s]ee accompanying Notes to Consolidated Financial Statements."[173]

Within the "Notes to Consolidated Financial Statements," Owens-Illinois detailed its "Tabular data dollars in millions," and included a section entitled "Equity Investments."[174] The accompanying table of "Equity Investments" explains that "[a]t December 31, 2018, the Company's ownership percentage in affiliates include[d]" seven companies in which it had ownership percentages of 25%, 49.7%, and 50%.[175] Owens-Illinois reported that among those companies, its ownership percentage in soda ash supplier "Tata Chemical (Soda Ash) Partners" in 2018 was 25%.[176]

The following section presents "[s]ummarized information pertaining to the Company's equity affiliates" with "[e]quity in earnings" and "[d]ividends received."[177] It also contains unaudited "[s]ummarized combined financial information for equity affiliates" including end of the year assets and liabilities, and net sales, gross profits, and net earnings.[178]

In its 10-K, Owens-Illinois identified TCSAP as its "[e]quity investment" and an "affiliate."[179] Owens-Illinois clearly reported that it held a 25% ownership interest in TCSAP and utilized the "equity method of accounting for investments in

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171 Summary Decision at 36 (citing Owens-Illinois 2018 10-K).

172 Owens-Illinois 2018 10-K at 58.

173 *Id.* at 52-57.

174 *Id.* at 65.

175 *Id.*

176 *Id.*

177 *Id.* at 66.

178 *Id.*

179 *Id.* at 65.

which it ha[d] a significant influence and generally an ownership interest of 20% to 50%."[180] The inclusion of the financial information of TCSAP in the notes to Owens-Illinois's consolidated financial statements together with that company's own assessment of its significant influence over TCSAP, rendered Respondent TCNA, TCSAP's integrated entity and parent company, a covered "affiliate" of Owens-Illinois.[181]

5. Under Either the Banking or Securities Frameworks, Respondent Is an Affiliate Whose Financial Information Is Included in the Consolidated Financial Statements of a Publicly Traded Company

We must determine whether Respondent is covered under Section 806 as an affiliate whose financial information is included in the consolidated financial statements of a publicly traded company. Above we identified two frameworks to answer the definitional question as to whether Respondent is such an affiliate. In its response to our invitation for amicus briefing, the Assistant Secretary for Occupational Safety and Health urges us to adopt the Bank Holding Company Act's definition and accompanying guidance for the meaning of "affiliate" and "control" in SOX as amended.[182] We need not choose one over the other in this case. Pursuant to either the definitions of "affiliate" and "control" in the banking framework or those corresponding definitions in the securities framework, Respondent is covered through TCSAP Holdings' relationship with Owens-Illinois.

An entity attains "affiliate" status under Section 806 when a publicly held entity controls it, it controls a publicly held entity, or it is under common control with a publicly held entity. We apply the overlapping element of the banking and securities definitions of "control" here: the *possession, direct or indirect, of the power*

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180 *Id.* at 58.

181 Owens-Illinois, through its wholly owned subsidiary Andover Group, had a 25% ownership interest in private company TCSAP Holdings and the remaining 75% was owned by TCNA. TCSAP Holdings owned 99% of private company TCSAP. Summary Decision at 25. The ALJ's summary decision refers to Owens-Illinois's 25% ownership interest as in "TCSAP Holdings" and "TCSAP" interchangeably (Summary Decision at 25, 26, 34). Given the nearly total ownership of TCSAP by TCSAP Holdings (1% of TCSAP Holdings was owned by TCSAP LLC), this discrepancy does not change our evaluation of TCNA's coverage. Summary Decision at 25 n.36.

182 Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae* at 7-21.

to direct or cause the direction of the management and policies, via the ownership of voting shares, by contract, or otherwise.[183]

Under this shared definition, we conclude that the totality of the circumstances—Owens-Illinois's 25% ownership interest in TCSAP Holdings; Owens-Illinois's proportional, one-quarter representation on TCSAP's operating committee; the requirement that TCNA obtain Owens-Illinois's approval for TCSAP's unbudgeted capital requests exceeding $250,000 and for forward exchange contracts; and TCNA's provision of financial information to Owens-Illinois—illustrates that Owens-Illinois possessed the power to cause the direction of TCSAP's management or, in other words, had significant influence over TCSAP. There is therefore no genuine issue that TCNA (as majority owner of TCSAP) and Owens-Illinois, were "affiliate[s]" as contemplated by SOX. This is further confirmed by the fact that Owens-Illinois treated TCSAP as its affiliate in its consolidated financial statements.[184]

Part II: Complainant's Protected Activity

In Part I, we examined SOX's language to conclude that Respondent is covered under SOX. This carries us to a second component of Complainant's burden: to demonstrate that he engaged in protected activity. For the reasons specified

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183 17 C.F.R. § 240.12b-2 ("'control' . . . 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 securities, by contract, or otherwise"); *see also* 12 U.S.C. § 1841(a)(2): control exists where the company

> (A) . . . 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 . . . ; (B) . . . controls in any manner the election of a majority of the directors or trustees . . . ; *or* (C) the Board determines . . . that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company. (emphasis added).

184 Complainant also argues that Respondent attained coverage under SOX through a relationship with a second public company, Church & Dwight. Complainant argued that Church & Dwight was Respondent's affiliate and that Church & Dwight included Respondent's information in a SEC 10K it filed during Complainant's period of employment with Respondent. Complainant's Brief (Comp. Br.) at 15-25; Complainant's Response to Respondent's Motion for Summary Decision and Memorandum at 9-13. It is unnecessary for us to decide this question given our determination above that Respondent was an affiliate of Owen-Illinois and is thus a SOX-covered entity.

below, we conclude the ALJ erred in granting summary decision to Respondent on the question of protected activity.

SOX's employee protection provision prohibits discharge or discrimination against any employee who:

> (1) provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .[185]

In *Sylvester*, the Board explained that under SOX, a "reasonable belief" has both subjective and objective components.[186] A subjective belief is satisfied when the employee holds an actual belief that the conduct complained of constitutes a violation of one of the enumerated provisions in Section 806.[187] Objective reasonableness, however, "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[188] Several circuits have adopted *Sylvester*'s

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185 18 U.S.C. § 1514A(a)(1).

186 *Sylvester v. Parexel Int'l, LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14-15 (ARB May 25, 2011).

187 *Id.*

188 *Id.* at 15 (citation omitted); *see also Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Lab.,* 717 F.3d 1121, 1132 (10th Cir. 2013) (noting that "[t]he decisions of multiple Circuit Courts of Appeals are in accord" with *Sylvester v. Parexel*'s assessment of

"reasonable belief" standard.[189]

To engage in protected activity under SOX, a successful complainant need not cite to any particular provision of law when raising concerns to the employer.[190] The complainant will be protected so long as a reasonable person with the same or similar training and experience would also believe that the relevant activity constitutes a violation.[191] It is not necessary for a complainant to demonstrate that there is an existing violation; a reasonable belief that conduct has the potential to lead to a violation is protected.[192]

In addition, an employee's activity retains protection under SOX even when the employee is mistaken in their belief that a violation of an enumerated provision could occur or has occurred.[193] Further, "[t]he reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether

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"reasonable belief" under 18 U.S.C. §1514A(a)(1)). More recent ARB cases have used the word "similar" rather than or in addition to the word "same" with respect to objective reasonableness. *See Van v. JP Morgan Chase & Co.*, ARB No. 2023-0018, ALJ No. 2022-SOX-00028, slip op at 10 (ARB Nov. 5, 2024); *Iwaseczko v. Teton Cnty. Weed & Pest Control Dist.*, ARB No. 2022-0059, ALJ Nos. 2018-ACA-00001, 2019-ACA-00002, slip op. at 23 (ARB Aug. 14, 2025); *Forrand v. FedEx Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 4 (ARB Jan. 4, 2021).

