

DON'T WHISTLE WHILE YOU WORK—UNLESS YOU WHISTLE TO THE SEC

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I. INTRODUCTION

In September 2008, four events pushed the U.S. financial system to the verge of collapse: (1) the federal government took control over home mortgage giants Fannie Mae and Freddie Mac;¹ (2) wealth management company Merrill Lynch agreed to sell itself to Bank of America for a fraction of its stock trading price when its liquidity dissolved in a single day;² (3) global financial services firm Lehman Brothers filed for bankruptcy;³ and (4) multinational insurance corporation, American International Group (AIG), faced collapse, prompting the federal government to loan the insurance giant eighty-five billion dollars.⁴ At the close of 2008, Wall Street finished its worst year since the 1930s, and the housing market finished its worst year in recorded history.⁵ It took huge taxpayer-financed bail outs to repair the American market.⁶ Despite efforts to stop the turmoil, the 2008

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¹ David Ellis, *U.S. Seizes Fannie and Freddie*, CNN MONEY (Sept. 7, 2008, 8:28 PM), http://money.cnn.com/2008/09/07/news/companies/fannie_freddie/.

² Matthew Karnitschnig et al., *Bank of America to Buy Merrill*, WALL ST. J. (Sept. 15, 2008, 12:01 AM), <http://online.wsj.com/article/SB122142278543033525.html>.

³ Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill is Sold*, N.Y. TIMES (Sept. 14, 2008), http://www.nytimes.com/2008/09/15/business/15lehman.html?pagewanted=all&_r=0.

⁴ Edmund L. Andrews et al., *Fed's \$85 Billion Loan Rescues Insurer*, N.Y. TIMES (Sept. 16, 2008), <http://www.nytimes.com/2008/09/17/business/17insure.html?pagewanted=all>.

⁵ MARK ZANDI, FROM FINANCIAL CRISIS TO RECOVERY 7 (2012) (discussing how, collectively, “a string of financial policy errors beginning with the government takeover of Fannie Mae and Freddie Mac, and the collective decision of the Bush Administration and the Federal Reserve to allow Lehman Brothers to go bankrupt . . . turned a serious yet manageable financial crisis into an out-of-control financial panic” and leading to “the worst economic global downturn since the 1930’s Great Depression”).

⁶ *The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 7, 2013),

crisis resulted in the largest depression this country has seen since the stock market crash of 1929, and today we are still feeling the effects of the 2008 recession.⁷

In response to the financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank,” “Dodd-Frank Act,” or “the Act”) on July 21, 2010.⁸ The goals of the Act, as summarized in the preamble, are “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”⁹

One specific goal of Dodd-Frank is to encourage whistleblowers to report securities law violations.¹⁰ The Act provides monetary awards to incentivize employees to report violations and protects employees who do come forward by shielding them from any employer retaliation that may arise in response to their whistleblowing.¹¹ It is not clear, however, who qualifies as a whistleblower under the statute, leaving potential tipsters uncertain of whether or not they will be eligible for Dodd-Frank’s protection from employer retaliation if they choose to report a violation. The ambiguity stems from two conflicting provisions: the “Definitions” section of the Act, which specifically defines a whistleblower as an individual who reports a violation directly to the U.S. Securities and Exchange Commission (SEC or “the Commission”);¹² and the “Protection of Whistleblowers” provision (the “Anti-Retaliation provision”), which prohibits employer retaliation against “whistleblowers” that report either internally or to an agency

<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article> (“September 2008 almost brought down the world’s financial system. It took huge taxpayer-financed bail-outs to shore up the industry.”).

⁷ See, e.g., Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 11 (2009) (“[T]he global economic slowdown is not like the most recent slowdowns seen in 2001, 1998, or 1987, but is, rather, quite comparable to the period after the debilitating 1929 stock market crash known as the Great Depression.”).

⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.).

⁹ Preamble, 124 Stat. 1376 (2010).

¹⁰ Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 BUS. L.J. 123, 124 (2011) (“Dodd-Frank is designed to incentivize whistleblowers to expose securities fraud.”).

¹¹ 15 U.S.C. § 78u-6 (2015).

¹² § 78u-6(a)(6) (“The term ‘whistleblower’ means any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”).

other than the SEC.¹³ The clashing provisions leave employers, potential whistleblowers, and courts with the unresolved question: does Dodd-Frank require employees to report directly to the SEC before they are eligible for whistleblower protection under the Act, or will internal reporting suffice?

Several courts have considered this issue, and their rulings fall on both sides of the debate.¹⁴ To further complicate matters, the SEC has expressed its own opinion through regulation and amicus briefs that an employee who raises complaints of potential violations internally, perhaps to a supervisor or compliance department, falls within the Act's whistleblower protection.¹⁵ Yet the SEC's guidance has proven ineffective and, arguably, has only further complicated the matter. Several jurisdictions declined to follow the SEC's broad interpretation and even questioned the SEC's authority to regulate on the issue,¹⁶ leaving potential whistleblowers in these jurisdictions with conflicting advice about their protection under Dodd-Frank.

It is imperative to Dodd-Frank's success that either the courts or legislature clarify which employees are eligible for whistleblower anti-retaliation protections under the Act. Raising a complaint exposes the reporting employee to various personal and professional risks. Generally, there are two unfavorable consequences that deter employees from reporting violations. The first is the risk of social pressures from colleagues who consider whistleblowers "snitches."¹⁷ Second is the risk of employer backlash, such as being passed over for a promotion, being demoted, or even being terminated.¹⁸ These risks stem from the fact that employers and employees are in an unequal power relationship, and "most employers move to isolate, humiliate and terminate any employee who questions the legality of their . . .

¹³ § 78u-6(h)(1).

¹⁴ Compare *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013) (concluding that the plain language of 15 U.S.C. § 78u-6(a)(6), the Dodd-Frank whistleblower protection provision, only protects those individuals "who provide information relating to a violation of the securities laws to the SEC"), with *Rosenblum v. Thomson Reuters (Mkts.), LLC*, 984 F. Supp. 2d 141, 147–48 (S.D.N.Y. 2013) (holding that an individual reporting securities laws violations internally will fall under the whistle-blower protections of 15 U.S.C. § 78u-6(a)(6)).

¹⁵ 17 C.F.R. § 240.21F-2(b) (2013); see also Brief for the SEC, Amicus Curiae in Support of the Appellant, *Meng-Lin Liu v. Siemens AG*, No. 13 Civ. 317 (WHP), 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013), <http://www.sec.gov/litigation/briefs/2014/liu-siemens-0214.pdf> [hereinafter SEC, Amicus Brief].

¹⁶ See *infra* Part III.C.

¹⁷ Frances J. Milliken et al., *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, 40 J. MGT. STUD. 1453, 1454 (2003).

¹⁸ *Id.*

practices.”¹⁹ An incident experienced by Patrick Burns, Co-Director of the non-profit organization Taxpayers Against Fraud, adequately summarizes employer sentiment towards whistleblowers: “I once asked a room full of compliance officers if their company had ever made an internal whistleblower ‘employee of the month’ or given them a raise. The room burst out laughing.”²⁰

Without assurance that Dodd-Frank will protect tipsters from employer retaliation, it is doubtful that employees will risk their jobs and reputations by raising complaints. “Most potential internal whistleblowers, including executive-level ones, will not jeopardize their careers without an absolute guarantee of anonymity”²¹ An assurance of anonymity and Dodd-Frank’s strong anti-retaliation protections, however, can ameliorate many of the social and professional risks associated with reporting and encourage tipsters to come forward.²²

Part II of this Comment provides an overview of pre-Dodd-Frank whistleblower laws and discusses the importance of whistleblowers in maintaining corporate integrity. Part III analyzes Dodd-Frank’s whistleblower provision and discusses how previous whistleblower law shaped the provision. Part IV provides a summary of the conflicting interpretations of the Anti-Retaliation statute, and Part V discusses how the statute’s ambiguity can be resolved by using the *Chevron* test to ultimately defer to the SEC’s regulations. Part VI concludes.

