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Victoria M. Vitarelli

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Is Internal Reporting Sufficient for Retaliation Protection Under Dodd-Frank? — Ambiguity Requires Deference Be Given to the SEC, Which Says Yes.

I. Introduction

Retaliation is “[t]he act of doing someone harm in return for actual or perceived injuries or wrongs.”¹ These perceived wrongs include the acts of an employee who discloses a company’s possible violations of the law. These persons are better known as “whistleblowers,” and, in this day and age, “whistleblowing [has become] a fact of life that is not going away.”²

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) included Section 922(a)(h)(1) dedicated to “protection of whistleblowers,” through “prohibition against retaliation.”³ It was designed to protect victims of retaliation for the kinds of conduct it sought to encourage — essentially, the reporting of certain kinds of legal violations.⁴ Such protection was intended “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system.”⁵ Section 922(a)(h)(1) is codified as 15 U.S.C. § 78u-6(h)(1)⁶ and seeks to advance Dodd-Frank’s objective by providing protection against retaliation.⁷

Since the enactment of 15 U.S.C. § 78u-6(h)(1), courts have struggled with applying it.⁸ One issue is whether an employee, who suffers retaliation due to his reporting of wrongdoing

¹ BLACK’S LAW DICTIONARY 1510 (2014).

² Jason M. Halper & Carrie H. Lebigre, *Second Circuit Splits With Fifth Circuit Setting Up Possible Supreme Court Review: Are Internal Whistleblowers Protected Under Dodd-Frank?* (Sept. 11, 2015), <https://www.orrick.com/Events-and-Publications/Pages/Second-Circuit-Splits-With-Fifth-Circuit-Setting-Up-Possible-Supreme-Court-Review.aspx>.

³ 15 U.S.C. § 78u-6(h) (2012).

⁴ *Id.*

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (2010).

⁶ 15 U.S.C. § 78u-6(h)(1) is also included in the Securities Exchange Act of 1934 (“Securities Exchange Act”), as Amendment Section 21F.

⁷ 15 U.S.C. § 78u-6(h)(1)(A).

⁸ *See, e.g.,* Verfuert v. Orion Energy Systems, Inc., 65 F. Supp. 3d 640 (E.D. Wis. 2014); Banko v. Apple Inc., 20 F. Supp. 3d 749 (N.D. Cal. 2013); Dressler v. Lime Energy, 2015 U.S. Dist. LEXIS

internally to his company, but not to the Securities Exchange Commission (“SEC”), is protected by Dodd-Frank.⁹ While an employee who reports directly to the SEC will be protected, when such an employee reports only internally, the SEC will learn about the possible violations of securities laws only after retaliatory termination of the employee, and then only if she sues.¹⁰

The issue stems from the confused relationship between subdivision (A)(iii) of 15 U.S.C. § 78u-6(h)(1) and Dodd-Frank’s definition of “whistleblower.”¹¹ In its entirety, subdivision (A)(iii) provides:

[n]o 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 . . . (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 [], section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.¹²

Read by itself, the subdivision would seem to provide protection for any protected disclosure since it does not limit those to whom the disclosure is made. But when this subdivision is read in conjunction with the Dodd-Frank’s definition of “whistleblower,” tension arises. The definition requires an employee to provide “information relating to a violation of the securities laws *to the Commission*[,]” referring to the SEC.¹³

While many district courts that have attempted to reconcile 15 U.S.C. § 78u-6(h)(1)(A)(iii) with the definition of whistleblower, only two circuit courts have spoken on this matter. The Fifth Circuit, in *Asadi v. G.E. Energy United States, L.L.C.*, held that in order for an employee to qualify

106532 (D.N.J. Aug. 13, 2015); *Murray v. UBS Securities, LLC*, 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. May 21, 2013).

⁹ See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 146 (2d Cir. 2015).

¹⁰ See *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013).

¹¹ *Berman*, 801 F.3d at 146.

¹² 15 U.S.C. § 78u-6(h)(1)(A)(iii).

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

for Dodd-Frank retaliation remedies, she must provide information to the SEC, and thus it is insufficient for an employee to only report internally.¹⁴ Two years later, the Second Circuit turned the monologue into a conversation when, in *Berman v. Neo@Ogilvy*, the court held contrary to the Fifth Circuit.¹⁵ The Second Circuit held that an employee qualified for Dodd-Frank retaliation remedies after reporting wrongdoing internally to his employer and being terminated for that report.¹⁶ While the district courts in the Second and Fifth Circuits have each circuit's respective guidance on this matter, the district courts in the rest of the country land are left to their own devices to sort through 15 U.S.C. § 78u-6(h)(1)(A)'s meaning. Without more circuit courts taking a stance or the Supreme Court ruling on the issue, district courts will continue to have inconsistent holdings. That means that courts in agreement with *Berman* will provide more employees with remedies under Dodd-Frank, leaving some employees in *Asadi*-like circuits without such remedies. The solution for the inconsistent holdings is found in *Berman*. Employees who report wrongdoing only internally should be entitled to Dodd-Frank remedies.