189 *See Wadler v. Bio-Rad Lab'ys, Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019); *Genberg v. Porter*, 882 F.3d 1249, 1255-56 (10th Cir. 2018); *Beacom v. Oracle Am., Inc.*, 825 F.3d 376, 380 (8th Cir. 2016); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 810-12 (6th Cir. 2015); *Wiest v. Lynch*, 710 F.3d 121, 132-33 (3d Cir. 2013).

190 *See Sylvester*, ARB No. 2007-0123, slip op. at 17-19; *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (noting that to be protected under the SOX whistleblower provision "[t]he employee is not required to provide the employer with the citation to the precise code provision in question. The employee is not required to show that there was an actual violation of the provision involved.") (citations omitted).

191 *See, e.g., Beacom,* 825 F.3d at 380-81; *Iwaseczko*, ARB No. 2022-0059, slip op. at 23.

192 *Sylvester,* ARB No. 2007-0123, slip op. at 16; *see also Wiest,* 710 F.3d at 133 (noting any requirement an employee wait for an actual violation to occur "when an earlier report possibly could have prevented it" would frustrate the purposes of 18 U.S.C. § 1514A).

193 *Sylvester*, ARB No. 2007-0123, slip op. at 16; *see also Rhinehimer*, 787 F.3d at 812 (citing *Wiest,* 710 F.3d at 132) ("[C]ourts universally recognize that § 1514A protects employees who reasonably but mistakenly believe that the conduct at issue constitutes a violation of relevant law.").

the complainant actually communicated the reasonableness of those beliefs to management or the authorities."[194]

1. The ALJ's Legal Errors in Analyzing Protected Activity

Before examining Complainant's alleged protected activities, we address errors in the ALJ's legal analysis.

A. Complaints to External Auditors Are Protected Under SOX

The ALJ found Complainant's report to KPMG was not protected activity because KPMG lacked supervisory authority over Complainant.[195] Complainant argues on appeal that this determination was error because: KPMG served as a direct conduit to the Audit Committee and Board; was designated by Respondent to receive fraud-related whistleblower reports; and played a central role in investigating and evaluating Respondent's financial reporting.[196] He also asserts that senior TCL officials, including the Vice President of Human Resources and the Chief Financial Officer, first learned of the potential fraud investigation through Complainant's disclosures to KPMG.[197] Respondent counters that Section 806 does not protect an employee's report to "external auditors" such as KPMG because they are not one of the three entities[198] to whom an employee can report protected activity.[199]

We agree with Complainant. The ALJ erred in concluding that a report of fraud to an external auditor such as KPMG cannot constitute protected activity. The plain language of the statute makes clear that reports concerning activity

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[194] *Sylvester*, ARB No. 2007-0123, slip op. at 15 (emphasis original) (citation omitted); *accord Wadler,* 916 F.3d at 1188.

[195] Summary Decision at 42-43.

[196] Comp. Br. at 27-28.

[197] *Id.* at 27.

[198] SOX protects reports based on a reasonable belief of a violation of an enumerated category when made to: (1) a Federal regulatory or law enforcement agency; (2) any Member of Congress or any committee of Congress; or (3) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct). 18 U.S.C. § 1514A(a).

[199] Respondent's Brief (Resp. Br.) at 34 (citing *Tides v. Boeing Co.*, 644 F.3d 809, 816 (9th Cir. 2011) in support of this contention).

reasonably believed to constitute a violation of a SOX-enumerated provision are protected when made to "a person with supervisory authority over the employee (*or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct*) . . . ."[200]

An auditor such as KPMG, whether the auditor is internal or external to the employer's organizational structure, is a person with the authority to investigate and terminate misconduct. Protecting reports to auditors is consistent with the very purpose of SOX. Ensuring that employees, attorneys, financial personnel, and managers may disclose information to auditors is fundamental to protecting the integrity of the financial markets.[201] "[O]utside accountants, auditors, and lawyers" are gatekeepers in "uncover[ing] and comprehend[ing] evidence of potential wrongdoing."[202] To construe otherwise would run contrary to Congress's clear concern with remedying the "corporate code of silence" which "not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity."[203] As such, the ALJ erred as a matter of law in determining that Complainant's report to KPMG concerning the environmental fines could not be protected by SOX.[204]

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[200] 18 U.S.C. § 1514A(a)(1)(C) (emphasis added).

[201] *See Lawson,* 571 U.S. at 447-48 (noting that the Enron debacle was facilitated by "professionals who helped create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns" and that "clear from the legislative record is Congress' understanding that outside professionals bear significant responsibility" for reporting misdeeds) (citations and internal quotation marks omitted); *see also* Paul Munter, Acting Chief Accountant, U.S. Sec. & Exch. Comm'n, *The Importance of High Quality Independent Audits and Effective Audit Committee Oversight to High Quality Financial Reporting to Investors* (Oct. 26, 2021), https://www.sec.gov/newsroom/speeches-statements/munter-audit-2021-10-26 ("[A]ssurance provided by *independent* public accountants improves the quality of financial disclosures and, in turn, such assurance is a critical component of our capital markets.").

[202] *Spinner v. David Landau & Assocs.,* ARB Nos. 2010-0111, -0115, ALJ No. 2010-SOX-00029, slip op. at 13 (ARB May 31, 2012).

[203] S. Rep. No. 107-146, at 5 (2002) (internal quotation marks omitted).

[204] *Tides,* 644 F.3d at 816 (cited by the ALJ in her summary decision and Respondent in its brief before the Board), does nothing to persuade us that a report to external auditors is unprotected by the SOX as it involves employee reports of alleged wrongdoing to the news media and not to "individuals and entities with the capacity or authority to act effectively on the information provided."

B. The ALJ Erred in Determining Complainant Did Not Engage in SOX-Protected Activity Based on the Environmental Content of Complainant's Report to KPMG

The ALJ found Complainant's report to KPMG was not protected activity because Complainant alleged he reported environmental and not financial/accounting fraud to KPMG.[205] The ALJ determined that "[r]eporting the *possibility* that this alleged *environmental* fraud could result in fines and liabilities does not constitute reporting *financial* fraud or misconduct violative of SOX."[206] The ALJ also found that "Complainant's mere performance of his job duties [as Respondent's accountant] in the normal course of business is not protected by SOX."[207]

Complainant contends the ALJ erred because he properly reported to KPMG that the environmental infractions would have resulted in "material fines and financial liabilities" that were never reported or properly disclosed to investors, bankers, creditors, lenders, or other interested parties.[208]

We again agree with Complainant. First, the ALJ erred in finding Complainant's report to KPMG was unprotected by SOX by virtue of the environmental origin of the fines and liabilities incurred by Respondent. The environmental and financial components of this case are not mutually exclusive. A concern raised by Complainant that Respondent's handling of such environmental fines and liabilities violated a SOX-enumerated provision would render this report SOX-protected notwithstanding the environmental aspect.