II. WHISTLEBLOWER LAW BEFORE DODD-FRANK

Whistleblowing occurs when an employee discloses wrongdoing on the part of his corporation or organization.²³ Whistleblowing may occur internally, when an employee contacts a manager or a supervisor, or externally, when an employee reports such behavior to a government agency or media representative.²⁴ As employees within the company that they report, whistleblowers possess knowledge that shareholders and the public would otherwise not uncover and are therefore crucial to detecting corporate fraud. According to a 2010

¹⁹ Nicholas Feeney & Patrick Burns, *Three Whistleblower Stories*, TAXPAYERS AGAINST FRAUD EDUC. FUND (July 24, 2012), <https://www.taf.org/blog/three-whistleblower-stories>.

²⁰ FREDERICK D. LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 1 (2011).

²¹ *Id.*

²² *Id.*

²³ Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 548 (2004).

²⁴ *Id.*

study conducted by the Association of Certified Fraud Examiners (ACFE), “[whistleblower] tips account for more than 40 percent of reported instances of occupational fraud.”²⁵ The ACFE’s 2010 study also concludes that tips are “more effective in detecting occupational fraud than the collective total of management review, internal audit and external audit.”²⁶ Absent reporting by internal whistleblowers, “future incidents of massive corporate wrongdoing, along the lines of the Enron scandal or the Bernard Madoff ponzi scheme might never be revealed, or might have been revealed too late.”²⁷

The federal government has long recognized the value of a whistleblower’s unique position and his power to maintain corporate integrity,²⁸ and has continuously tried to incentivize whistleblowers to come forward through monetary awards and retaliation protections for reporting information to government agencies.²⁹ Despite these efforts, very few whistleblowers had come forward to report violations,³⁰ perhaps due to the negative treatment whistleblowers tend to face after raising claims.³¹ Further, even if a whistleblower leaves his company, the negative reputation attached to the whistleblower label follows and may hurt the employee’s chances of securing another job.³²

While our society still attaches many negative stigmas to whistleblowers, several recent corporate scandals have instigated a shift

²⁵ LIPMAN, *supra* note 20, at 2.

²⁶ *Id.* According to a 2010 study, employee tips are the leading method of detecting securities laws violations, accounting for 40.2% of all cases. *Id.* The second most effective of detecting securities laws violations is management review, only accounting for 15.4% of all cases. *Id.*

²⁷ Michael J. Kaufman & John M. Wunderlich, *Resolving the Continuing Controversy Regarding Confidential Informants in Private Securities Fraud Litigation*, 19 CORNELL J.L. & PUB. POL’Y 637, 668 (2010).

²⁸ Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1904 (2007). The origins of whistleblowing legislation in the United States can be traced to the False Claims Act, enacted in 1863 to reduce the incidences of fraud among the suppliers of munitions and other war materials to the Union government during the Civil War. *Id.*; see also Umang Desai, Comment, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 436 (2012) (“Congress has demonstrated its belief that employees and other insiders are in a unique position to uncover fraud . . .”).

²⁹ Desai, *supra* note 28, at 440.

³⁰ *Id.* at 437.

³¹ *Id.* at 437 (“Employee complaints are often diluted or dismissed by management, and after a claim has been made, many employees are subjected to various forms of retaliation,” such as workplace harassment or termination.). See generally Jisoo Kim, *Confessions of a Whistleblower: The Need to Reform the Whistleblower Provision of the Sarbanes-Oxley Act*, 43 J. MARSHALL L. REV. 241, 249 (2009).

³² Kim, *supra* note 31.

in perspective towards acceptance of and even praise for whistleblowers³³: “whistleblowing as a means to police corporate misconduct is gaining support.”³⁴ Public disdain for whistleblowers undoubtedly hindered any past whistleblower incentive programs. Perhaps this shift in perspective will allow Dodd-Frank to succeed where its predecessors did not.

A. *The Securities Exchange Act of 1934*

Congress passed the Securities Exchange Act of 1934 (“the 1934 Act”) to regulate the secondary securities markets in response to the infamous stock market crash of 1929.³⁵ The 1934 Act created the SEC, a federal administrative agency formed to oversee these markets.³⁶ Prior to Dodd-Frank’s amendment to the 1934 Act, the SEC could reward only whistleblowers involved in insider-trading cases. The SEC has discretion to award whistleblowers a percentage of the amount recovered from violators of the Act. That recovery amount, however, maxes out at ten percent of the total penalty imposed on the violator, and many whistleblowers receive significantly less than ten percent of the penalty amount, if they receive any reward at all.³⁷ The SEC retains unrestricted discretion in determining whether or not to grant a reward, and many whistleblowers do not receive any money for their reports.³⁸

Unsurprisingly, the “relatively small financial reward combined with the discretionary authority of the SEC to reward the whistleblower” has rendered the 1934 Act an ineffective means of uncovering insider-trading or other securities violations.³⁹ Since the statute has been in effect, only five whistleblowers have received

³³ Macey, *supra* note 28, at 1901–02 (attributing the newfound praise for whistleblowers to the Enron, Adelphia, and WorldCom scandals, and even to movies like *The Insider*).

³⁴ Peter J. Henning, *Tattletales Embraced as Whistle-Blower Program Gain Support*, N.Y. TIMES DEALBOOK, (Dec. 1, 2014, 9:38 AM) <http://dealbook.nytimes.com/2014/12/01/tattletales-embraced-as-whistle-blower-programs-gain-support/?module=BlogPost-Title>.

³⁵ Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a et seq. (2015)).

³⁶ 15 U.S.C. § 78(d).

³⁷ § 78u-6.

³⁸ Sarah Johnson, *Paid to Whistle*, CFO (July 23, 2010), <http://ww2.cfo.com/risk-compliance/2010/07/paid-to-whistle/>.

³⁹ Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of ‘Greedy,’ the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1282 (2011).

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awards, and those awards totaled a mere \$159,537.⁴⁰

B. *The False Claims Act*

In 1986, Congress drastically changed the structure of whistleblower law by expanding the scope of the False Claims Act (FCA) to prevent the false submission of claims for the payment of government contracts.⁴¹ The FCA allows a private individual, with knowledge of past or present fraud committed on the federal government, to sue on the government's behalf and recover a portion of any damage award.⁴² Awards for whistleblowers under the FCA are mandatory and range from fifteen to thirty percent of any money that the government receives from the violator.⁴³

The 1986 amendment radically increased FCA compliance and enforcement.⁴⁴ Prior to the 1986 amendment, less than ten percent of FCA claims were initiated by whistleblowers.⁴⁵ By 2011, however, eighty-five percent of the FCA claims investigated by the government or prosecuted were initiated by whistleblowers. In that year alone, the government reclaimed more than \$3 billion, with roughly \$530 million of that amount going to the whistleblowers that instigated these actions.⁴⁶

The success of the FCA underscores how crucial whistleblowers are in uncovering corporate fraud and illegal business practices. It also highlights that money talks, and if the government wants whistleblowers to come forward, it will need to incentivize them with offers of a substantial percentage of the recovery. Although the FCA improved previous whistleblower law with the promise of stronger rewards, the FCA lacks a whistleblower protection provision and leaves tipsters vulnerable to any employer retaliation that may occur as a result of whistleblowing.

