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| CARRI S. JOHNSON,<br>*Complainant-Appellant*,<br>v.<br>SIEMENS BUILDING TECHNOLOGIES, INC. and SIEMENS AG<br>*Respondent-Appellee.* | ARB Case No. 08-032<br>ALJ Case No. 2005-SOX-015 |

# REPLY BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-APPELLEE

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The Chamber of Commerce of the United States of America ("U.S. Chamber") respectfully submits this reply brief per the Administrative Review Board's ("ARB") July 21, 2010 Order inviting briefing by *amici curiae* to address whether § 929A of the Dodd-Frank Reform and Consumer Protection Act (H.R. 4173) ("Dodd-Frank Act") should be applied retroactively.

## QUESTION PRESENTED

In its July 21, 2010 Order inviting briefing by *amici curiae*, the ARB posed the following question:

> Section 929A of the Dodd-Frank Act, titled "Protection for Employees Of Subsidiaries And Affiliates of Publicly Traded Companies," amends the whistleblower protection provision in Section 1514A of the Sarbanes-Oxley Act of 2002 ("SOX") by inserting the following: "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company" after "the Securities Exchange Act of 1934 (15 U.S.C. 78(o)(d))." Does this amendment to the whistleblower provisions in § 806 of SOX apply retroactively?

## INTRODUCTION

§ 929A of the Dodd-Frank Act was enacted on July 21, 2010. It amends § 806 of SOX to now cover private subsidiaries and affiliates of publicly traded companies whose financial information is included in the publicly traded company's financial statements. A comparison of this new statute's plain text against the original version of § 806 of SOX compels the conclusion that it is not a mere clarification, but instead represents a substantive expansion of prior law that imposes new obligations on and now subjects broad range of companies and individuals to liability. This conclusion is fortified by the adverse effect that a retroactive application of this statute would engender. Accordingly, as a matter of law, § 929A of the Dodd-Frank Act may only be given a prospective application.

More specifically, there is a robust presumption against applying statutory amendments retroactively where, as here, doing so would subject entities and individuals to liability for conduct that was not unlawful at the time it took place. Such a result would be particularly unfair to newly covered entities, as they had no notice of an obligation to comply with § 806 of SOX. Indeed, as a practical matter, the lack of such notice likely led many such entities to avoid the costs and burdens associated with steps that covered entities often take to minimize the risk of claims under § 806 of SOX. For example, it is likely that such entities would have instituted anonymous hotlines, crafted and implemented codes of conduct and anti-retaliation policies tailored to ensuring compliance with § 806 of SOX, and trained managers to be receptive and respond appropriately to SOX whistleblower claims.

Moreover, § 929A of the Dodd-Frank Act cannot reasonably be construed as the type of "clarification" that would permit a retroactive application, notwithstanding the fact that a generalized reference to clarity is included in a Senate report. The coverage provisions in the original version of § 806 of SOX are unambiguous, and this conclusion is supported by the lengthy list of cases in the U.S. Chamber's Opening Brief uniformly holding that § 806 of SOX only applies to publicly traded companies (with limited exceptions). Further, a comparison of the original text of § 806 of SOX against the text of the Dodd-Frank Act illustrates that this new statute not a clarification, but, instead, is a substantive departure that dramatically widens the net of § 806 of SOX. In similar instances, courts have concluded that the mere fact that a Senate report generically characterizes an amendment as a clarification is an insufficient basis for applying a statute retroactively.

In sum, § 929A of the Dodd-Frank Act does not apply retroactively, which means that the original version of § 806 of SOX – which only applies to publicly traded companies (with

limited the limited exceptions set forth in the U.S. Chamber's Opening Brief) – applies to cases filed before July 21, 2010.

## DISCUSSION

### I. Standard Of Law

There is a strong presumption against applying statutory amendments retroactively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (amendment to Civil Rights expanding available damages and right to jury determined not to apply retroactively); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172 (4th Cir. 2010) (amendment clarifying term "actual charges" between insurers and insureds determined not to be retroactive); *Diaz v. Shallbetter*, 984 F.2d 850, 852 (7th Cir. 1993) ("There is a venerable principle that changes in statutes do not apply to pending cases unless the legislature so commands explicitly."). This is because retroactive legislation – *i.e.*, new laws that reach backwards in time to imposes obligations when none existed (and, *a fortiori*, impose such obligations in the absence of fair notice of an obligation to comply with them) can create "severe problems of unfairness because it can upset legitimate expectations and settled transactions." *U.S. Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 418 (5th Cir. 2000). Thus, "[c]ourts should be *extremely hesitant* to apply a statute retroactively where Congress has not expressly mandated such an extension." *Bowlds v. General Motors Mfg. Div. of the General Motors Corp.*, 411 F.3d 808, 811 (7th Cir. 2004) (emphasis added).

Courts apply a two-step analysis to determine whether a federal statute should be applied retroactively. First, courts determine whether Congress expressly has stated its intention for the amendment to apply retroactively. *See Landgraf*, 511 U.S. 272-73. Second, if Congress's intent to apply the amendment retroactively is not clear from the amendment's plain language, courts determine whether a retroactive application would increase a party's liability for past conduct,

impose new duties with respect to transactions already completed or impair the rights a party possessed when it acted. *See id.*

## II. § 929A Of The Dodd-Frank Act Has No Language Requiring A Retroactive Application

Courts rigorously evaluate statutory amendments to determine whether Congress truly intended for them to be applied retroactively. *See Landgraf*, 511 U.S. 272-73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."). Indeed, "[t]he 'words used in the statute must be so *clear, strong, and imperative* that no other meaning can be annexed to them, or ... the intention of the legislature must be such that it cannot be otherwise satisfied." *Ward*, 595 F.3d at 174 (emphasis added).

Here, § 929A of the Dodd-Frank Act is devoid of any language suggesting that it should be applied retroactively. It simply provides that § 806 of SOX is amended to cover a subsidiary or affiliate of a publicly traded company whose financial information is included in the publicly traded company's financial statements. Thus, there is no basis for concluding, as courts require, that the plain language in § 929A of the Dodd-Frank Act reflects Congress's clear and unmistakable intention for it to be applied retroactively.

## III. Applying § 929A Of The Dodd-Frank Act Retroactively Would Have An Impermissible "Retroactive Effect"

As noted, where, as here, a statutory amendment does not expressly provide that it applies retroactively, courts determine whether applying the amendment retroactively would have an "retroactive effect" by, for example, increasing a party's liability for past conduct, or imposing new duties with respect to transactions that already have been completed. *See Schmitz v. Louisiana*, No. 07-CV-891, 2009 WL 210497, at *1 (M.D. La. Jan. 27, 2009) (provisions of

ADA Amendments Act of 2008 changing the definition of "disability" under the ADA could not be applied retroactively) (citing *Landgraf*); *Miller v. LaSalle Bank Nat'l Assoc.*, 595 F.3d 782, 789 (7th Cir. 2010) (courts examine whether "the amended statute attache[s] new consequences to past events."); *Labojewski v. Gonzales*, 407 F.3d 814, 819 (7th Cir. 2005) (the inquiry is "whether the new provision attaches new legal consequences to events completed before the enactment"). "The analysis requires a commonsense, functional judgment and calls for an assessment of familiar considerations of fair notice, reasonable reliance, and settled expectations to determine whether a statute operates retroactively." *Id.*; *see also Ward*, 595 F.3d at 173 (the "inquiry requires a 'commonsense, functional judgment.'").

Applying § 929A of the Dodd-Frank Act retroactively inarguably would have a prohibited retroactive effect: if § 929A of the Dodd-Frank Act applies retroactively then private subsidiaries and affiliates of publicly traded companies and their decision-making employees that were not required to comply with § 806 of SOX before July 21, 2010 (the date § 929A of the Dodd-Frank Act was enacted) would now be subject to liability for failing to comply with it. This would be fundamentally unfair, as those entities and individuals had no notice that § 806 of SOX applied to them at that time.

This is not a mere theoretical concern. As a practical matter, the inapplicability of § 806 to private subsidiaries and affiliates of publicly traded companies before July 21, 2010 may have dissuaded them from taking proactive measures to minimize the risk of claims under that statute, such as incurring costs attendant to:

- implementing Internet- and/or telephone-based hotlines and related procedures designed to receive and appropriately respond to employee reports of fraud;
- training supervisors to recognize and respond appropriately to good-faith complaints of fraud; and

- creating and implementing codes of conduct and anti-retaliation policies tailored to ensuring compliance with § 806 of SOX.

In sum, applying § 929A retroactively would subject private subsidiaries and affiliates of publicly traded companies and their decision-making employees to liability for conduct that was not unlawful at the time it took place. Courts have routinely precluded retroactive applications of statutory amendments for the purpose of avoid this very result.

## IV. § 929A Of The Dodd-Frank Act Is Not A Mere "Clarification" Of § 806 Of SOX

There are limited exceptions to the presumption against retroactive application of a statutory amendment. One exists where a statute merely clarifies rather than substantively alters a statute. *See Middleton v. City of Chicago*, 578 F.3d 655, 663 (7th Cir. 2009) (Senate report stating that bill would "clarify" Congress's original intent did not cause the statutory amendment to be applied retroactively).

A number of factors may indicate whether an amendment is a mere clarification, including: whether Congress declared that it was clarifying a prior version of the law; whether a conflict or ambiguity in the law existed prior to the amendment; and whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history. *See Miller*, 595 F.3d at 790 (7th Cir. 2010).

Importantly, moreover, the mere fact that an amendment to a statute is a clarification may be insufficient to justify applying the amendment retroactively. Courts still "proceed with caution when Congress declares its intent to clarify a law in the legislative history rather than the amendment's text." *Id.* at 664; *see also Ward*, 595 F.3d at 174 ("Usually, legislative history is an insufficient indicia of intent, and courts instead demand express words evincing an intent that it be retroactive or words necessarily implying such an intent."); *cf. Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1284 (11th Cir. 1999) ("As a general rule, '[a] mere statement in a

conference report of [subsequent] legislation as to what the committee believes an earlier statute meant is obviously less weighty' than a statement in the amendment itself.") (alterations in original).

The Seventh Circuit's decision in *Middleton* is instructive. There, although Congress used the word "clarify" in a Senate report, the court considered other attributes of the legislation to determine whether it merely provided a clarification or whether it ushered in a substantive change in the law. 578 F.3d at 664. The court emphasized that the legislative history was silent on the question of retroactivity and was hesitant to afford the word "clarify" more weight than it deserved. *See id.* Moreover, the court determined that there was no need to turn to the legislative history in light of the absence of a reference to a clarification or retroactivity in the statute itself. *See id.* Ultimately, the court decided not to apply the statute retroactively, despite the presence of the word "clarify" in the Senate report. *See id.*

The U.S. Chamber anticipates that proponents of a retroactive application of § 929A of the Dodd-Frank Act will rely on language in a Senate report providing that this section:

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

Senate Report No. 111-176.

The use of the word "clarification" in that report, however, does not yield the conclusion that § 929A of the Dodd-Frank Act should be applied retroactively. *See Middleton*, 578 F.3d at 664 ("Although Congress used the word 'clarify,' its act must also comport with other attributes of 'clarifying' legislation to avoid being a substantive change in the law."). In fact, the following

side-by-side comparison of § 806 of SOX before and after the amendment establishes that it would be unreasonable to conclude that § 929A of the Dodd-Frank Act is a true "clarification" of an ambiguous statute:

| SOX § 806 Pre-Dodd-Frank Amendment | SOX § 806 Post-Dodd-Frank Amendment |
|---|---|
| Title of § 806: § 806 is titled "Protection For Employees of ***Publicly Traded*** Companies Who Provide Evidence Of Fraud," and subsection (a) is titled "Whistleblower Protection For Employees Of ***Publicly Traded*** Companies." (emphasis added). | Title of § 929A: Protection for Employees Of ***Subsidiaries And Affiliates of*** Publicly Traded Companies (emphasis added) |
| Original Text of SOX § 806: "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)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . ." 18 U.S.C. § 1514A. | New Text of SOX § 806: 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 any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . ." (emphasis added). |

As this table illustrates, the original text of § 806 of SOX is *unambiguous* as to the scope of its coverage; nothing in the original text lends the inference that it covers private subsidiaries. This table also shows that § 929A of the Dodd-Frank Act substantially increases the scope of the coverage provisions in § 806 of SOX to cover a new and exceedingly broad category of companies.

In addition, in stark contrast to § 929A, other sections of the Dodd-Frank Act – specifically, §§ 406, 912, 919 and 928 – expressly state that they are clarifications. This disparity exposes Congress's intent to omit text stating that § 929A is a clarification of § 806. (Opening Br. pp. 6-7 (citing cases)); *see also Rusello v. U.S.*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In the same vein, as detailed in the U.S. Chamber's opening brief, Congress's omission of private subsidiaries from § 806 should be considered intentional because it included private subsidiaries in sections of SOX other than 806 (*e.g.*, in §§ 78j-l(m)(3)(B)(ii) and 7241(a)(4)(B)). (Opening Br. pp. 6-7.)

Likewise, as further detailed in the U.S. Chamber's opening brief, the legislative history to the original version of § 806 of SOX shows that Congress intended for it to be limited to publicly traded companies. (*Id.*) This, too, casts serious doubt on any argument that Congress intended § 929 of the Dodd-Frank Act to apply retroactively. *See Miller*, 595 F.3d at 790 (7th Cir. 2010).

In short, despite the presence of the word "clarify" in a Senate report, § 929 of the Dodd-Frank Act simply does not clarify the text of § 806 of SOX. That text is unambiguous and § 929 of the Dodd-Frank Act substantively departs from and expands it.

## V. § 929 Of The Dodd-Frank Act Is Not A Mere Expansion Of Jurisdiction

Another exception to the presumption against retroactive application of a statutory amendment exists in limited situations where an amendment expands a statute's jurisdiction. This is because "[a]pplication of a new jurisdictional rule usually takes away no substantive right

but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 511 U.S. at 274 (quotations omitted); *see also Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 951 (1997) (same; amendment eliminating defense under False Claims Act and expanding the type of case that could be brought was not merely an expansion of jurisdiction but created a new cause of action).[1] More specifically, as the U.S. Supreme Court explained,

> [s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.

*Id.*

In view of the foregoing case law, § 929A of the Dodd-Frank Act cannot fairly be characterized as a mere expansion of jurisdiction in this context. It creates jurisdiction over private subsidiaries and affiliates of publicly traded companies where none previously existed. This is a far cry from simply altering the forum in which a case may be adjudicated; this amendment now subjects a new range of entities to liability for past conduct.

## CONCLUSION

WHEREFORE, for the foregoing reasons, the U.S. Chamber respectfully submits that § 929A of the Dodd-Frank Act should not be applied retroactively.

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[1] *See also Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 124 (D.C.C. 1999) (amendment to Foreign Sovereign Immunities Act did not affect contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning enforcement of an arbitral award); *Haven v. Republic of Poland*, 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (same); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 224 (1957) (holding long-arm statute enacted after parties entered into contract "did nothing more than provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent."); *Duldulao v. INS*, 90 F.3d 396, 399 (9th Cir. 1996) (AEDPA section 440(a) withdrawing the jurisdiction that Congress had previously conferred on courts of appeals to review certain final orders of deportation applied to all actions pending at that time).

**DATED: August 16, 2010**

Respectfully submitted,

CHAMBER OF COMMERCE OF THE
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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that on August 16, 2010, he caused a true and correct copy of the foregoing REPLY BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-APPELLEE to be served upon the following by U.S. mail, proper postage prepaid, on this 16th day of August, 2010:

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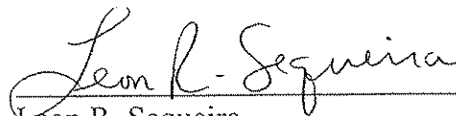

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