Second, the ALJ erred in denying SOX's protection to Complainant because his report to KPMG and any prevention of financial misstatements fell within Complainant's job duties.[209] We make plain here that a complainant can engage in

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205 Summary Decision at 43-44.

206 *Id.* at 44 (emphasis original).

207 *Id.*

208 Comp. Br. at 28.

209 Summary Decision at 44.

protected activity even though the content of the activity is part of the complainant's job duties.[210]

C. *The ALJ Erred in Denying Protection to Complainant on the Basis That Protection Only Applies to Employees of Publicly Traded Companies*

With respect to Complainant's contention that he properly accounted for the WDEQ fines against Ellis's instructions, the ALJ acknowledged that several federal courts "have consistently held that disclosures concerning perceived circumvention of internal control standards are SOX-protected disclosures."[211] The ALJ found, however, that because the subject company in each case was a public company or wholly owned subsidiary and (as the ALJ had earlier concluded) Respondent was not a public company, or subsidiary or affiliate thereof, Respondent was not subject to SEC rules on internal controls.[212] The ALJ thus found Complainant could not have reasonably believed that Respondent's conduct constituted a violation of SEC rules or other laws against shareholder fraud.[213]

Complainant argues the ALJ's determination that his complaints concerning internal controls and violations of SEC rules and regulations are not protected because Respondent is not a SOX-covered entity was legal error.[214] We agree with Complainant. Above, we concluded that Respondent is covered by SOX as an affiliate of a covered entity, namely publicly traded company Owens-Illinois.[215]

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210 *See Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 530 (S.D.N.Y. 2014) (noting that the Board "has made clear that an employee may engage in protected activity even where the employee is discharging her duties.") (citing *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012)); *Robinson v. Morgan-Stanley*, ARB No. 2007-0070, ALJ No. 2005-SOX-00044, slip op. at 13-14 (ARB Jan. 10, 2010)) ("[Section 1514A] does not indicate that an employee's report or complaint about a potential violation must involve actions outside the complainant's assigned duties."); *see also Vinnett v. Mitsubishi Power Sys.,* ARB No. 2008-0104, ALJ No. 2006-ERA-00029, slip op. at 10-11 (ARB July 27, 2010) (noting that reports submitted in the course of the performance of an employee's assigned responsibilities remain protected under the ERA).

211 Summary Decision at 48 (citing *Zulfer v. Playboy Enters.*, Case No. CV 12-08263-MMM (SHx), 2013 WL 12132075 (C.D. Cal. Apr. 24, 2013)) (remaining citations omitted).

212 Summary Decision at 48.

213 *Id.*

214 Comp. Br. at 34-35.

215 *See supra,* pp. 17-33.

Second, the coverage and protected activity analyses are two separate components in the adjudication of a SOX whistleblower claim. When they are each in question, the ALJ should typically address them independently.[216]

2. Complainant Engaged in Protected Activity Concerning Environmental Fine Accruals

Having addressed the preliminary legal errors embedded in the ALJ's evaluation of activity protected under SOX, we next turn to the Complainant's amended complaint and the ALJ's remaining protected activity analysis. In his amended complaint, Complainant alleged several violations by Respondent which he claimed resulted in fraud or potential fraud, violations of accounting standards such as GAAP, and violations of rules and regulations of the SEC such as internal controls over financial reporting.[217]

At a minimum, Complainant's allegations fall under a reasonable belief of a violation of a rule or regulation of the SEC.[218] SEC rules and regulations require companies that file periodic financial reports with the SEC to make and keep accurate books, records, and accounts;[219] to establish and maintain a system of

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216 *See Mara v. Sempra Energy Trading, LLC,* ARB No. 2010-0051, ALJ No. 2009-SOX-00018, slip op. at 6-9 (ARB June 28, 2011) (treating the respondent's possible status as a covered subsidiary or affiliate under SOX and the assessment of whether the complainant had engaged in protected activity as analytically distinct inquiries); *see also Denneny v. MBDA, Inc*., ARB No. 2018-0027, ALJ No. 2016-SOX-00032, slip op. at 7-13 (ARB Jan. 8, 2021) (finding resolution of the issue of respondent's SOX-coverage as a contractor unnecessary but nonetheless separating the protected activity analysis from the discussion of coverage).

217 Am. Compl. at 2-13. "Financial statements filed with the Commission which are not prepared in accordance with generally accepted accounting principles will be presumed to be misleading or inaccurate . . . ." 17 C.F.R. § 210.4-01(a)(1).

218 18 U.S.C. § 1514A(a)(1) ("to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of . . . any rule or regulation of the Securities and Exchange Commission . . . ."). A complainant in a senior financial role such as that of Chief Financial Officer can raise complex and serious financial and accounting irregularities that might constitute a reasonable belief of a violation of multiple categories of SOX-protected activity.

219 17 C.F.R. § 240.13b2-1 (implementing regulation of the Foreign Corrupt Practices Act, which amended Section 13 of the Securities Exchange Act of 1934/15 U.S.C. § 78m) ("No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act."); *see Wadler,* 916 F.3d

internal accounting controls over financial reporting; and to disclose any material weakness in internal controls.[220]

The SEC defines internal controls as follows:

> The term *internal control over financial reporting* is defined as a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

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at 1185-1189 (finding that the statutory provisions of the FCPA are not "rules or regulations of the SEC" under Section 806, but that administrative rules or regulations of the SEC are, including the books-and-records provision at 17 C.F.R. § 240.13b2-1, and remanding for the district court to consider whether a new trial was warranted to decide if complainant's belief that respondent's actions constituted a violation of 17 C.F.R. § 240.13b2-1 was objectively reasonable).

[220] Management is to provide a report on its internal control over financial reporting that includes:

> (1) A statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the registrant; (2) A statement identifying the framework used by management to evaluate the effectiveness of the registrant's internal control over financial reporting as required by paragraph (c) of § 240.13a-15 or § 240.15d-15 of this chapter; (3) Management's assessment of the effectiveness of the registrant's internal control over financial reporting as of the end of the registrant's most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective. This discussion must include disclosure of any material weakness in the registrant's internal control over financial reporting identified by management. Management is not permitted to conclude that the registrant's internal control over financial reporting is effective if there are one or more material weaknesses in the registrant's internal control over financial reporting . . . .

17 C.F.R. § 229.308(a)(1)-(3).

> (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
>
> (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
>
> (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.[221]

Each principal executive and financial officer must certify the following regarding their financial reports:

> The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
> (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and

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221 *Id.* § 240.13a–15(f) (emphasis original); *see Erhart v. Bofl Holding, Inc.*, 612 F. Supp. 3d 1062, 1091-93 (S.D. Cal. 2020) ("[L]ike the Books-and-Records Rule, the Internal Controls Rule [at 17 C.F.R. § 240.13a–15(f)] falls under § 1514A because it is a 'rule or regulation of the [SEC].'"); *id.* at 1093 (citing 18 U.S.C. § 1514A). The Internal Controls Rule requires "compliance with the applicable laws and regulations directly related to the preparation of financial statements, such as the Commission's financial reporting requirements." *Id.* at 1092 (quoting *In Re Mgmt.'s Report on Internal Control over Fin. Reporting & Certification of Disclosure in Exch. Act Periodic Reports*, Release No. 8238, 80 S.E.C. Docket 1014, 2003 WL 21294970, at *8 (June 5, 2003)).