II. Background

A. Understanding How We Got Here

The problem regarding the protection of whistleblowers under Dodd-Frank is relatively recent, as Dodd-Frank itself was enacted nearly six years ago.¹⁷ Dodd-Frank implemented sixteen titles in an effort to secure financial stability.¹⁸ The specific title at issue for purposes of this Comment is Title IX: Investor Protections and Improvements to the Regulation of Securities.

¹⁴ *Asadi*, 720 F.3d at 629.

¹⁵ *Berman*, 801 F.3d at 153.

¹⁶ *Id.*

¹⁷ Barack Obama, President of the United States, Remarks on 21st Century Financial Regulatory Reform (June 17, 2009).

¹⁸ *Id.*

Within Title IX, 15 U.S.C. § 78u-6 is codified as Section 922, which establishes whistleblower protections.¹⁹

Both definitions and rules are included in 15 U.S.C. § 78u-6, which jointly develop the tension within 15 U.S.C. § 78u-6(h)(1)(A). Within 15 U.S.C. § 78u-6, “whistleblower” is defined 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.”²⁰ This definition appears to plainly limit who Dodd-Frank protects as a whistleblower, by requiring information be provided to the SEC. This seemingly plain language is in tension with 15 U.S.C. § 78u-6(h)(1)(A), which outlines the actions that will be protected under Dodd-Frank.²¹ This section includes that

[i]n general-- 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;
- (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 Sarbanes-Oxley Act of 2002 [], the Securities Exchange Act of 1934 [], including section 10A(m) of such Act [], section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.²²

The word “whistleblower” is included in 15 U.S.C. § 78u-6(h)(1)(A), and it appears to connect to subdivision (i), (ii), and (iii) to establish the three scenarios in which Dodd-Frank remedies are available.²³ Subdivisions (i) and (ii) include language regarding “the Commission”

¹⁹ 15 U.S.C. § 78u-6(h).

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

²¹ 15 U.S.C. § 78u-6(h)(1)(A).

²² 15 U.S.C. § 78u-6(h)(1)(A)

²³ *Id.*

in referencing the requirement that information be provided to the Commission.²⁴ While subdivision (iii) also includes the words, “the Commission,” this language is in reference to the jurisdiction of the SEC, and not explicitly a requirement of information being provided to the SEC.²⁵

In August 2011, a year after Dodd-Frank’s enactment, the SEC promulgated a rule to clarify the application of 15 U.S.C. § 78u-6(h)(1)(A):²⁶

[f]or purposes of the anti-retaliation protections afforded by [15 U.S.C. § 78u-6(h)(1)] of the Exchange Act [], you are a whistleblower if:

- (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;
- (ii) You provide that information in a manner described in [15 U.S.C. § 78u-6(h)(1)(A)] of the Exchange Act [].²⁷

Although the text of the rule is not explicit, the SEC in its explanation of this rule, stated that 15 U.S.C. § 78u-6(h)(1)(A)(iii) includes a category of whistleblowers who are individuals who report to persons or governmental authorities *other than the Commission*.²⁸ The SEC’s rule instead added another layer for interpretation because now courts need to decide not merely the meaning of the statute in the abstract, but also whether deference should be given to the SEC’s approach.

In August 2015, two years after *Asadi* and a month before *Berman*, the SEC issued a more formal interpretation of 15 U.S.C. § 78u-6(h)(1)(A).²⁹ The SEC began its interpretation by conceding that the text of 15 U.S.C. § 78u-6(h)(1)(A) is ambiguous about who is afforded Dodd-Frank remedies.³⁰ While considering the statutory definitions of “whistleblower,” in conjunction

²⁴ 15 U.S.C. § 78u-6(h)(1)(A)(i)-(ii)

²⁵ 15 U.S.C. § 78u-6(h)(1)(A)(iii)

²⁶ 17 C.F.R. 240.21F-2 (2011).

²⁷ *Id.*

²⁸ 76 Fed. Reg. 34300, 34304 (June 13, 2011).