⁴⁰ Johnson, *supra* note 38.

⁴¹ False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified as amended at 31 U.S.C. §§ 3729–33 (2015)).

⁴² 31 U.S.C. § 3729–33.

⁴³ § 3730(d)(1); *see generally* Robert R. Stauffer & Andrew D. Kennedy, *Dodd-Frank Act Promises Large Bounties for Whistleblowers*, LAW.COM, Aug. 23, 2010, at 1, <http://jenner.com/system/assets/publications/270/original/Law.comDoddFrankArticle.pdf?1318891008>.

⁴⁴ Stauffer & Kennedy, *supra* note 43.

⁴⁵ *Age Of The Whistleblower: Incentives And Protections*, LAW360 (Sept. 6, 2012), <http://www.law360.com/articles/375370/age-of-the-whistleblower-incentives-and-protections>.

⁴⁶ *Id.*

C. The Sarbanes-Oxley Act of 2002

In 2002, Congress enacted the Sarbanes-Oxley Act of 2002 (SOX) following several corporate scandals, such as Enron and Worldcom, in which numerous multinational corporations became victims of corporate fraud. These corporate scandals ultimately cost investors billions of dollars, sending many of these investors and corporations into insolvency.⁴⁷ SOX expanded upon previous whistleblower laws by expressly protecting whistleblowers from employer retaliation, a feature lacking in previous whistleblower statutes. Unlike the 1934 Act and FCA, SOX protects whistleblowers from employer retaliation after reporting violations and also extends whistleblower protection beyond federal employees to employees of publicly held companies.⁴⁸

The relevant provisions within SOX addressing whistleblower protection are Section 301 and Section 806. Section 301 creates an employee reporting system designed to catch instances of corporate fraud.⁴⁹ Section 806 imposes both civil and criminal liability on companies that take retaliatory actions against whistleblowers and entitles these whistleblowers to reinstatement or some other form of recourse.⁵⁰ Section 806 also penalizes corporations that fail to address fraud and/or punish the whistleblower that exposed the violations.⁵¹

Unfortunately, SOX has not been as successful as expected in bringing tipsters forward with reports of violations. SOX's whistleblower protections have a number of loopholes, and its shield has been characterized as "narrow in scope and more illusory than real."⁵² In fact, "after SOX was introduced, the percentage of whistleblowers . . . actually dropped from 18.4% to 13.2%."⁵³ The statute is procedurally complex and provides no punitive damages in civil actions by whistleblowers, meaning that a terminated whistleblower's only likely victory would be an award of back pay and attorney's fees.⁵⁴ The turnaround between witnessing the violation and

⁴⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28 and 29 U.S.C. (2012))

⁴⁸ Hartmann, *supra* note 39, at 1285-86.

⁴⁹ 15 U.S.C. § 78j-1(m)(4).

⁵⁰ 18 U.S.C. § 1514A(a), (c) (2012).

⁵¹ *Id.*

⁵² Geoffrey Christopher Rapp, Article, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U.L. REV. 73, 83 (2012) (quoting Deborah L. Seifert et al., *The Influence of Organizational Justice on Accountant Whistleblowing*, 35 ACCT., ORGS. & SOC. 707, 709 (2010)).

⁵³ Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 128 (2014).

⁵⁴ *Id.* at 129.

reporting the violation must also be quick, as SOX restricts tipsters to a ninety-day statute of limitations from the date of the violation. Further, there is no right to a jury trial under SOX for those whistleblowers bringing claims in federal court.⁵⁵

III. CURRENT WHISTLEBLOWER LAW UNDER THE DODD-FRANK ACT

Section 922(a) of the Dodd-Frank Act adds a new section to the 1934 Act,⁵⁶ which expands previous whistleblower laws in two ways: (1) it increases whistleblowers' financial incentive to report by requiring the SEC to award bounties to persons who provide useful information to the SEC regarding securities law violations;⁵⁷ and (2) it strengthens retaliation protections for whistleblowers who provide such information.⁵⁸ In passing the Act, Congress sought to encourage employees to report information related to potential violations of the securities laws to the Commission.⁵⁹

The bounty program under Dodd-Frank is a major improvement from SOX.⁶⁰ While SOX improved whistleblower protection from employer retaliation, there was no "financial incentive for whistleblowers or informants."⁶¹ SOX "screams out for a bounty program," given its "exceedingly weak" anti-retaliation provision, the massive potential for fraud not likely to otherwise be detected by regulators, and the ability to tie the value of a bounty to the level of fraud revealed by a whistleblower.⁶² The payment of a bounty is mandatory under Dodd-Frank. That Act stipulates that the SEC "shall pay an award" of ten to thirty percent of the collected monetary sanctions resulting from "successful enforcement" actions.⁶³ The SEC has discretion to determine the amount of the award, although the law provides some guidance, urging the SEC to consider factors such as the significance of the information provided, the degree of assistance

⁵⁵ Rapp, *supra* note 52.

⁵⁶ NORRIS McLAUGHLIN & MARCUS, P.A., NEW WHISTLEBLOWER INCENTIVES AND PROTECTION IN THE DODD-FRANK ACT 2 (2010), <http://www.nmmlaw.com/pdf/Whistleblower%20Dodd%20Frank%20Act.pdf>.

⁵⁷ 15 U.S.C. § 78u-6(b) (2012).

⁵⁸ § 78u-6(h).

⁵⁹ See, e.g., S. REP. NO. 111-176, at 110 (2010).

⁶⁰ 15 U.S.C. § 78u-6(h).

⁶¹ M. Thomas Arnold, "It's *Deja Vu* All Over Again:" Using Bounty Hunters to Leverage Gatekeeper Duties, 45 TULSA L. REV. 419, 460 (2010).

⁶² Rapp, *supra* note 52, at 85 (quoting Jarod Spencer Gonzalez, *A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing*, 14 EMP. RTS. & EMP. POL'Y J. 325, 346 (2010)).

⁶³ 15 U.S.C. § 78u-6(b).

the whistleblower provides, and the “programmatically interest” of the SEC in “detering violations of the securities laws by making awards to whistleblowers.”⁶⁴

Dodd-Frank expands SOX in several other respects as well, such as increasing the statute of limitations period for reporting violations. Under Dodd-Frank, tipsters who are discriminated against or fired in response to their whistleblowing have a six-year statute of limitations to bring their case to a federal judge, and the limitations period begins with “the date on which the employee became aware of the violation”⁶⁵ rather than the date the violation occurred.⁶⁶ Dodd-Frank also expands protection to employees in private subsidiaries and affiliates of public companies and gives SOX whistleblowers an express right to a jury trial in retaliation cases.⁶⁷

A. *Who is a Whistleblower Under Dodd-Frank?*

Dodd-Frank defines a whistleblower under the Act as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”⁶⁸ At first glance, this definition suggests that a whistleblower must report violations directly to the SEC in order for Dodd-Frank to shield him from employer retaliation. A protected “whistleblower” under Dodd-Frank is one who reports securities laws violations “to the Commission, in a manner established, by rule or regulation, by the Commission.”⁶⁹ This provision, however, cannot be fully understood without considering subsection (iii) of 15 U.S.C. § 78u-6(h)(1)(A), Dodd-Frank’s Anti-Retaliation provision, which specifies the ways in which the Act protects whistleblowers from their employers. The Act provides:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower-

- (i) in providing information to the Commission in accordance with this section;

⁶⁴ *Id.*

⁶⁵ 18 U.S.C. § 1514A(b)(2)(D) (2012).