> report financial information; and (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.[222]

In *Thibodeau v. Wal-Mart Stores, Inc.*, the Board observed that the SEC's rules and regulations on internal controls apply to controls needed to ensure the "accuracy, completeness, and integrity of financial statements and public companies' accounting and auditing functions."[223] Federal courts have also determined that complaints alleging violations of internal controls are protected activity under SOX.[224] For example, a complainant's claim that her employer pressured her to engage in suspect accounting practices regarding the accrual of bonuses can constitute a report of a potential violation of internal controls and thus be SOX-protected.[225]

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[222] 17 C.F.R. §§ 229.601(b)(31)(i)(5)(a)-(b), 240.13a-14 (certification of disclosure in annual and quarterly reports).

[223] *Thibodeau v. Wal-Mart Stores, Inc*., ARB No. 2017-0078, ALJ No. 2015-SOX-00036, slip op. at 9 (ARB Dec. 17, 2020). The ARB noted that a mistaken belief that flawed internal controls violate the SEC rules or regulations relevant to financial reporting may be objectively reasonable "if the totality of the circumstances known or reasonably perceived by the complainant at the time of the complaint, analyzed in light of his training and experience, would lead a reasonable person to believe that the conduct complained of constituted a violation of relevant law." *Id.* at 10 (citing *Sylvester,* ARB No. 2007-0123, slip op. at 15) (remaining citations omitted); *see also Klopfenstein v. PCC Flow Tech. Holdings Inc.*, ARB No. 2004-0149, ALJ No. 2004-SOX-00011, slip op. at 17 (ARB May 31, 2006) (finding a communication about a material irregularity in inventory accounting may constitute protected activity because incompetence in internal controls could affect the accuracy of financial statements).

[224] *Feldman v. Law Enf't Assocs. Corp.*, 779 F. Supp. 2d 472, 492 (E.D.N.C. 2011) ("Disclosures made by employees concerning reasonably perceived violations of SEC rules governing internal control standards can constitute protected conduct under SOX."); *Collins v. Beazer Homes USA Inc.*, 334 F. Supp. 2d 1365, 1378 (N.D. Ga. 2004) (holding that "allegations . . . [of] violations of the company's internal accounting controls . . . were within the zone of protection afforded by Sarbanes Oxley.").

[225] *Zulfer,* 2013 WL 12132075, at *7-8; *see Wadler,* 916 F.3d at 1188 ("There is sufficient evidence to support the objective reasonableness of [the plaintiff's] belief that [respondent] had falsified books and records."); *see also Erhart,* 612 F. Supp. 3d at 1101 ("When the evidence is construed in Erhart's favor, a reasonable factfinder could conclude Erhart reasonably believed—or mistakenly believed—that this conduct amounted to a violation of the Internal Controls Rule [at 17 C.F.R. § 240.13a–15(a)].").

Complainant alleged violations of internal controls numerous times in his amended complaint.[226] Complainant alleged TCNA "set an inappropriate tone at the top for internal controls and fostered an environment conducive to or even encouraging cover-ups, unclear and non-meaningful financial [reports], and unethical or illegal acts in order to save face."[227] He asserted that this culture was specifically fostered by Ellis who held a "unique centralized position of authority"[228] and "issued verbal directions against disclosures and supportive of cover-ups" violative of SOX.[229] Complainant alleged that his own "style of clearly communicating meaningful financial reports and other information were protected activities supporting [the] Congressional purposes" of the statute.[230]

Complainant alleged his communications with management personnel to attempt to compel Respondent's "self-reporting the violation to the WDEQ" were protected under the CAA and SOX.[231] Complainant claimed SOX protects his discussions with the auditors and management personnel because he "properly account[ed] for material contingent liabilities related to fines that WDEQ could impose" and sought to prevent "failures of internal accounting controls . . . ."[232]

Complainant specifically alleged that during a January 5, 2019 meeting, KPMG representatives queried him on "cases of fraud and possible contingent liabilities."[233] Complainant asserted he "properly repeated" to KPMG that

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226 Am. Compl. at 2 ("Complainant was attempting to avoid financial fraud by properly accounting for contingent liabilities related to fines that the WDEQ could impose, and as related to failures of internal accounting controls"), 2-3 (stating Ellis "vehemently chastis[ed] [Complainant] for relating the issue to KPMG (quite contrary to supporting sound internal accounting controls."), 4 ("Complainant avoided financial reporting fraud by ignoring the CEO and properly accounting for a pro-rata increase in the expected fines. CEO's direction to cook the books was a direct violation of internal accounting controls . . ."), 8 ("These violations constituted a material failure of the internal controls that Complainant was systematically addressing with the knowledge of both of his supervisors, the CEO and the TCL CFO.").

227 *Id*. at 8.

228 *Id*. at 9.

229 *Id*. at 8.

230 *Id*.

231 *Id*. at 2.

232 *Id*.

233 *Id*.

Respondent had begun a "new investigation into the alleged fraud" related to the falsified dust emission reports and that he did so in order "to help resolve the related financial reporting issue."[234] He argues these disclosures could have caused negative financial consequences through loss of investor confidence.[235]

Complainant alleged that when Ellis learned of his report to KPMG concerning "fraud," he was irate and rebuked him for his report to the external auditors.[236] Complainant stated that, by refusing to withdraw his report to KPMG absent corrective information from Ellis, he was opposing "fraud and/or any cover-up" and resisting attempts to engage in deficient accounting for fines and liabilities.[237]

Complainant stated that Ellis informed him that in approximately mid-May 2019, that the investigation was completed, that Respondent had self-reported the investigator's findings on "fraudulent [dust emission] reporting" to the WDEQ, and, as a result, the WDEQ had waived the fines.[238] Complainant alleged he engaged in CAA and SOX-protected activity when he repeatedly asked for a copy of Respondent's 2019 self-filing regarding the dust emission report with the WDEQ from May to August 2019,[239] in order to "compel compliance with clean air act statutes" and to update KPMG on the proper accounting of the potential fines in preparation for fiscal reviews.[240]

Complainant also alleged that in June 2019, Ellis, in an attempt to "cook the books," backtracked on his prior directions to accrue the environmental fines.[241] By not following this directive, Complainant claimed, he "avoided financial fraud (mail, wire, and bank frauds) by . . . properly accounting for a pro-rata increase in the

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234 *Id.*

235 Comp. Br. at 28.

236 Am. Compl. at 2-3; *see also id.* at 3 (alleging that when he informed John Mulhall (TCL's CFO and his "second supervisor") of the elevated hostility between himself and Ellis, Mulhall told Complainant that as Respondent's CFO he was "in charge of accounting and financial issues").

237 Comp. Br. at 29.

238 Am. Compl. at 3.

239 *Id.*

240 *Id.* at 4.

241 *Id.*

expected [environmental] fines" of $1 million.[242] Complainant asserted that his refusal to go along with Ellis's instruction maintained compliance with internal controls.[243]

Respondent does not dispute that Complainant was tasked with properly accounting and accruing the contingent liabilities related to the fines and that he discussed such accounting/accrual with KPMG.[244] Nor does Respondent dispute that Complainant actually communicated with and sought information from Respondent and TCSAP staff about the environmental fines for the purposes of accruing them.[245] We hold that Complainant engaged in protected activity concerning environmental fine accruals.