²⁹ 90 Fed. Reg. 47829 (Aug. 10, 2015).

³⁰ *Id.*

with 15 U.S.C. § 78u-6(h)(1)(A), the SEC spent much effort to resolve the ambiguity: “an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission.”³¹ The SEC reasoned that, from a policy standpoint, this reading of 15 U.S.C. § 78u-6(h)(1)(A) would remove any serious disincentive to report internally before reporting to the SEC.³² Since this interpretation is recent, the cases discussed in this Comment do not consider it; however, it is important for this Comment’s analysis, and may be crucial in a potential future Supreme Court ruling.

B. Dodd-Frank and the Sarbanes-Oxley Act of 2002

As an additional consideration in understanding how Dodd-Frank aids whistleblowers, 15 U.S.C. § 78u-6(h)(1)(A)(iii) mentions the Sarbanes-Oxley Act of 2002 (“SOX”), which also has an anti-retaliation provision.³³ This provision prohibits any publicly traded company, or “any officer, employee, contractor, subcontractor, or agent of such company,” from retaliating against any employee.³⁴ An employee who is retaliated against for protected disclosures must file a complaint with the Secretary of Labor no later than 180 days after the alleged violation.³⁵ An employee who prevails in a SOX anti-retaliation action is entitled to relief that would “make the employee whole.”³⁶

SOX’s anti-retaliation provision differs from Dodd-Frank’s provision. While SOX requires filing with the Secretary of Labor, individuals may bring a Dodd-Frank claim “without first filing their claim with a federal agency.”³⁷ The remedies for a prevailing individual under

³¹ *Id.* at 47830.

³² *Id.*

³³ 15 U.S.C. § 78u-6(h)(1)(A)(iii).

³⁴ 18 U.S.C. § 1514A (2010).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

Dodd-Frank are generally the same as those under SOX, but Dodd-Frank provides such individual with two times the amount of back pay owed.³⁸ The 180-day limitation on SOX claims does not govern Dodd-Frank's statute of limitations, which instead allows claims to be filed from six to ten years after the violation.³⁹ These significant differences mean that any suggestion that certain constructions of Dodd-Frank would render the SOX anti-retaliation provision moot, are incorrect.⁴⁰

C. How courts are managing 15 U.S.C. § 78u-6(h)(1)(A)

Many district courts have faced the confusion underlying 15 U.S.C. § 78u-6(h)(1)(A).⁴¹ The Fifth Circuit became the first circuit court to rule on the issue, in *Asadi*.⁴² The Second Circuit created a circuit split just a few years later in *Berman*.⁴³

C-1. Asadi v. G.E. Energy United States, L.L.C.

In *Asadi*, a former employee of GE Energy, Asadi, reported to his supervisors a potential Foreign Corrupt Practices Act ("FCPA") violation.⁴⁴ Shortly after these internal reports, Asadi received a negative performance review, was pressured to step down from his position to accept a reduced role, and, when he did not comply, was fired.⁴⁵ Asadi did not report to the SEC, but reported only internally to his superiors.⁴⁶ Asadi brought suit against GE Energy, asserting that he was retaliated against for voicing concerns about violations, and was therefore entitled to Dodd-

³⁸ 15 U.S.C. § 78u-6(h)(1)(C)(ii).

³⁹ 15 U.S.C. § 78u-6(h)(1)(B)(iii).

⁴⁰ *See, e.g., Asadi*, 720 F.3d at 628; *Verfuert v. Orion Energy Systems, Inc.*, 65 F. Supp. 3d 640, 645–46 (E.D. Wis. 2014).

⁴¹ *See, e.g., Asadi*, 720 F.3d at 620; *Murray v. UBS Securities, LLC*, 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. May 21, 2013); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012).

⁴² *Asadi*, 720 F.3d at 620.

⁴³ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015).

⁴⁴ *Asadi*, 720 F.3d at 621.

⁴⁵ *Id.*

⁴⁶ *Id.*

Frank’s whistleblower protection.⁴⁷ Asadi reasoned that the protection against retaliation provision should include individuals who take any action that falls within 15 U.S.C. § 78u-6(h)(1)(A)(iii), regardless of whether the SEC is provided with information.⁴⁸ Asadi made this argument by finding ambiguity in the language of 15 U.S.C. § 78u-6(h)(1)(A).⁴⁹ He conceded that he was not a whistleblower within 15 U.S.C. § 78u-6’s definition because he did not report to the SEC, but he contended that the inconsistency of 15 U.S.C. § 78u-6 “does not necessarily require disclosure of information to the SEC” for an individual to be protected.⁵⁰ The Fifth Circuit disagreed with Asadi, finding the language unambiguous and requiring an individual to be a whistleblower, within 15 U.S.C. § 78u-6’s definition, in order to benefit from Dodd-Frank remedies.⁵¹