⁶⁶ See Leifer, *supra* note 53, at 129.

⁶⁷ Rapp, *supra* note 52, at 73.

⁶⁸ 15 U.S.C. §78u-6(a)(6).

⁶⁹ *Id.* (emphasis added).

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(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . , the Securities Exchange Act of 1934 . . . , including section 10A(m) of such Act . . . , and any other law, rule, or regulation subject to the jurisdiction of the Commission.⁷⁰

Subsections (i) and (ii) undoubtedly protect whistleblowers who report potentially illegal activity to the SEC, or employees that work with the SEC, in some manner, concerning potential securities violations. The confusion over who qualifies as a whistleblower under Dodd-Frank stems from subsection (iii) of the Anti-Retaliation provision. This subsection indicates that a whistleblower reporting securities violations internally, and not to the SEC, still falls within the scope of Dodd-Frank as long as he would otherwise be protected under SOX, the 1934 Act, or any other law, rule, or regulation within the SEC's jurisdiction.

Subsection (iii) seems inconsistent with the definition of a whistleblower because many laws, rules and regulations within the SEC's jurisdiction do not require any interaction with the SEC whatsoever.⁷¹ SOX, for example, affords whistleblower protection to an employee who gives "information or assistance" to "a person with supervisory authority over the employee."⁷² Hypothetically, if an employee reports activity violating SOX to a supervisor and does not contact the SEC, Dodd-Frank would protect that whistleblower from employer harassment or retaliation. If, under the Act, a whistleblower is strictly an individual who reports a violation to the SEC, why also include protections for employees that report either internally or to other agencies?

⁷⁰ § 78u-6(h)(1)(A).

⁷¹ Rapp, *supra* note 52, at 74.

⁷² 18 U.S.C. § 1514A(a)(1), (1)(C) (2012).

B. *The SEC's Interpretation of Dodd-Frank's Whistleblower Provision*

Recognizing the potential conflict, the SEC attempted to settle the issue through regulation. The SEC argues that its Rule 21F-2(b)(1) reasonably resolves this tension because it “ensur[es] that individuals who report internally first will not be potentially disadvantaged by losing employment anti-retaliation protection.”⁷³ In its final regulations adopted on May 25, 2011, the SEC took the position that a whistleblower need not make a disclosure to the SEC to be protected under Dodd-Frank.⁷⁴ The regulations, in relevant part, provide that:

- (1) For purposes of the anti-retaliation protections afforded by . . . 78u-6(h)(1), you are a whistleblower if:
- (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . that has occurred, is ongoing, or is about to occur, and;
 - (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).⁷⁵

The SEC regulations, however, have not resolved the issue. If anything, the regulations have further confused the matter by introducing the new question: does the SEC have the authority to define “whistleblower” in the context of Dodd-Frank?⁷⁶

In February 2014, the SEC filed an amicus brief with the Second Circuit in *Meng-Lin Liu v. Siemens*, encouraging the court to rule on the scope of whistleblower protection and to adopt the SEC’s rule-making authority.⁷⁷ In *Meng-Lin Liu*, the plaintiff, a Taiwanese resident and compliance officer for Siemens China, was terminated shortly after internally reporting concerns about an alleged kickback scheme in the company’s healthcare division.⁷⁸ Liu filed suit in the District Court for the Southern District of New York, claiming protection as a whistleblower under Dodd-Frank’s Anti-Retaliation provision and arguing that the Anti-Retaliation provision does not explicitly require external reporting to the SEC.⁷⁹

⁷³ 17 C.F.R. § 240.21F-2 (2013).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Henning, *supra* note 34. Under *Chevron*, courts should defer to an agency’s reasonable interpretation of an ambiguous statute. The SEC’s interpretation should prevail if the statute is unclear. *Id.*

⁷⁷ SEC, Amicus Brief, *supra* note 15, at 39.

⁷⁸ *Meng-Lin Liu v. Siemens AG*, 978 F. Supp. 2d 325, 327 (S.D.N.Y. 2013).

⁷⁹ *Id.*

In its amicus brief, the SEC argued that the statutory language of Dodd-Frank does not unambiguously indicate whether individuals must report directly to the SEC to come within the Act's protection.⁸⁰ As long as there is ambiguity in the statute, the SEC argued, it is permissible for the SEC to adopt a reasonable interpretation. The SEC also maintained that its interpretation of Dodd-Frank is consistent with congressional policy to encourage, and in some instances require, internal reporting of potential misconduct under federal securities laws, especially SOX. Finally, the SEC urged that the narrow interpretation, if adopted, "would significantly weaken the deterrence effect on employers who might otherwise consider taking an adverse employment action."⁸¹ The court ultimately dismissed the case based on unrelated deficiencies in the plaintiff's claim and skirted the issue of whether or not internal whistleblowers are protected under Dodd-Frank.⁸²

In December 2014, the SEC filed a second amicus brief with the Third Circuit in support of the plaintiff in *Safarian v. American DG Energy Inc.*,⁸³ reiterating its argument that the statute is ambiguous and urging the court to endorse the agency's definition of "whistleblower" as including individuals who only report internally. The SEC again argued that the protection afforded by clause (iii) "reaches beyond just disclosures involving securities law violations and disclosures to the Commission."⁸⁴

C. Case Law Interpreting Dodd-Frank's Whistleblower Provision

Several district courts have acknowledged the conflict between the plain terms of the Dodd-Frank Act's definition of "whistleblower"—one who provides information "to the Commission"—and the Anti-Retaliation provision, which protects an individual who makes disclosures "required or protected" under any law, rule, or regulation subject to the jurisdiction of the Commission. The cases decided thus far fall on one of two sides: either whistleblowers under Dodd-Frank are only those individuals who

⁸⁰ SEC, Amicus Brief, *supra* note 15, at 12.

⁸¹ *Id.* at 30.

⁸² Meng-Lin Liu v. Siemens AG, 978 F. Supp. 2d 325, 332 (S.D.N.Y. 2013).

⁸³ No. CIV. 10-6082, 2014 WL 1744989 (D.N.J. Apr. 29, 2014), *aff'd in part, vacated in part, remanded*, 622 F. App'x 149 (3d Cir. 2015).

⁸⁴ Brief for SEC as Amici Curiae in Support of the Appellant, at 29, *Safarian v. Am. DG Energy Inc.*, No. CIV. 10-6082, 2014 WL 1744989 (D.N.J. Apr. 29, 2014), *aff'd in part, vacated in part, remanded*, 622 F. App'x 149 (3d Cir. 2015), <https://www.sec.gov/litigation/briefs/2014/safarian-american-dg.pdf> [hereinafter SEC, Amicus Brief II].

report directly to the SEC and Dodd-Frank's protection does not extend to employees who report violations internally; or Dodd-Frank should be interpreted broadly to encompass whistleblowers who report violations internally.⁸⁵ Of the courts that have considered the issue, an overwhelming majority side with the SEC and interpret the statute broadly to protect both external and internal whistleblowers.⁸⁶ Not all of these courts, however, reach this conclusion in the same manner; a number of courts used the basic tools of statutory construction while others simply deferred to the SEC's interpretation.⁸⁷

i. A Majority of Courts Agree That the Statute is
Ambiguous and Defer to the SEC's Reasonable
Interpretation Using the Chevron Test

Many courts considering the issue find the text of Dodd-Frank to be ambiguous with regard to its whistleblower definition and defer to the SEC. The Southern District of New York, for instance, ruled in *Rosenblum v. Thomson Reuters LLC* that the whistleblower requirements are ambiguous under Dodd-Frank, and the court should thus respect the SEC's determination that reporting to the SEC is not required in order for an individual to qualify as a whistleblower.⁸⁸

The plaintiff in *Rosenblum* who sold financial products for Thomson Reuters, witnessed a company practice that violated insider-trading rules. Rosenblum reported the illegal behavior to two Thomson Reuters supervisors.⁸⁹ The two supervisors dismissed his concern, prompting Rosenblum to contact both the Federal Bureau of

⁸⁵ See Mystica M. Alexander, *Defining the Whistleblower Under Dodd-Frank: Who Decides?*, 5 CALIF. L. REV. CIRCUIT 278, 281–82 (2014), http://www.californialawreview.org/wpcontent/uploads/2014/10/ALEXANDER_278.pdf.