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[242] *Id.* at 4-5.

[243] *Id.* at 4. While Complainant stated Respondent failed follow "sound internal controls" per the "require[ments of] [the Dodd-Frank Act]," he described such failures in terms indicating they amounted to violations of an SEC rule or regulation under the SOX. *Id.* at 8 ("A principal Congressional purpose in adopting the DFA was to require the establishment of sound internal controls to help ensure fair, complete, and materially accurate financial reports;" "[S]tanding in its own right as a protected activity in violation of SOX and DFA, [Respondent] set an inappropriate tone at the top for internal controls . . . ."). Nonetheless, the complainant's description of the alleged SOX-protected activity need not pinpoint the precise SOX-enumerated provision pertinent to their claim. *See Sylvester*, ARB No. 2007-0123, slip op. at 18 (rejecting any requirement that the complainant's claim to SOX-protected activity "definitively and specifically" relate to one or more of the provisions listed in § 1514A(a)(1)).

[244] "Complainant admits his only role in accruals was to record it on the books or add a contingent liability to the footnotes in the financials." Respondent's Motion for Summary Decision at 51 (cleaned up). "Complainant discussed the proper accounting of the potential penalties that may result from the Equipment Issue with [Respondent's] external, third party accountants." Respondent's Amended Motion to Dismiss at 3. "Complainant's concern was to accrue what Complainant thought were the correct liabilities in the event that Respondent received potential fines from the state environmental agency." *Id.* at 14.

[245] *See* CX 35, CX 37, CX 53 at 2 (showing Complainant's efforts to obtain additional information from members of Respondent's management and TCSAP personnel on the status of the fines). It also does not appear to be disputed that Ellis directed Complainant to increase accruals of the fines quarterly, yet removed the accruals shortly thereafter. On June 5, 2019, Ellis told Complainant to start increasing the WDEQ fine accrual by $250,000/quarter (in addition to the $600,000 accrued) through at least Quarter 3 of 2020. CX 38. As of June 17, 2019, Ellis changed course and removed the DEQ fines for September and December totaling $500,000 because he did not know whether they would actually be imposed. CX 40. Respondent's Motion for Summary Decision at 51 (acknowledging the correspondence between Ellis and Complainant on the environmental accruals and that Ellis had initially put forward a "piecemeal accrual approach.").

3. Complainant Engaged in Protected Activity Concerning IBNR Accruals

As noted above, the SEC's rules and regulations require that companies filing periodic financial reports make and keep accurate books, records, and accounts and establish and maintain a system of internal accounting controls over financial reporting.[246] In his complaint, Complainant alleged he developed an "actuarial model to produce an Incurred-But-Not-Billed Report (IBNR) for estimating outstanding employee medical benefit liabilities" and "record[ed] the required liability" of "between $500,000 and $600,000" in accordance with U.S. GAAP accounting rules.[247] Complainant asserted he did so contrary to Ellis's criticizing him for creating the model and instructing him to remove the accrual from financial reports.[248]

The ALJ summarily determined that Complainant had not engaged in protected activity with respect to his submission of a model to accrue medical liability expenses (IBNR accruals).[249] The ALJ based her determination on several grounds. The ALJ observed that Complainant had failed to submit evidence showing that Ellis asked for the accrual to be reversed and that Complainant refused and provided a reason for refusing.[250] In this conclusion, the ALJ unnecessarily limited the scope of protected activity to that which is accompanied by a refusal and explanation. While protected whistleblowing is often overt, public, and confrontational, these requirements are not necessary for protection. An employee can engage in protected whistleblowing and be retaliated against without a public confrontation and a refusal to participate in the activity.[251]

Next, the ALJ determined that Complainant did not engage in protected activity because there could be no violation of SEC rules or other laws against public shareholder fraud when "Respondent is not a publicly traded company and is

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246 17 C.F.R. § 240.13b2-1 (implementing regulation of the FCPA) ("No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act.").

247 Am. Compl. at 6.

248 *Id.*

249 Summary Decision at 48-51.

250 *Id.* at 49.

251 *See supra* note 210 (outlining determinations that the routine fulfillment of the complainant's job duties can amount to protected activity).

not subject to SEC rules governing internal controls."[252] The ALJ concluded Complainant's IBNR-related activity was not SOX-protected even assuming that Complainant informed Ellis both that the IBNR accrual was GAAP-required and that its removal from Respondent's financial statements would violate internal accounting controls.[253] The ALJ reasoned that non-accrual of the IBNR expenses bore "no direct impact on the shareholders of a public company"[254] as "neither TCNA nor TCSAP is an affiliate whose financial information is included in the consolidated financial statements" of Owens-Illinois.[255]

On appeal, Complainant argues that the ALJ erred in determining that Complainant's attempts to account for the IBNR accruals in accordance with GAAP was not SOX-protected.[256] He contends the ALJ's use of coverage to deny protection to the IBNR portion of his activity was error.[257] Complainant posits that "Respondent's failures to address financial frauds, potential or otherwise, constituted violations of internal controls that affected public partner[ ][Owens-Illinois]."[258] Complainant also argues that record evidence shows he submitted a model for recording IBNR accruals and that Ellis "inappropriately interfere[ed] with a standard accounting practice."[259] He asserts that his efforts to account for the IBNR accruals were protected by SOX given that ignoring such "material accruals . . . would de-facto be a violation of SOX."[260]

We previously stated that the ALJ erred in conflating the issue of coverage with her analysis of whether Complainant's report to KPMG was protected. Subtracting that error, the ALJ recognized that the subject matter of Complainant's communications (adherence to internal accounting controls) was protected under the SEC rules and regulations provision of SOX.[261] Indeed, SEC rules require

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252 Summary Decision at 50.

253 *Id.* at 49.

254 *Id.* at 50.

255 *Id.* at 51.

256 Comp. Br. at 35-38.

257 *Id.* at 35.

258 *Id.*

259 *Id.* at 36.

260 *Id.* at 37.

261 Summary Decision at 48.

compliance with U.S. GAAP in financial reporting.[262] And a complainant's claim that activity furthers or maintains relevant accounting standards such as GAAP can constitute protected activity.[263]

Regarding Complainant's communications on the IBNR model and the accruals, Respondent does not dispute that Complainant acted to comply with applicable accounting rules. Specifically, Respondent does not dispute that Ellis questioned the need for the IBNR accruals, that Complainant submitted an internal model to the TCL CFO for accounting for them, that Ellis chastised Complainant for that submission, and that Complainant replied to Ellis that the IBNR accrual was required by GAAP.[264] We hold Complainant engaged in protected activity concerning IBNR accruals.

4. Allegations Pertaining to SEC Rules and Federal Law Related to Fraud Against Shareholders: Activities Factually Disputed and Remanded for a Hearing and a Decision on the Merits

Respondent appears to dispute whether Complainant participated in two activities he asserts are SOX-protected. Regarding the first activity, Complainant alleges that from May to August 2019, he asked Ellis and other managers for documentation of Respondent's self-report to WDEQ on the results of its

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[262] 17 C.F.R. § 210.4-01(a)(1).