Faced with statutory interpretation, the court first evaluated whether the text was plain and unambiguous on its face.⁵² It so found because the language plainly specified that only defined whistleblowers were protected for actions that fall within one of the three categories of 15 U.S.C. § 78u-6(h)(1)(A).⁵³ The court furthered its analysis, by finding that the third category does not conflict with the definition of “whistleblower,” as it is possible for an individual to take action that falls within the third category of protected activity, yet, by definition, not be a whistleblower.⁵⁴ Because the court found the text to be unambiguous, it found it unnecessary to consider the SEC’s 2011 rule in construing 15 U.S.C. § 78u-6(h)(1)(A).⁵⁵ The SEC’s rule would broaden the

⁴⁷ *Id.*

⁴⁸ *Id.* at 625.

⁴⁹ *Id.*

⁵⁰ Asadi, 720 F.3d at 624.

⁵¹ *Id.* at 630.

⁵² *Id.* at 622.

⁵³ *Id.* at 626.

⁵⁴ *Id.*

⁵⁵ *Id.* at 629.

definition of “whistleblower,” but, according to the court, that rule is invalid because it is inconsistent with the plain meaning of the statute.⁵⁶ The court reasoned that Congress directly spoke on this issue when it decided to use “whistleblower” instead of broader terms, such as “individual” or “employee” to express who qualified for the remedies.⁵⁷ Lastly, the court contended that, if 15 U.S.C. § 78u-6(h)(1)(A) were to be read according to *Asadi*, SOX’s anti-retaliation provision would become moot because Dodd-Frank’s enhanced remedies would lead individuals to bring claims under Dodd-Frank, leaving the SOX anti-retaliation irrelevant.⁵⁸ When evaluated in totality, the court held that only those who report to the SEC are entitled to remedies under Dodd-Frank because the text of 15 U.S.C. § 78u-6(h)(1)(A) is plain and unambiguous about such.⁵⁹

C-2. Berman v. Neo@Ogilvy LLC

In the years following *Asadi*, some district courts followed the Fifth Circuit’s reasoning, while others could not find justifications to do so.⁶⁰ The federal circuits split on this issue in September 2015, when the Second Circuit held 15 U.S.C. § 78u-6(h)(1)(A)’s language ambiguous.⁶¹ A former employee of Neo@Ogilvy, Berman, internally reported various practices of accounting fraud, and was allegedly terminated as a result of the reporting.⁶² Six months after his termination, Berman informed the SEC of the suspected accounting fraud.⁶³ Berman asserted

⁵⁶ *Asadi*, 720 F.3d at 629–30.

⁵⁷ *Id.* at 626.

⁵⁸ *Id.* at 628–29.

⁵⁹ *Id.* at 629.

⁶⁰ *Compare* *Verfuert v. Orion Energy Systems, Inc.*, 65 F. Supp. 3d 640, 645–46 (E.D. Wis. 2014) (holding that one must report to the SEC under all three prongs of the anti-retaliation provision in order to be protected); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013) (finding the anti-retaliation provision unambiguous); *with* *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015) (*Chevron* deference should be given because of the statute’s ambiguity); *Dressler v. Lime Energy*, 2015 U.S. Dist. LEXIS 106532 (D.N.J. Aug. 13, 2015) (finding Dodd-Frank’s inconsistent language as ambiguous).

⁶¹ *Berman*, 801 F.3d at 153.

⁶² *Id.* at 149.

⁶³ *Id.*

similar arguments as *Asadi*, claiming 15 U.S.C. § 78u-6(h)(1)(A)(iii) is ambiguous and allows for whistleblower protection for individuals who report violations internally and not to the SEC before termination.⁶⁴ The court, unlike in *Asadi*, agreed with this contention and held that individuals who reported internally are entitled to Dodd-Frank remedies.⁶⁵

In reaching its conclusion, the court engaged in a more extensive version of statutory interpretation as compared to *Asadi*.⁶⁶ Following the guidance of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a landmark case that stated the process of determining whether to grant deference to a government agency's interpretation of a statute that agency administered, the *Berman* court first concluded that the text of 15 U.S.C. § 78u-6(h)(1)(A) is ambiguous in expressing Congress's intent.⁶⁷ The text is ambiguous because otherwise "there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope."⁶⁸ Further, some employees, specifically attorneys and auditors, are required to report internally before reporting to the SEC, leaving them little, if anything, to gain from Dodd-Frank under the contrary interpretation.⁶⁹ The court reasoned that Congress did not intend this limitation, rather had simply enacted an unclear bill.⁷⁰ The lack of legislative history for subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A) suggest that this subdivision was inserted when the House and Senate bills were hastily reconciled,⁷¹ leaving unnoticed the lack of logic in the relationship of the two sections.⁷² The court reasoned that it was unlikely that the subdivision was intended to lead to an

⁶⁴ *Id.*

⁶⁵ *Id.* at 155.