⁸⁶ *Id.* at 281.

⁸⁷ Compare *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 729–30 (D. Neb. 2014) (independently adopting SEC's view based on statutory language of the Act), *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 533 (S.D.N.Y. 2014) (applying the *Chevron* test and ultimately deferring to SEC's regulation to hold that internal reporting is protected conduct), *Rosenblum v. Thomson Reuters (Mkts.), LLC*, 984 F. Supp. 2d 141, 147–48 (S.D.N.Y. 2013) (declining to follow *Asadi* and finding ambiguity in the conflict between Definitions section and Anti-Retaliation provision), and *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (“This court respectfully disagrees and instead adopts the SEC's interpretation of the relevant provisions of Dodd-Frank.”), with *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013) (holding that the plain language of the Dodd-Frank whistleblower protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to SEC).

⁸⁸ *Rosenblum*, 984 F. Supp. 2d at 147–48.

⁸⁹ *Id.* at 144.

Investigation and the Thomson Reuters Ethics Committee. Shortly after these events, Thomson Reuters fired Rosenblum. Rosenblum brought a claim against Thomson Reuters, alleging protection from retaliation under the whistleblower protection provision of Dodd-Frank. Defendants challenged Rosenblum's whistleblower status, arguing that because Rosenblum had failed to report information directly to the SEC, he did not qualify under the Dodd-Frank definition of a whistleblower.⁹⁰

The court determined that the statute was ambiguous and applied the two-part test established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁹¹ The *Chevron* test, as the court explained, requires the following:

The first step inquires whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. However, if the statute is silent or ambiguous with respect to the specific issue, the court applies step two—whether the agency's answer is based on a permissible construction of the statute. If the agency interpretation is reasonable, then [a court] must defer to it.⁹²

Applying the two-step test, the court acknowledged that “the governing statute is ambiguous” and found it “appropriate to consider the SEC's interpretation of the statute.”⁹³

Several months later, the District Court of New Jersey also deferred to the SEC's definition of a whistleblower. In *Khazin v. TD Ameritrade Holding Corp.*, the plaintiff was terminated after reporting improper pricing of certain financial products to his supervisor, prompting him to bring a claim under the whistleblower protection provision of Dodd-Frank.⁹⁴ The Court applied the *Chevron* test, reasoning: “if the statute is ambiguous and the Congressional intent underlying the statute is unclear, courts look to the agency's construction of the statute for guidance.”⁹⁵ The court noted the obvious conflict and ambiguity in the statute and deferred to the SEC's

⁹⁰ *Id.* at 148.

⁹¹ 467 U.S. 837 (1984).

⁹² See *Rosenblum*, 984 F. Supp. 2d at 147 (citations and internal quotation marks omitted).

⁹³ *Id.* at 147–48.

⁹⁴ *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), 2014 WL 940703, at *1 (D.N.J. Mar. 11, 2014).

⁹⁵ *Id.* at *4.

interpretation.⁹⁶

In September 2015, the Second Circuit Court of Appeals in *Berman v. Neo@Ogilvy LLC*, reversed the decision of the district court below and held that “the [whistleblower] provisions of Dodd-Frank create a sufficient ambiguity to warrant our deference to the SEC’s interpretive rule.”⁹⁷ In *Berman*, the plaintiff alleged that he reported to his employer, but not to the SEC, a number of transactions that he reasonably believed to be violations of “policy, law, and GAAP,” “WPP policies,” and “Sarbanes-Oxley, Dodd-Frank and U.S. Securities Laws.”⁹⁸ Plaintiff also claimed that his employer fired him after raising complaints in violation of Dodd-Frank’s Anti-Retaliation provision for whistleblowers.⁹⁹ The Southern District of New York declined to follow the prior case law of its own jurisdiction and instead followed the minority position outlined in *Asadi*, concluding that the employee was not a “whistleblower” under Dodd-Frank.¹⁰⁰

The split within the district itself was, however, short-lived. On appeal, the Second Circuit reversed the decision below and held that the definition of a whistleblower is ambiguous under the statute, thus it was appropriate to defer to the SEC’s reasonable interpretation using the *Chevron* test.¹⁰¹ In so holding, the court was not persuaded by the argument that reading the text in a way to protect internal whistleblowers would render certain parts of the statute “superfluous;” instead, the court noted that the additional language was just one of the “realities of the legislative process.”¹⁰² Pointing out that the Anti-Retaliation provisions were “added at the last minute,” the court reasoned: “it is not at all surprising that no one noticed that the new subdivision and the definition of ‘whistleblower’ do not fit together neatly.”¹⁰³ Further, the court reasoned that it “need not definitively construe the statute, because . . . the tension between the

⁹⁶ *Id.* at *6.

⁹⁷ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 146 (2d Cir. 2015).

⁹⁸ *Id.* at 149.

⁹⁹ *Id.*

¹⁰⁰ *Id.* The district court below reasoned that “[a]pplying the standard canons of statutory construction, one would expect that the defined term would have the same meaning in the anti-retaliation provisions of the Act as it does elsewhere in the statute.” *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404, 407 (S.D.N.Y. 2014), *rev’d and remanded*, 801 F.3d 145 (2d Cir. 2015). The district court further reasoned that this reading makes sense in the context of the financial bounty provisions of the Act, noting, “it is hard to imagine how the Commission would pay a financial award to a whistleblower who never reported information to the Commission.” *Id.*

¹⁰¹ *Berman*, 801 F.3d at 154–55.

¹⁰² *Id.* at 154.

¹⁰³ *Id.* at 154–55.

definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) . . . [is] sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute.”¹⁰⁴

ii. Other Courts Find That the Text of Dodd-Frank
Unambiguously Supports a Definition of
Whistleblower That Includes Internal Reporting

Other courts have relied solely on the text of Dodd-Frank to hold that a whistleblower does not need to report to the SEC under the Act by carving out a narrow exception to the definition of whistleblower specifically for the Anti-Retaliation provision.¹⁰⁵ In *Ellington v. Giacomakis*, the plaintiff brought suit against his former employer, defendant New England Investment & Retirement Group, Inc. (NEINV), alleging a termination of his employment in violation of the whistleblower provisions of the Dodd-Frank Act after he reported securities laws violations to a NEINV compliance officer.¹⁰⁶ Plaintiff argued that his disclosures were protected under the whistleblower provisions of the SOX, which, by extension, are incorporated into the protections afforded to whistleblowers under Dodd-Frank.¹⁰⁷

Ultimately, the court held for the plaintiff, analyzing the text of the statute to reach its conclusion. The court reasoned that it is “apparent from the wording and positioning of § 78u-6(h)(1)(B)(i) that Congress intended that an employee terminated for reporting Sarbanes-Oxley violations to a supervisor or an outside compliance officer, and ultimately to the SEC, have a private right of action under Dodd-Frank whether or not [the employee reports the violation to the SEC].”¹⁰⁸

In *Murray v. UBS Securities, LLC*, the Southern District of New York evaluated the two interpretations of the Act and concluded that although both were permissible, neither was mandatory.¹⁰⁹ The court

¹⁰⁴ *Id.* at 155.