[263] *Smith v. Corning, Inc.*, 496 F. Supp. 2d 244, 248-50 (W.D.N.Y. 2007) (finding the complainant's disclosure that a company was implementing a financial reporting program that was not GAAP-compliant was protected under SOX); *Mahony v. KeySpan Corp.*, No. 04-CV-554-SJ, 2007 WL 805813, at *6 (E.D.N.Y. Mar. 12, 2007) (denying summary judgment motion and noting that "a fair and reasonable juror could find that Plaintiff reasonably believed that the company was engaging in accounting practices that needed to be corrected before its financial statements misled shareholders").

[264] *See* Summary Decision at 49 (discussing emails from Ellis stating that with respect to the IBNR accruals, Respondent "cannot have these last minute surprises that put us behind on ABP only two months in the fiscal year" (CX 41); from Complainant proposing an internal model for estimating IBNR claims to John Mulhall at TCL (CX 45; RX 21 at 1); a reply email from Ellis chastising Complainant for sending TCL the model without his involvement (*Id.*); and from Complainant in reply to Ellis explaining that "[t]he IBNR accrual is required under GAAP and this is only an accounting process issue; not something with which a CEO would normally be involved" (RX 21 at 1)); *see also* Tr. at 262 (testimony from Ellis, recounting his disapproval of Complainant's proposal to TCL for a "significant change in how the company was calculating its [IBNR] liability and reporting it on the financial statements . . . .").

investigation into fraudulent dust-emission reporting as well as documentation showing WDEQ had waived the environmental fines.[265] If Complainant engaged in this activity, his requests for documentation regarding the status of the investigation into the environmental misreporting may have been an effort to comply with internal accounting controls related to financial reporting and therefore may have been a provision of information concerning conduct reasonably believed to constitute a violation of an SEC rule or regulation.[266]

Respondent also disputes Complainant's allegation that Complainant objected to Ellis's cancelling the consulting contract of a retired account manager in January 2019.[267] Complainant states the account manager had previously reported the overstatement of TCSAP's inventory to an ethics hotline in March 2018 and that Ellis did not want the account manager at TCNA for this reason.[268] If this occurred, Complainant's objection may be protected under SOX as a provision of information relating to conduct reasonably believed to constitute a violation of Section 806, which qualifies as "any provision of Federal law relating to fraud against shareholders."[269]

5. There Is a Genuine Issue of Material Fact that Complainant Reasonably Believed Clarifying the Loan Agreement Term "Consolidating Statements" Avoided Bank Fraud

Complainant alleged in his amended complaint that Respondent's loan agreement with a bank required Respondent's certification that Respondent had

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[265] Am. Compl. at 3-4. Complainant says he asked for the documentation after Ellis verbally told him of Respondent's self-report and the WDEQ's waiver of the fines in mid-May 2019. Complainant's repeated, specific requests for the documentation of the self-report and fine waiver do not appear in the record. Respondent has disputed only the legal question of whether the discussions amounted to protected activity and not whether the discussions themselves occurred. Respondent Amended Motion to Dismiss at 19.

[266] 18 U.S.C. § 1514A(a)(1).

[267] Am. Compl. at 6-7. "Entirely absent from the record is any evidence that Complainant ever raised concerns about this former employee, but more importantly, this allegation clearly does not articulate protected activity defined under Section 806 . . . ." Respondent's Motion for Summary Decision at 54.

[268] Am. Compl. at 6-7.

[269] 18 U.S.C. § 1514A(a)(1).

filed “consolidating statements” in June 2019.[270] As Respondent’s “lead and sole point of contact” with the bank, Complainant sought the bank’s clarification as to the meaning of the term “consolidating statements” before submitting the requisite certification to the bank that Respondent had provided such financial statements.[271]

He also alleged he negotiated an amendment to the loan agreement concerning the term after the bank declined to clarify it.[272] Complainant alleged that Ellis disapproved of Complainant’s attempt to obtain the clarification and “suggested that Complainant should have just certified the financial/covenant filings as his predecessor had done in prior years even though the filings were incomplete and technically not in compliance.”[273]

The ALJ determined that these allegations did not constitute protected activity because “no reasonable person could conclude that a mere ‘suggestion’ by Mr. Ellis that Complainant should have certified Respondent’s compliance with the loan agreement constituted fraud.”[274] She further concluded that Complainant’s communications with management about the loan agreement were unprotected because there was no evidence “that Complainant provided information to anyone regarding bank fraud.”[275] She ultimately determined that even accepting Complainant’s allegations as true, there was no evidence or allegation that “Complainant believed in good faith that Mr. Ellis committed bank fraud or that Complainant reported such fraud.”[276]

On appeal, Complainant argues the ALJ erred in concluding he did not provide information concerning Respondent’s potential involvement in bank fraud. He argues that he communicated the loan agreement issue to TCL CFO Mulhall and Ellis, who understood the legal significance of the compliance certificate and

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[270] Am. Compl. at 5.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] Summary Decision at 52.

[275] *Id.*

[276] *Id.*

that certifying compliance without first establishing compliance would have been false and therefore fraudulent.[277]

We find that the ALJ erred in failing to address evidence tending to show Complainant's reasonable belief that Respondent's certification of the loan agreement without the clarifying amendment amounted to a violation of 18 U.S.C. § 1344, the bank fraud statute set forth in SOX. The bank fraud statute provides criminal penalties for "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises . . . ."[278] Modeled after the wire and mail fraud statutes, "[t]he [bank fraud] statute was intended to reach a wide range of fraudulent activity that undermines the integrity of the federal banking system."[279] Accordingly, "courts have liberally construed the statute."[280]

Bank fraud can include the loan application process to the extent it involves a scheme to defraud a financial institution.[281] In a case involving the submission of documents containing false information to a bank in connection with a loan, important questions to resolve are the nature of the false information,[282] whether

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277 Comp. Br. at 39.

278 18 U.S.C. § 1344.

279 *United States v. Akers*, 215 F.3d 1089, 1102 (10th Cir. 2000) (citation and quotation marks omitted). Analysis of bank fraud often draws from corresponding analysis of the mail and wire fraud statutes. *See United States v. Williams*, 865 F.3d 1302, 1309 (10th Cir. 2017).

280 *United States v. Flanders*, 491 F.3d 1197, 1212 (10th Cir. 2007) (citation omitted).

281 *Id.* at 1213 ("Banks are in the business of assuming risks. Section 1344(1) of the bank fraud statute, however, prohibits individuals from exposing a bank to a risk of loss that the bank did not knowingly assume.") (citation omitted).

282 The bank fraud statute has two elements. Under prong one, a scheme to defraud a financial institution does not require but can include an affirmative false or fraudulent statement. Half-truths, omissions, deceptions, and concealment can support a conviction. *See United States v. Young*, 952 F.2d 1252, 1256-57 (10th Cir. 1991); *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (observing that in the inquiry into "whether [a scheme] [i]s fraudulent in nature, there are no hard and fast rules of law to apply"); *United States v. Zarrab*, No. 15 Cr. 867 (RMB), 2016 WL 6820737, at *13 (S.D.N.Y. Oct. 17, 2016). The second prong can be satisfied when there is an attempt to execute a scheme to obtain

the falsity was material and nontrivial,[283] and whether the falsity, omission, or concealment was known by the defendant.[284] We note, however, a whistleblower complainant need only show a reasonable belief of a violation of a SOX-enumerated provision, not the specific elements necessary for a conviction under that provision.[285]

Here, the ALJ acknowledged Complainant's June 12, 2019 email in which he informed TCL CFO John Mulhall that Respondent "may be in technical breach" of its credit agreement with JP Morgan and recommended resolving the issue with a clarifying amendment.[286] The ALJ did not acknowledge, however, that Mulhall appeared to confirm in reply that Respondent had not filed consolidating statements.[287] The ALJ thus did not explain how Mulhall's response that Respondent had not filed the requisite consolidating statements informed her assessment that Complainant lacked a reasonable belief that certifying that Respondent had filed them would constitute a violation of § 1344.[288]

Further, the case cited by the ALJ in support of her conclusion that Complainant did not raise a genuine issue of material fact his belief was reasonable is inapposite.[289] In that case, *Neff v. Keybank National Association*, the ARB affirmed the ALJ's grant of summary decision where "there [was] *no evidence or allegation* that Neff held a good faith belief that Respondents took [the alleged protected] actions or that she had ever reported such actions to *any person*."[290] In

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property "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344(a)(2); *United States v. Gregory*, 54 F.4th 1183, 1192-93 (10th Cir. 2022).