⁶⁶ *Id.* at 151.

⁶⁷ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); *Berman*, 801 F.3d at 149 n.2.

⁶⁸ *Berman*, 801 F.3d at 152.

⁶⁹ *Id.*

⁷⁰ *Id.* at 155.

⁷¹ *Id.*

⁷² *Id.* at 154.

extremely limited scope.⁷³ Ultimately, the court found the SEC’s regulation to be a reasonable interpretation of 15 U.S.C. § 78u-6(h)(1)(A)(iii) and deferred to it in holding that Berman was entitled to pursue Dodd-Frank remedies.⁷⁴

D. Relevant Approaches to Statutory Interpretation

At the heart of this circuit split is the issue of statutory interpretation. Courts are essentially divided on whether the text of 15 U.S.C. § 78u-6(h)(1)(A) is ambiguous, and because that answer is unclear, courts’ holdings are inconsistent.⁷⁵ While the *Asadi* Court approached the evaluation of 15 U.S.C. § 78u-6(h)(1)(A) with a textualist lens, the *Berman* Court looked beyond the text and based its decision on the purpose and practicality of 15 U.S.C. § 78u-6(h)(1)(A).⁷⁶ These varying approaches to statutory interpretation in a variety of contexts have caused tension within the judicial system for decades.⁷⁷

Textualism emphasizes the importance of the words Congress chose when it wrote the statute.⁷⁸ Textualists interpret statutes with the presumption that Congress “invariably legislates against the background of a number of linguistic and cultural understandings that influence, and indeed determine, what a linguistically competent person would understand a statute to say.”⁷⁹ Textualists argue against the use of legislative history because they think this history is not a reliable indicator of the legislature’s intent.⁸⁰

⁷³ *Id.* at 155.

⁷⁴ *Berman*, 801 F.3d at 155.

⁷⁵ *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013); *Berman*, 801 F.3d at 155.

⁷⁶ *Asadi*, 720 F.3d at 629; *Berman*, 801 F.3d at 155.

⁷⁷ Richard M. Re, *The New Holy Trinity*, 18 Green Bag 2D 407 (2015), http://www.greenbag.org/v18n4/v18n4_articles_re.pdf.

⁷⁸ See Richard H. Fallon, Jr., Note, *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment within Both*, 99 CORNELL L. REV. 685, 707 (2014).

⁷⁹ *Id.* at 685.

⁸⁰ See Michael Dorf, Justice Scalia’s King v. Burwell Dissent Degrades His Textualist “Brand”, DORF ON LAW (June 25, 2015), <http://www.dorfonlaw.org/2015/06/justice-scalias-king-v-burwell-dissent.html>.

On the other hand, purposivism looks beyond the text to plausible purposes of the statute.⁸¹ While text remains important, purposivists utilize this process because they assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”⁸² Unlike textualists, purposivists will sometimes examine legislative history to find evidence of Congress’s intent.⁸³ According to purposivists, “judges should construe statutory language to fulfill [the] purposes” Congress intended to reach.⁸⁴ These different views on statutory interpretation suggest the possibility of inconsistent decisions.

E. The Current Form of Statutory Interpretation

For over a century, a purposivist framework guided the Supreme Court, in response to the Court’s 1892 decision in *Church of the Holy Trinity v. United States*.⁸⁵ The Court in this case held that it could not look only to the literal terms of a statute because, when applied with the case’s facts, that approach yielded a result that Congress was unlikely to have intended.⁸⁶ In the last two decades, this trend has been greatly criticized in favor of a more textualist approach.⁸⁷ Instead of taking a hard stance for one approach as opposed to the other, the Supreme Court has done some melding.⁸⁸ The Court’s latest approach may be coined the “textually-structured purposivism approach,” as the Court considers text, purpose, and pragmatism when clarifying statutory ambiguity.⁸⁹ The Court’s current trend keeps both textualism and purposivism in mind.