¹⁰⁵ *See, e.g.,* Egan v. TradingScreen, Inc., No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011) (“The contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)’s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)’s definition of a whistleblower as one who reports to the SEC.”).

¹⁰⁶ *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 43 (D. Mass. 2013).

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 45.

¹⁰⁹ *Murray v. UBS Secs., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3–4 (S.D.N.Y. May 21, 2013).

also used the “existence of these ‘competing, plausible interpretations’ of the statutory provisions as clear evidence that ‘the statutory text is ambiguous in conveying Congress’s intent.’”¹¹⁰ The court considered multiple factors in reaching its conclusion: the trend in recent case law; the basic tools of statutory construction; and the SEC’s promulgated rules. The court reasoned that “the SEC’s rule clarifies an ambiguous statutory scheme . . . and reflects the considerable experience and expertise that the agency has acquired over time with respect to interpretation and enforcement of the securities laws,” and ultimately sided with the broad interpretation of a whistleblower as also including employees that raise violations internally to a supervisor.¹¹¹

In *Bussing v. COR Clearing LLC*, the District Court for the District of Nebraska held that a whistleblower who reported violations to the Financial Industry Regulatory Authority (FINRA)¹¹² was protected under Dodd-Frank’s Anti-Retaliation provision.¹¹³ Bussing brought suit against her former employer, Legent Clearing (now COR Clearing), after being fired for preparing a report, in response to a document request from FINRA, that alleged Legent violated the Bank Secrecy Act and anti-money laundering provisions.¹¹⁴ The court held that the plaintiff’s disclosures to FINRA qualified as a disclosure subject to the jurisdiction of the SEC and therefore entitled plaintiff to protection under subsection (iii) of the Anti-Retaliation provision.¹¹⁵ The court refused to apply the definition of “whistleblower” found in 5 U.S.C. §78u-6(a)(6) to the Anti-Retaliation provision, reasoning that a strict reading of the text would undermine Dodd-Frank’s overall purpose.¹¹⁶ The court argued:

When it is apparent that Congress intended a word to be given its ordinary meaning, notwithstanding the presence of a statutory definition to the contrary, and when applying the definition to the provision at issue would defeat that provision’s purpose, the Court will not mechanically read the statutory definition into that provision.¹¹⁷

¹¹⁰ *Id.* at *5.

¹¹¹ *Id.* at *7.

¹¹² FINRA is a non-governmental entity that acts as a self-regulatory organization and regulates trading of equities, corporate bonds, securities futures, and options.

¹¹³ *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 740 (D. Neb. 2014).

¹¹⁴ *Id.* at 723–25.

¹¹⁵ *Id.* at 730.

¹¹⁶ *Id.* (“Nor is it logical to conclude that Congress intended to encourage an across-the-board departure from the general practice of first making an internal report.”).

¹¹⁷ *Id.* at 729.

Rejecting the statutory definition, the court instead used the everyday definition of a whistleblower as “a person who tells police, reporters, etc., about something (such as a crime) that has been kept secret, or an employee who reports employer wrongdoing to a governmental or law-enforcement agency.”¹¹⁸ Unless the term “whistleblower” is given its ordinary meaning for purposes of the Anti-Retaliation provision, subsection (iii) will be rendered insignificant, and its purpose—to shield a broad range of employee disclosures—will be thwarted.¹¹⁹

iii. A Minority of Courts Have Held That the Text of Dodd-Frank Unambiguously States a Whistleblower Under the Act is an Individual or Individuals Who Report Securities Violations to the SEC

Until the recent Second Circuit decision in *Berman*, the Fifth Circuit was the only circuit court to rule on the question of whether the SEC’s interpretation is entitled to judicial deference. In July 2013, the U.S. Court of Appeals for the Fifth Circuit found no ambiguity in the Act’s qualifications for a whistleblower and, thus, refused to follow the SEC’s regulations.¹²⁰ The court also declined to follow the trend in several district court decisions that had found internal reports to be protected.¹²¹ The Fifth Circuit issued a decision in *Asadi v. G.E. Energy (USA), LLC*, holding that, to be a “whistleblower” under the SEC’s whistleblower program, an employee must provide information relating to a violation of the securities laws to the SEC.¹²²

In *Asadi*, the plaintiff worked for GE Energy’s Iraq Country Executive. After witnessing practices that he believed violated the Foreign Corrupt Practices Act (FCPA), the plaintiff reported the issue to both of his supervisors, but did not raise any complaints to the SEC.¹²³ Shortly after his complaint, Asadi received a “surprisingly negative” performance review, and his supervisors pressured him to step down from his position. Ultimately, the plaintiff was fired, prompting him to file suit alleging that GE Energy violated the SEC whistleblower protections of Dodd-Frank.¹²⁴ Asadi asserted that he was

¹¹⁸ *Id.* (internal quotation marks and footnotes omitted).

¹¹⁹ *Bussing*, 20 F. Supp. 3d at 729.

¹²⁰ *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 630 (5th Cir. 2013).

¹²¹ See Catherine Foti, *When is A ‘Whistleblower’ Not Really A Whistleblower?*, FORBES (Aug. 7, 2013, 11:22 AM), <http://www.forbes.com/sites/insider/2013/08/07/when-is-a-whistleblower-not-really-a-whistleblower/>.

¹²² *Asadi*, 720 F.3d at 630.

¹²³ *Id.* at 621.

¹²⁴ *Id.*

a whistleblower under Dodd-Frank and argued that the Anti-Retaliation section, on its face, did not require disclosure of information to the SEC.¹²⁵

The court disagreed with the plaintiff's claim, ruling that he was not a "whistleblower" because he did not report a violation of the securities laws to the SEC.¹²⁶ The court also held that plaintiff's internal reporting of potential FCPA violations did not fall within the Anti-Retaliation provision of the Dodd-Frank Act because he could not show that his internal disclosures of alleged corrupt actions were protected or required by the terms of the FCPA.¹²⁷ The protections the Anti-Retaliation provision offers, the court explained, extend only to individuals who meet the external reporting requirements of the Definitions section; "the latter section merely describes a set of protected activities for individuals who have already achieved whistleblower status by reporting to the SEC."¹²⁸ The court focused on the word "whistleblower" in the Anti-Retaliation section and argued that, had Congress intended this section to provide protections for all individuals making internal disclosures, it would have used the term "individual" or "employee" rather than "whistleblower." Instead of reading subsection (iii) as expanding the definition of a Dodd-Frank whistleblower, subsection (iii) merely "expands protection for those who report both to the SEC and internally."¹²⁹

In deciding to follow this narrow definition, the Fifth Circuit also considered how the broad definition of whistleblower would implicate SOX if it were controlling law. If all SOX-protected activity fell under Dodd-Frank's whistleblower provisions, then regardless of whether the employee provided information to the SEC, all SOX claimants could arguably file a whistleblower retaliation claim under Dodd-Frank and circumvent SOX altogether.¹³⁰ This means that a plaintiff could raise any SOX issue under Dodd-Frank and take advantage of a longer statute of limitations, a direct right of action in federal district court, and nearly double monetary damages. Such a construction would, according to the Fifth Circuit, render SOX obsolete.¹³¹

¹²⁵ *Id.* at 624.