283 *Williams*, 865 F.3d at 1310-11. A false statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999).

284 *See Loughrin v. United States*, 573 U.S. 351, 356-57 (2014); *United States v. Blasini-Lluberas*, 169 F.3d 57, 64-65 (1st Cir. 1999).

285 *Sylvester*, ARB No. 2007-0123, slip op. at 21-22.

286 JX 13.

287 *Id.* (Mulhall stated that "Consolidating and consolidation should read as the same thing. What we have not, and never would do, is file the consolidating entries – these are never shown anywhere.").

288 Summary Decision at 51-52.

289 *Id.* at 52.

290 *Neff v. Keybank Nat'l Ass'n*, ARB No. 2019-0035, ALJ No. 2018-SOX-00013, slip. op. at 4 (ARB Feb. 5, 2020) (emphasis added).

contrast, Complainant clearly alleges his belief was reasonable and submitted evidence indicating so when viewed in the light most favorable to him.

Additionally, Respondent does not appear to dispute that Complainant emailed Mulhall his concern that Respondent could be in "technical breach" of the loan agreement, that Complainant sought clarification as to whether Respondent had filed consolidating statements per the required certification, and that he was informed by Mulhall that Respondent had not filed them.[291]

Part III: The ALJ Did Not Err in Dismissing Complainant's CAA Claim

1. The ALJ Did Not Err in Determining Complainant's CAA Claim Was Untimely and Not Subject to Equitable Modification

The CAA provides that "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, **within thirty days** after such violation occurs, file . . . a complaint . . . alleging such discharge or discrimination."[292] The 30-day limitations period for a CAA complaint begins when the complainant receives "final, definitive, and unequivocal notice" of the adverse employment action.[293] Thus, a claim accrues when the employer communicates its decision to take the adverse action, "rather than the date the consequences of the decision are felt."[294]

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[291] JX 13. At deposition, Ellis stated that "[u]nder the loan agreement, from my recollection, we were required to submit consolidated and consolidating financial statements. And we had only been submitting, apparently, consolidated financial statements." RX 19 at 10; Resp. Br. at 37. Nor does Respondent dispute that Complainant negotiated the clarifying amendment with the bank or that Ellis disapproved of his doing so. JX 13; RX 19 at 9; Resp. Br. at 37.

[292] 42 U.S.C. § 7622(b)(1) (emphasis added).

[293] *Udofot v. NASA*, ARB No. 2010-0027, ALJ No. 2009-CAA-00007, slip op. at 4 (ARB Dec. 20, 2011) (citations omitted); *see also Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) ("the filing limitations periods therefore commenced—at the time the [adverse action] decision was made and communicated"). The notice is an unambiguous "communication that is decisive or conclusive, leaving no room for further action, discussion, or change." *Sachdev v. Wells Fargo Bank*, ARB No. 2019-0069, ALJ No. 2019-CFP-00002, slip op. at 3 (ARB May 19, 2020) (citing *McManus v. Tetra Tech. Constr. Inc.*, ARB No. 2016-0063, ALJ No. 2016-SOX-00012, slip op. at 3 (ARB Dec. 19, 2017)).

[294] *Mehrotra v. Gen. Elec. Co.,* ARB No. 2022-0060, ALJ No. 2022-SOX-00014, slip op. at 5 (ARB Sept. 21, 2023) (citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981)) (remaining

Complainant filed his complaint alleging violations of the CAA on October 25, 2019.[295] The ALJ determined that there was no genuine dispute of material fact that Complainant received notice his bonus was reduced in June 2019 or notice of his termination on September 4, 2019.[296] She found that because Complainant filed the complaint on October 25, 2019, and more than 30 days after these occurrences, the bonus reduction and termination claims were thus untimely pled with respect to the CAA.[297] The ALJ found that the CAA claim of retaliatory bonus reduction was too remote for equitable modification principles to apply and thus ruled this claim untimely.[298] The ALJ found there was a genuine issue of material fact as to whether equitable estoppel applied to Complainant's claim of retaliatory termination.[299] After holding evidentiary hearings on this issue on August 10 and 12, 2022, the ALJ concluded that equitable estoppel did not apply to Complainant's retaliatory termination claim and dismissed it as untimely filed on November 17, 2023.[300]

The Board has recognized that the 30-day limitations period to file a CAA complaint is not jurisdictional and may be modified when equitable tolling or equitable estoppel principles apply.[301] The party seeking equitable modification bears the burden of establishing that they are entitled to it.[302] Further, while arguments presented by self-represented parties are assessed with a measure of latitude, such parties are "equally bound to follow the rules of practice and procedure as complainants represented by counsel."[303]

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citations omitted). Accordingly, "the time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date." *Id.* at 5 (citation omitted).

[295] Summary Decision at 1.

[296] *Id.* at 4.

[297] *Id.*

[298] *Id.* at 9. Accordingly, the alleged retaliatory bonus reduction was not part of the decision after hearing.

[299] *Id.*

[300] D. & O. at 43.

[301] *Udofot,* ARB No. 2010-0027, slip op. at 4-5.

[302] *Id.* at 5.

[303] *Xanthopoulos v. Mercer Inv. Consulting*, ARB 2022-0032, ALJ No. 2021-SOX-00017, slip op. at 27 (ARB Sept. 28, 2023) (citation omitted).

Equitable modification falls into two categories. Equitable tolling applies when the employee is unable to meet the filing deadline despite their own reasonable diligence, including when (1) the employee has raised the precise statutory claim at issue in the wrong forum, (2) extraordinary circumstances prevented the employee from timely filing, or (3) the employee was excusably ignorant of the alleged adverse action.[304]

By contrast, equitable estoppel focuses on the extent to which the employer's conduct induced or lulled the employee into delaying the filing of their complaint.[305] It applies, for example, when the employer promises "not to plead the limitations defense or by presenting fabricated evidence to negate any basis for a claim"[306] or makes assurances leading the complainant to reasonably believe that the adverse action will be reversed or redressed.[307] Generally, equitable estoppel will not be held to alter the filing deadline, however, "unless the employer has acted deliberately to deceive, mislead or coerce the employee" into not timely filing.[308]

Complainant argues the ALJ erred in determining that the filing deadline for his retaliatory termination claim under the CAA was not subject to equitable modification.[309] Respondent responds that the ALJ correctly determined that

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304 *See Farrar v. Straitline Well Servs.,* ARB No. 2022-0051, ALJ No. 2022-CAA-00001, slip op. at 4-5 (ARB Aug. 25, 2023) (citing *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 9 (ARB June 8, 2023)).