⁸¹ See Note, 99 CORNELL L. REV. 685, 704 (2014).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ John F. Manning, *Article: The New Purposivism*, 2011 SUP. CT. REV. 113 (2011).

⁸⁵ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

⁸⁶ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 150 (2d Cir. 2015).

⁸⁷ *The New Purposivism*, 2011 SUP. CT. REV. 113.

⁸⁸ *Id.* at 119.

⁸⁹ *Id.*; Richard M. Re, *The New Holy Trinity*, 18 Green Bag 2D 407, 421 (2015), http://www.greenbag.org/v18n4/v18n4_articles_re.pdf.

The Supreme Court's recent inclination for melding textualism and purposivism is exemplified in three of its recent decisions.⁹⁰ In *King v. Burwell*, the Court was faced with interpreting the phrase "established by a state" in a provision regarding income tax subsidies for health exchanges in the Patient Protection and Affordable Care Act.⁹¹ The issue was whether this phrase also included the federal government, which would have broadened its meaning.⁹² The Court found for the broader interpretation in order to further the Act's intent.⁹³ The Court reasoned that the "most natural reading" of "established by a state" would eliminate the existence of "qualified individuals" on Federal Exchanges.⁹⁴ This result in turn would undermine another provision in the Act, which contemplates "there will be qualified individuals on every Exchange."⁹⁵ The Court determined that without qualified individuals, an Exchange would not be able accomplish its purpose.⁹⁶ In essence, the Court reasoned this narrower interpretation would have destroyed the provision of the Act, and therefore the Court favored the broader interpretation.

In *Yates v. United States*, the Court was also faced with interpreting a phrase's meaning, specifically "tangible object."⁹⁷ The issue was whether "fish" was included in the scope of "tangible object."⁹⁸ The Court considered the purpose of the statute in which the phrase was found, and ultimately did not apply the ordinary meaning of the phrase.⁹⁹ The Court considered the words

⁹⁰ *The New Holy Trinity*, 18 Green Bag 2D 407 (discussing *King v. Burwell*, 135 S. Ct. 2480 (2015); *Yates v. United States*, 135 S. Ct. 1074, 1077 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014)).

⁹¹ *King*, 135 S. Ct. at 2490.

⁹² *Id.* at 2491.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1082.

surrounding the phrase and the title in which the phrase was found, to determine that the phrase should apply only in the financial context of SOX.¹⁰⁰ If the Court had applied a broader meaning, it could have created a “coverall spoliation of [an] evidence statute.”¹⁰¹ The Court reasoned that the statutory purpose and context of the phrase conflicted with the phrase’s ordinary meaning, requiring the Court to resolve the ambiguity with a narrow interpretation.¹⁰²

In *Bond v. United States*, the Court declined to apply the definition of “chemical weapon” to a toxic chemical for the matter at bar.¹⁰³ The Court limited the statute’s scope because a broader reading of the phrase would have gone beyond the statute’s purpose of enhancing national security, and would have intruded upon state criminal jurisdiction.¹⁰⁴ Specifically, the Court was faced with a unique set of facts of a woman who covered her ex-husband’s car with chemicals, and was subsequently prosecuted under the federal Chemical Weapons Convention Implementation Act.¹⁰⁵ The Court held that the Act was not implemented with the purpose of covering local criminal activity.¹⁰⁶ By construing the phrase narrowly, the Court protected the application of traditional state criminal jurisdiction.¹⁰⁷

In each of these cases, the Supreme Court found textual ambiguity, allowing it to move away from a strict textualist approach.¹⁰⁸ Notably, however, the finding of ambiguity did not result solely from the text, because “purposive and pragmatic reasons” also suggested ambiguity.¹⁰⁹ This

¹⁰⁰ *Id.* at 1079.

¹⁰¹ *Id.* at 1088.

¹⁰² *Id.* at 1086.

¹⁰³ *Bond v. United States*, 134 S. Ct. 2077, 2092 (2014).

¹⁰⁴ *Id.* at 2093.

¹⁰⁵ *Id.* at 2088.

¹⁰⁶ *Id.* at 2093-94.

¹⁰⁷ *Id.* at 2088.

¹⁰⁸ Richard M. Re, *The New Holy Trinity*, 18 Green Bag 2D 407, 409 (2015), http://www.greenbag.org/v18n4/v18n4_articles_re.pdf.

¹⁰⁹ *Id.*

suggests that courts need to further their understanding of Congress's intent when interpreting statutes and their provisions.¹¹⁰ These three Supreme Court decisions may have no direct impact for deciding how to resolve who is entitled to whistleblower protection remedies under Dodd-Frank; however, they suggest a methodology that would cut in favor of the *Berman* approach and aid in predicting how the Supreme Court may decide who might benefit from the whistleblower protection provision.