¹²⁶ *Id.* at 630.

¹²⁷ *Id.*

¹²⁸ Leifer, *supra* note 53, at 137 (citing *Asadi*, 720 F.3d at 626).

¹²⁹ Alison Frankel, *Appeals Court Restricts Dodd-Frank Protection for Whistle-Blowers*, REUTERS (July 18, 2013), <http://blogs.reuters.com/alison-frankel/2013/07/18/appeals-court-restricts-dodd-frank-protection-for-whistle-blowers/>.

¹³⁰ *Asadi*, 720 F.3d at 628.

¹³¹ *Id.*

Unfortunately, the courts have only further muddled the question of who qualifies for Dodd-Frank whistleblower protection. The courts “are all over the place Unless you’re in the Fifth Circuit, there’s no consensus.”¹³² Yet even the Fifth Circuit’s reasoning is not entirely persuasive and leaves certain aspects of the issue unresolved. Under *Asadi*, reporting a securities law violation to the SEC is an absolute prerequisite to Dodd-Frank protection.¹³³ Subsection (iii), according to the *Asadi* reasoning, simply prohibits employers from taking retaliatory action against a whistleblower for any further reporting. But this conclusion ignores the bigger picture of Dodd-Frank within the context of broader securities-law framework, “particularly the internal reporting processes that Congress has previously established.”¹³⁴ Dodd-Frank aims to improve the accountability and transparency of the financial system. Adopting the broad definition of a whistleblower avoids “disincentivizing individuals from reporting internally first in appropriate circumstances.”¹³⁵ According to a study by the Ethics Resource Center, eighty-four percent of whistleblowers attempt to report their concerns internally and only turn to outside authorities with compliance violations when their internal complaints go unheeded.¹³⁶ Companies want their employees to first report alleged legal violations internally so that they can investigate the allegation; decide whether there is a violation; and determine whether they can defend against the allegation, identify any wrongdoers, and remediate the situation.¹³⁷ Yet employers may find it difficult to encourage employees to use the company’s reporting systems if employees understand that internal whistleblowing is not protected conduct.

¹³² Ben James, *5 Questions Weighing on Whistleblower Lawyers in 2015*, LAW360 (Jan. 13, 2015, 3:03 PM), <http://www.law360.com/articles/607911/5-questions-weighing-on-whistleblower-lawyers-in-2015> (internal quotation marks omitted).

¹³³ *Asadi*, 720 F.3d at 630.

¹³⁴ The 1995 amendment to the 1934 Act, imposing a series of internal company disclosure obligations on registered public accounting firms, coupled with the 2002 enactment of SOX, imposing additional requirements for internal company reporting of wrongdoing, underscore Congress’ intent to increase corporate transparency. SEC, Amicus Brief II, *supra* note 84, at 33.

¹³⁵ SEC, Amicus Brief, *supra* note 15, at 28 (citing Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70500 (Nov. 17, 2010)).

¹³⁶ Christopher M. Matthews, *Most Whistleblowers Report Internally, Study Finds*, WSJ BLOGS (May 30, 2012, 9:25 PM), <http://blogs.wsj.com/corruption-currents/2012/05/30/most-whistleblowers-report-internally-study-finds/>.

¹³⁷ *Id.*

In support of the narrow definition of a whistleblower, the *Asadi* court argued that the broad interpretation would make SOX irrelevant. The court reasoned that the broad interpretation would render a private cause of action under Sarbanes-Oxley Section 806, “for practical purposes, moot.”¹³⁸ But this statement ignores the advantages of bringing a SOX claim over a Dodd-Frank claim in certain situations. First, a SOX claim is more suitable for a plaintiff seeking to avoid litigation costs and to stay out of courtrooms. SOX claims, unlike claims brought under Dodd-Frank, are heard in an administrative forum at the Department of Labor (DOL). DOL also “assumes responsibility for investigating the retaliation claim and preparing the evidence for an administrative law judge’s review.”¹³⁹ Under certain circumstances, SOX can also provide for a greater financial reward than a claim under Dodd-Frank. Unlike Dodd-Frank, SOX provides for “all relief necessary to make the employee whole” and for “compensation for any special damages.”¹⁴⁰ This language has been held to authorize compensation for emotional distress and reputational harm.¹⁴¹ This option will be best for individuals who have suffered significant emotional harm.

Asadi also held that the broad interpretation of “whistleblower” would render the words “to the Commission” in the Definitions section superfluous.¹⁴² The same argument, however, can be flipped to argue that the words “to the Commission” in (ii) and (iii) are superfluous if the narrow interpretation is adopted. If a whistleblower is, by definition, already an individual who reports to the SEC, why repeat “to the Commission” in (ii) and (iii)? “Surely Congress could have been more explicit and more direct if it in fact intended to protect only those disclosures that involve securities law violations, and only if the employee has made a separate disclosure to the Commission.”¹⁴³

¹³⁸ *Asadi*, 720 F.3d at 628.

¹³⁹ SEC, Amicus Brief II, *supra* note 84.

¹⁴⁰ 18 U.S.C. § 1514A(c)(1) & (c)(2)(C) (2012).

¹⁴¹ See e.g., *Rutherford v. Jones Lang Lasalle Am., Inc.*, No. 12-14422, 2013 U.S. Dist. LEXIS 116872, at *14 (E.D. Mich. Jan. 29, 2013) (holding that “the language of SOX’s remedy provision, analogous whistleblower statutes and decisions of the ARB support the recovery of damages under SOX for emotional distress, mental anguish, humiliation and injury to reputation”).

¹⁴² *Asadi*, 720 F.3d at 628.

¹⁴³ SEC, Amicus Brief, *supra* note 15, at 21.

IV. COURTS CAN USE THE CHEVRON TEST TO RESOLVE DODD-FRANK'S AMBIGUOUS WHISTLEBLOWER PROVISION

Candidly, there are strong arguments for both the narrow and the broad interpretation of the word “whistleblower” under Dodd-Frank. Perhaps this is why courts have held for both sides of the issue. The ambiguity lies in the fact that both definitions, narrow and broad, are supported by the text of the statute.¹⁴⁴ On the one hand, the Anti-Retaliation provision, when read as a catch-all after carving out an exception to the definition of “whistleblower” in 78u-6(a), protects internal disclosures and other tips to agencies other than the SEC. Conversely, the Anti-Retaliation provision, when interpreted as a simple list of whistleblower protections (e.g., an individual has already reported a securities law violation to the SEC) raises the question of “why Congress [would] craft clause (iii) to [unnecessarily] suggest that it protects a much broader class of disclosures than it actually does?”¹⁴⁵

V. COURTS SHOULD APPLY THE CHEVRON TEST AND DEFER TO THE SEC'S INTERPRETATION

Chevron holds that an ambiguous statute can be clarified with a two-part test to determine regulatory authority.¹⁴⁶ First, the court must determine whether Congress has spoken directly on the question at issue. If so, then the court defers to the statute.¹⁴⁷ If Congress has not addressed the issue in the statute itself, then the court must determine whether the agency's response to the statute is based on a “permissible” interpretation of the statute and defer to the agency.¹⁴⁸ In defining “whistleblower,” Congress delegates power to the SEC as the rulemaking agency: “[t]he term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, *in a manner established, by rule or regulation, by the Commission.*”¹⁴⁹ Thus, the statute grants the SEC power to issue

¹⁴⁴ Murray v. UBS Secs., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *13–14 (S.D.N.Y. May 21, 2013).

¹⁴⁵ SEC, Amicus Brief II, *supra* note 84, at 20.

¹⁴⁶ Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

¹⁴⁷ If Congress has spoken directly on the issue, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43.

¹⁴⁸ *Id.* at 843. “Permissible” encompasses any interpretation that is not unreasonable. Essentially, courts must defer to the agency's interpretation unless that interpretation is irrational. See Orrin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (internal citations omitted).

¹⁴⁹ 15 U.S.C. § 78u-6(a)(6) (2015) (emphasis added).

regulations relating to the manner in which information may be reported under the Act.¹⁵⁰

A. Congress Has Not Spoken Directly to the Issue of Whether a Whistleblower Must Report a Securities Violation to the SEC

The statute's text provides little help in determining Congress' intent behind subsection (iii) of the Anti-Retaliation provision, as it was not included in the statute until very late in the drafting process. In fact, the language of subsection (iii) only first appeared in the base conference committee draft that the Senate, in May 2010, approved for use in the Dodd-Frank conference committee.¹⁵¹ It was not included in the bill that passed the House in December 2009, nor in the version that passed the Senate in May 2010, and there is no hint as to why the language was added to that draft.¹⁵² Furthermore, the majority of the committee reports and debates in Congress focus on the bounty provisions of the Act and "contain very few substantive discussions of its anti-retaliation provisions."¹⁵³ Of the minimal reports that discuss the Anti-Retaliation provision, "none touch upon the issue of whether reporting to the SEC is required for whistleblowers to avail themselves of the Act's anti-retaliation provisions."¹⁵⁴ Analysis of the legislative history does little more than suggest that Congress was not aware of any potential conflict when they included subsection (iii).¹⁵⁵

¹⁵⁰ See *id.*

¹⁵¹ The provision first appeared in the base conference committee draft that the Senate, in May 2010, approved for use in the Dodd-Frank conference committee. See H.R. 4173, 111th Cong. § 922(a) (conference base text).

¹⁵² This section was not included either in the original version of the bill that passed the House, H.R. 4173, 111th Cong. § 7203(a) (as passed Dec. 11, 2009), nor was it included in the version that initially passed the Senate, H.R. 4173, 111th Cong. § 922(a) (as passed May 20, 2010).

¹⁵³ See *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4 (S.D.N.Y. May 4, 2011) ("The legislative history of [Dodd-Frank] provides little evidence of Congress's purpose [regarding the Anti-Retaliation provision]. The various committee reports and debates in Congress focus on the bounty provisions of the Act and contain very few substantive discussions of its anti-retaliation provisions. Of those few, none touch upon the issue of whether reporting to the SEC is required for whistleblowers to avail themselves of the Act's anti-retaliation provisions.").

¹⁵⁴ *Id.*

¹⁵⁵ *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 731 (D. Neb. 2014) ("The official record contains only fleeting references to the anti-retaliation provision.").

B. *The SEC's Regulation Clarifying the Statute is a Reasonable Interpretation for Chevron Purposes*

The second prong of the *Chevron* test is “whether the agency’s answer is based on a permissible construction of the statute.”¹⁵⁶ The SEC maintains that its interpretation is reasonable because it: (1) “effectuates the broad employment anti-retaliation protections that clause (iii) contemplates”; (2) it “avoid[s] disincentivizing individuals from reporting internally first in appropriate circumstances”; (3) SEC experience indicates “that if internal compliance and reporting procedures ‘are not utilized or working, our system of securities regulation will be less effective’”; and (4) “it enhances the Commission’s ability to bring enforcement actions when employers take adverse employment actions against employees for reporting securities law violations internally.”¹⁵⁷

The SEC’s position, from a public policy standpoint, “is more in accordance with the overall objective of securities law enforcement, which is to encourage reporting.”¹⁵⁸ As the U.S. Chamber of Commerce recognizes in its public comments, “internal reporting mechanisms are cornerstones of effective compliance policies because they permit companies to discover instances of potential wrongdoing, to investigate underlying facts and to take remedial action,” in turn helping to create a strong culture of integrity and deter future misconduct.¹⁵⁹ Reporting internally should always be preferable for a business organization, as it helps organizations detect fraud from the inside,¹⁶⁰ thereby avoiding substantial future litigation costs or bad publicity. A whistleblower that reports directly to the SEC “may bypass internal compliance completely, depriving a company of an opportunity to investigate and remedy potential wrongdoing before regulators get involved—and depriving them of the possibility that regulators might never need to become involved.”¹⁶¹ If internal

¹⁵⁶ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁵⁷ SEC, Amicus Brief, *supra* note 15, at 28–29 (citing to Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70500 (Nov. 17, 2010)).

¹⁵⁸ Alexander, *supra* note 85, at 284.

¹⁵⁹ Jordan A. Thomas & Vanessa De Simone, *Opinion: Employers May Come to Regret Seeking Narrow Definition of ‘Whistleblower,’* THE NAT’L L. J. (Apr. 14, 2014), <http://www.nationallawjournal.com/id=1397049044573/Opinion-Employers-May-Come-to-Regret-Seeking-Narrow-Definition-of-Whistleblower?slreturn=20160114214914>.

¹⁶⁰ Alexander, *supra* note 85, at 284.

¹⁶¹ Foti, *supra* note 121.

reporting is not covered by Dodd-Frank, it encourages reporting to the government and undermines internal compliance programs, and could lead to costly and embarrassing regulatory issues. As a result, “[t]his decreases the effectiveness of compliance programs by reducing the number of employees willing to utilize internal reporting mechanisms.”¹⁶²

The SEC’s rule utilizes corporate compliance departments to streamline the whistleblowing process and make it more effective. The number of whistleblower tips is only expected to rise and the entire process will become more productive if the SEC can share some of the responsibility with the companies of the reporting employees.¹⁶³ In fiscal year 2012, the SEC had only fourteen employees administering a whistleblower program that generated 3,001 tips and required the SEC’s staff to return over 3,050 telephone calls.¹⁶⁴ Policing and enforcing securities laws will be more effective if the SEC and compliance groups can work together.¹⁶⁵

The SEC’s rule clarifies the ambiguity over who exactly qualifies as a Dodd-Frank whistleblower without undermining the goals of the Act. Until the Supreme Court can rule on the issue, the *Chevron* test can be used to defer to the SEC’s reasonable interpretation.

¹⁶² Shannon Kay Quigley, *Whistleblower Tug-Of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 269 (2012) (citation omitted).

¹⁶³ *Id.* at 272.

¹⁶⁴ Foti, *supra* note 121.

¹⁶⁵ *Id.*

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VI. CONCLUSION

It has been over five years since Congress enacted Dodd-Frank and we have yet to find a clear understanding of the whistleblower provision. Courts in the First, Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that Dodd-Frank protects internal whistleblowers.¹⁶⁶ Courts in the Fifth, Seventh, Ninth, and Tenth Circuits have held the opposite.¹⁶⁷ Even more troubling, judges in two district courts—Colorado and the Northern District of California—disagree as to whether internal complaints are protected.¹⁶⁸ Until either the courts or legislature clarify which tipsters are eligible for whistleblower status, Dodd-Frank cannot reach its full potential of uncovering and reprimanding securities law violators.

¹⁶⁶ Michael Filoromo, III, *SDNY Widens Split on Dodd-Frank Whistleblower Protection*, LAW 360 (Dec. 18, 2014, 12:01 PM), <http://www.law360.com/articles/602937/sdny-widens-split-on-dodd-frank-whistleblower-protection>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*