305 *Mehrotra,* ARB No. 2022-0060, slip op. at 8-9 (citing *Martin,* ARB No. 2022-0058, slip op. at 8); *see also Hyman v. KD Resources*, ARB No. 2009-0076, ALJ No. 2009-SOX-00020, slip op. at 7 (ARB Mar. 31, 2010) ("[T]he issue is whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period") (internal quotation marks and citation omitted).

306 *Mehrotra,* ARB No. 2022-0060, slip op. at 9 (internal quotation marks and citation omitted).

307 *See Hyman*, ARB No. 2009-0076, slip op. at 8 (finding equitable estoppel applicable where evidentiary documents showed the respondent or its agents "led [the complainant] to reasonably believe that he would be returned to his former employment or alternatively [be] given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated (including payment of back salary), and that [the respondent] would resolve the [ ] compliance issues that [the complainant] had raised.").

308 *Mehrotra,* ARB No. 2022-0060, slip op. at 9 (internal quotation marks and citations omitted).

309 Comp. Br. at 1-4. The arguments Complainant makes for equitable modification of the filing of his retaliatory termination claim under the CAA are essentially the same as

equitable modification principles did not apply.[310]

Applying the above standards and having carefully reviewed the parties' briefs, the ALJ's decisions, and the record, we find that none of Complainant's arguments establish that the ALJ committed reversible error in concluding that equitable modification principles do not apply to Complainant's untimely filed CAA claims. We specifically note that substantial evidence supports the ALJ's findings that Ellis offered Complainant an extension of his period of employment in order to assist Complainant's replacement transition into Complainant's soon-to-be former role.[311] It also supports her determination that Respondent's counsel's lack of prompt responses and/or requests for extensions to respond to Complainant's severance proposals left unchanged Respondent's essential decision to terminate Complainant's employment and that there was no evidence that Respondent did anything to communicate otherwise.[312]

Given the above and that Complainant received notice of Respondent's decision to terminate his employment on September 4, 2019, we affirm the ALJ's determination that Complainant's CAA-related claims were untimely and equitable

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those Complainant presented to the ALJ on this issue. Complainant's Response to Respondent's Motion for Summary Decision and Memorandum at 5-9. Complainant now argues before the Board that he understood the "violation" triggering the limitations period for his CAA retaliatory termination claim to be the date on which his termination took effect based on language on OSHA's website. Comp. Br. at 2. Complainant does not provide a link to the OSHA webpage he refers to. *Id.* Regardless, the CAA's implementing regulations define a "violation" as the point at which the decision to take the retaliatory action is communicated to the employee: "within 30 days after an alleged violation of any of the statutes listed in § 24.100(a) occurs (*i.e.,* when the retaliatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been retaliated against in violation of any of the statutes listed in § 24.100(a) may file . . . a complaint alleging such retaliation." 29 C.F.R. § 24.103(d)(1) (emphasis original).

[310] Resp. Br. at 15-20.

[311] D. & O. at 15-17.

[312] *Id.* at 18-20. Complainant requested a severance package and Respondent rejected Complainant's initial proposal. D. & O. at 8. During negotiations for settlement, Complainant filed a claim with OSHA alleging retaliation. The ALJ determined that the settlement negotiations did not qualify as grounds to excuse any untimely filings. *Id.* at 15, 17-19. The ALJ also agreed with Respondent that denial of severance was not an adverse action in this case. *Id.* at 23-26. We affirm these rulings. The ALJ correctly found there was no entitlement to severance or promise to provide severance. It was a discretionary benefit that was being negotiated by both parties. Subsequently, Complainant decided to pursue his claim legally.

modification principles did not excuse the late filing.[313] It is therefore unnecessary for us to address Complainant's arguments appealing the ALJ's determination he did not engage in CAA-protected activity.

2. Complainant Failed to Raise a Genuine Issue of Material Fact He Was Subjected to a Hostile Work Environment

While adjudication of timeliness often involves deciding whether discrete acts are timely, a certain type of alleged adverse action such as a hostile work environment is "based on the cumulative effect of individual acts."[314] It "involves repeated conduct," which "occurs over a series of days or perhaps even years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[315]

The ALJ found that Complainant had failed to demonstrate a genuine issue of material fact that he suffered a hostile work environment claim,[316] and any alleged hostile work environment ended as a matter of law on the last day of Complainant's work at TCNA on September 12, 2019.[317] Complainant alleges that the ALJ erred in finding that he failed to make such a showing and that a finding of

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313 We see no legal error in the ALJ's determination that Complainant's CAA hostile work environment claim was untimely on the basis that there was no genuine issue of material fact that Complainant's last day performing work and exposed to any arguably hostile environment was September 12, 2019, more than 30 days before Complainant filed his CAA complaint. Summary Decision at 5-6.

314 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

315 *Id*. A timely filed hostile work environment claim is contingent upon "whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Id.* at 120. Conversely, "discrete discriminatory acts [such as termination, failure to promote, denial of transfer, or refusal to hire] are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113; *see also Onysko v. Utah Dep't of Env't Quality,* ARB No. 2019-0042, ALJ No. 2017-SDW-00002, 2018-SDW-00003, slip. op. at 25 (ARB Dec. 16, 2020).

316 Summary Decision at 21. While the ALJ concluded that Complainant failed to establish a prima facie hostile work environment claim, she briefly stated that "[e]ven drawing all inferences in Complainant's favor, there is no genuine dispute that Respondent did not subject Complainant to a hostile work environment . . . ." *Id.* at 22.

317 *Id*. at 5-6.

continuing violations under a hostile work environment claim would have extended the CAA filing deadline for his CAA claims.[318]

We have reviewed Complainant's hostile work environment allegations and evidence he submitted in support of them, including several emails from Ellis.[319] We note that Complainant alleges Ellis sharply and disrespectfully criticized Complainant's handling of accounting matters. But the total conduct described by Complainant together with the evidence he believes demonstrates a hostile work environment do not create a genuine issue of material fact that Complainant meets the high bar for a hostile work environment. Such an environment exists when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ."[320] Discourtesy or rudeness are not features of a hostile work environment "nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing . . . ."[321] The ALJ did not err in determining that Complainant's allegations were insufficient to establish a hostile work environment.

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318 Comp. Br. at 48-49.

319 Complainant alleged that from January through September 2019, Respondent created a hostile work environment when Ellis reprimanded him for his January 2019 communication with KPMG and otherwise criticized his work, and when upper management treated him with a "cold shoulder," and cut his bonus. Summary Decision at 19-20.

320 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

321 *Brune v. Horizon Air Indus., Inc.*, ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 10 (ARB Jan. 31, 2006) (citations omitted); *see also id.* at 11 ("Circumstances germane to gauging a work environment include the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.") (citations and internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, we **VACATE** and **REVERSE** the ALJ's determinations that Respondent was not covered under SOX. We **VACATE** and **REVERSE** the ALJ's conclusion that Complainant did not engage in activity protected under SOX as a matter of law. We **AFFIRM** the ALJ's findings and conclusions that Complainant's CAA claim was untimely and not subject to equitable modification. We **AFFIRM** the ALJ's conclusion that Complainant did not suffer a hostile work environment. We **REMAND** this matter for further proceedings consistent with this opinion.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge