UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of:

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

REPLY BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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The Equal Employment Advisory Council (EEAC) respectfully submits this reply brief *amicus curiae* pursuant to the Letter of the Hon. Paul M. Igasaki, Chair of the Administrative Review Board and Chief Administrative Appeals Judge, dated July 21, 2010, inviting reply briefs addressing the impact of § 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act on the instant case. As did our original brief, this reply brief urges the Board to affirm the Decision and Order of the Administrative Law Judge ("ALJ" or "the Judge"). EEAC's Statement of Interest is fully set forth in our original brief.

ARGUMENT

I. UNDER *LANDGRAF v. USI FILM PRODUCTS*, THE PROVISION OF THE DODD-FRANK BILL EXTENDING SARBANES-OXLEY WHISTLEBLOWER COVERAGE TO SUBSIDIARIES OF PUBLICLY HELD COMPANIES CANNOT BE APPLIED RETROACTIVELY

A. The Amendment Took Effect On July 22, 2010, The Date After Enactment

As passed in 2002, § 806(a) of the Sarbanes-Oxley Act ("SOX"), Pub. L. No. 107-204, 116 Stat. 745, 802 (July 30, 2002), codified at 18 U.S.C. § 1514A, provided that:

> WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—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—

with regard to any of the listed protected activities. 18 U.S.C. § 1514A(a).

In the recent Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress amended § 806(a) as follows:

> SEC. 929A. PROTECTION FOR EMPLOYEES OF SUBSIDIARIES AND AFFILIATES OF PUBLICLY TRADED COMPANIES.
> Section 1514A of title 18, United States Code, is amended by inserting "including any subsidiary or affiliate whose financial information is included in the

consolidated financial statements of such company" after "the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))".

Pub. L. No. 111-203 (July 21, 2010) (§ 929A).

Section 4 of the Dodd-Frank Act, entitled "Effective Date," says that "Except as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act." *Id.* (§ 4). No provision of the Act establishes a different effective date for § 929A. Thus, § 929A took effect on the date after enactment, or July 22, 2010.

B. Under *Landgraf*, § 929A Cannot Be Applied Retroactively

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the U.S. Supreme Court established the rules that this Board must follow in determining whether a statutory amendment can be given retroactive application or not. Most importantly, the Court pointed out that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265 (footnote omitted). Under the rules established in *Landgraf*, § 929A can be applied only prospectively.

1. Congress has stated expressly that the amendment takes effect after enactment

"When a case implicates a federal statute enacted after the events in suit," the Court said, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

Congress stated expressly that the amendments made by the Dodd-Frank Act, which include § 929A, would take effect "1 day after the date of enactment . . . ." Pub. L. No. 111-203 (§ 4). This explicit language evidences that Congress intended the amendment to have only

prospective effect. *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1971 (2009). *See also Lockheed Corp. v. Spink*, 517 U.S. 882, 896 (1996) (noting that statutory language providing the date upon which the statute is to take effect "compels the conclusion that the amendments are prospective").

"Where, as here, the temporal effect of a statute is manifest on its face, 'there is no need to resort to judicial default rules,' and inquiry is at an end." *Lockheed* at 896-97 (quoting *Landgraf* at 280). Accordingly, the amendment to § 806(a) of SOX contained in § 929A of the Dodd-Frank bill cannot be applied retroactively.

2. If applied retroactively, § 929A would create a new cause of action against subsidiaries and thus would have retroactive effect

Even if the Congressional intent to have § 929A operate only prospectively were not clear from the "effective date" provision of the Dodd-Frank bill, the longstanding presumption against retroactivity still would compel the same outcome.

As the Court explained in *Landgraf*, "[w]hen . . . the statute contains no . . . express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. Section 929A creates a new cause of action against non-public subsidiaries of public companies, who were not covered previously by § 806. Where a statute creates a new cause of action, it would have retroactive effect if applied retroactively. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). Accordingly, Section 929A indeed would have retroactive effect.

3. Under *Landgraf*, a New Statute That Would Have Retroactive Effect Cannot Be Applied Retroactively Without Clear Congressional Intent, Which Is Conspicuously Absent Here

"If the statute would operate retroactively," the Court continued in *Landgraf*, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." 511 U.S. at 280. Under *Landgraf*, then, § 929A cannot operate retroactively absent clear Congressional intent that it do so.

As noted above, the effective date provided in the Dodd-Frank bill provides unmistakable evidence that Congress intended § 929A to operate only prospectively, not retroactively. Nevertheless, the Government's briefs in this case argue that language in the Senate Report on the Dodd-Frank bill provide adequate evidence of Congressional intent to override both the clear provision of a prospective effective date and the presumption against retroactivity.

The Government is incorrect. The Senate Report indeed states that § 929A is intended to "make clear" that Section 806(a) covers subsidiaries of publicly held companies. S. Rep. No. 111-176, at 114 (April 30, 2010). That language, however, falls far short of indicating that Congress intended § 929A to operate retroactively.

Indeed, quite to the contrary, the Senate Report goes on to say that "[t]his clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute." *Id.* The Supreme Court has confirmed that eliminating a defense, like creating a new cause of action, "changes the substance of the existing cause of action . . . by 'attaching a new disability, in respect to transactions or considerations already past.'" *Hughes Aircraft*, 520 U.S. at 948 (quoting *Landgraf*, 511 U.S. at 269).

Thus, the Senate Report language more likely acknowledges that Congress knew it was changing the *status quo* going forward. What § 929A makes clear is that, for causes of action

arising after July 22, 2010, "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of" a publicly held company covered by § 806 of SOX will be prohibited from taking any of the enumerated adverse employment actions against an employee who engages in any of the listed protected activities. 18 U.S.C. § 1514A (as amended 2010).

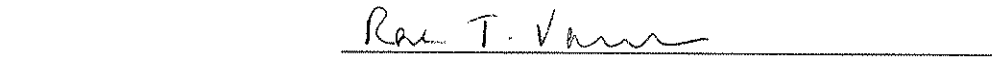
Nor is it relevant, as the Government claims, that retroactive application of § 929A may more effectively implement the purposes of § 806. As the Supreme Court said in *Landgraf*, "[i]t will frequently be true, as petitioner and *amici* forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity." 511 U.S. at 285-86 (footnote omitted).

Had Congress wanted to make the SOX amendment in § 929A retroactive, it could have done so. It did not. Accordingly, this Board should rule that § 929A cannot be applied retroactively.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the Administrative Law Judge should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify on this 6th day of August, 2010, I caused to be served a true and correct copy of the foregoing Brief via first class U.S. mail on the following:

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