F. What this means for Employers, Employees, and the Federal Circuits

Dodd-Frank's whistleblower protection, through 15 U.S.C. § 78u-6(h)(1), works in conjunction with the SEC's whistleblower incentive program, to protect whistleblowers from retaliation.¹¹¹ Thus, the SEC directly incentivizes individuals to blow the whistle about any violations of securities laws, and in return, the SEC will protect those individuals.¹¹² With the circuits split about who is protected, individuals, in circuits other than the Second, may seriously hesitate to report to their company, as they may be unsure of what protections they would be entitled to.¹¹³ In the Fifth Circuit, potential whistleblowers are incentivized to go public rather than give their companies an opportunity to correct the problem. For employers, this split has a significant impact on how a business should operate because the importance of avoiding retaliation claims is heightened.¹¹⁴ Internal reporting incentivizes employers to adhere to internal compliance programs, remedy conduct before any violation actually occurs, and correct misunderstandings.¹¹⁵

¹¹⁰ *Id.* at 415.

¹¹¹ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 146 (2d Cir. 2015).

¹¹² *Id.*

¹¹³ Eric Havian, *Whistleblower Showdown Heads to Supreme Court*, CFO (Sept. 29, 2015), <http://ww2.cfo.com/legal/2015/09/whistleblower-showdown-heads-supreme-court/>.

¹¹⁴ Jonathan Stempel, *Whistleblower wins U.S. appeals court victory; split created*, REUTERS (Sept. 10, 2015, 2:55 PM), <http://www.reuters.com/article/2015/09/10/wpp-whistleblower-idUSL1N11G18O20150910>.

¹¹⁵ *Dressler v. Lime Energy*, 2015 U.S. Dist. LEXIS 106532, at *36 n.10 (D.N.J. Aug. 13, 2015).

Employers may also be well-advised to read Dodd-Frank’s anti-retaliation provision broadly because the circuit split may persist and there is no knowing of what side other circuits will come out on.¹¹⁶

Until the United States Supreme Court rules on whom it finds to be appropriately entitled to the Dodd-Frank remedies, employees and employers will continue to live in a world that lacks clarity for Dodd-Frank’s whistleblower protection. Unfortunately, this split will not be resolved soon. On October 14, 2015, the Second Circuit stayed the issuance of its mandate in *Berman*; however, on November 10, 2015, the defendant advised the Second Circuit that it would not be petitioning for a writ of certiorari with the United States Supreme Court.¹¹⁷

III. Analysis

The holdings in *Asadi* and *Berman* are directly contradictory. *Asadi* narrowly applies 15 U.S.C. § 78u-6(h)(1)(A)(iii) by not affording internal reporter protection and *Berman* applies it broadly, by affording that protection.¹¹⁸ This Comment argues that the broad interpretation in *Berman* best comports with congressional intent, policy, and application.

The analysis for determining the deference of an agency’s interpretation was supplied by the Supreme Court in its landmark decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.¹¹⁹ Time and time again, the Court has applied this decision, and its two-step analysis will

¹¹⁶ Michael Arnold & Brent Douglas, *Internal Whistleblowing Protected Against Retaliation Under Dodd-Frank, Says Second Circuit*, MINTZ LEVIN BLOG (Sept. 29, 2015), <http://www.employmentmattersblog.com/2015/09/internal-whistleblowing-protected-against-retaliation-under-dodd-frank-says-second-circuit/>.

¹¹⁷ Aaron Vehling, *Dodd-Frank Whistleblower Battle Won’t Hit The High Court*, LAW360 (Nov. 12, 2015), <http://www.law360.com/articles/726167/dodd-frank-whistleblower-battle-wont-hit-the-high-court>.

¹¹⁸ *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

¹¹⁹ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

be utilized as a partial framework for this Comment’s argument.¹²⁰ *Chevron*’s two-step test first begins with inquiring, “whether Congress has directly spoken to the precise question at issue.”¹²¹ If Congress’s intent is clear, then the language does not require further interpretation and can be applied accordingly.¹²² Step two of the test is not necessary in this scenario. If the court determines, however, that Congress has not directly spoken to the precise question at issue, the court must utilize step two of *Chevron*.¹²³ In that event, the court must determine whether the agency’s interpretation is “based on a permissible construction of the statute.”¹²⁴

The determination of “a permissible construction” is controlled by whether there is an interpretive gap, implicitly or explicitly left by Congress for the agency to fill.¹²⁵ That, of course, is the thrust of step one. If Congress explicitly left such a gap, the agency’s “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”¹²⁶ If Congress implicitly left the gap, a court may not substitute its own interpretation for a reasonable interpretation by an agency.¹²⁷ The rationale for this distinction is that Congress may use “capacious terms when it wishes to enlarge, agency discretion.”¹²⁸ This second part of the two-step test occurs because the statute is either silent or ambiguous regarding a specific issue.¹²⁹

¹²⁰ See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1864 (2013) (holding that courts must apply *Chevron* framework); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (referring to *Chevron* as the “pathmarking decision” when according deference to an agency’s interpretation).

¹²¹ *Chevron*, 467 U.S. at 842.

¹²² *Id.*

¹²³ *Id.* at 843.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 844.

¹²⁷ *Chevron*, 467 U.S. at 844.

¹²⁸ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)

¹²⁹ *Id.*

The *Asadi* court found 15 U.S.C. § 78u-6(h)(1)(A) unambiguous, and thus truncated its analysis at *Chevron*'s first step.¹³⁰ The *Berman* court continued to *Chevron*'s second step when it found 15 U.S.C. § 78u-6(h)(1)(A) ambiguous.¹³¹ Ambiguity is the beginning of the inquiry.

A. Ambiguity

The Second and Fifth Circuit Courts split at the first step of the *Chevron* two-step analysis because these circuit courts have opposing views on whether the text of the protection against retaliation provision is ambiguous.¹³² Following the Supreme Court's recent trend towards a textually structured purposivist approach, the combination of 15 U.S.C. § 78u-6(h)(1)(A)'s text, purpose, and pragmatic use will lead the Court to find ambiguity.

The text of 15 U.S.C. § 78u-6(h)(1)(A)(iii) is ambiguous on its face and through its application. It is facially ambiguous because it does not include the words "to the Commission," as the other two categories require, and furthermore, it includes other acts and statutes in which disclosures are required or protected.¹³³ Under these other acts and statutes, internal reporting may be protected.¹³⁴ Through its application, it is unclear how a retaliated against employee can receive protection.

The Supreme Court should evaluate 15 U.S.C. § 78u-6(h)(1)(A) with a purposivist approach in mind, which would require that it be broadly interpreted. Dodd-Frank was enacted to "promote financial stability . . . by improving accountability and transparency in the financial system."¹³⁵ Dodd-Frank implemented 15 U.S.C. § 78u-6(h)(1)(A) as an amendment to the

¹³⁰ *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013).

¹³¹ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 148 (2d Cir. 2015).

¹³² *Asadi*, 720 F.3d at 629; *Berman*, 801 F.3d at 148.

¹³³ 15 U.S.C. § 78u-6(h)(1)(A)(iii).

¹³⁴ Steven J. Pearlman, *Does Dodd-Frank Protect Internal Whistleblowing?*, LAW360 (Sept. 11, 2015, 2:51 PM), <http://www.law360.com/articles/701958/does-dodd-frank-protect-internal-whistleblowing>; *Dressler*, 2015 U.S. Dist. LEXIS 106532, at *42.

¹³⁵ Dodd-Frank Wall Street Reform And Consumer Protection Act, 124 Stat. 1376 (2010).

Securities Exchange Act of 1934.¹³⁶ The purpose of the Securities Exchange Act of 1934 was “[t]o provide for the regulation of securities exchanges and of over-the-counter markets . . . to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.”¹³⁷ Thus, 15 U.S.C. § 78u-6(h)(1)(A) should be read in accordance with these purposes.

If the Supreme Court were to read 15 U.S.C. § 78u-6(h)(1)(A) narrowly, by considering only the words within the four corners of the page, the Court would fail to further the purposes of these acts. Textualists argue that the text speaks for itself and that the definition of “whistleblowers” within 15 U.S.C. § 78u-6 sufficiently provides for who is protected.¹³⁸ The textualist approach, however, does not address the statutory gap, leading to 15 U.S.C. § 78u-6(h)(1)(A)’s ambiguity. The application of 15 U.S.C. § 78u-6(h)(1)(A) does not “follow[] directly from the plain language of” subdivision (iii); and instead the plain language leaves the matter unclear.¹³⁹ The Supreme Court previously held that a statute’s clear definition should not be used if doing so would violate the statute’s congressional intent.¹⁴⁰ To read a statute in accordance with congressional intent, it must be “recognize[ed] that ‘Congress legislates against the backdrop’ of certain unexpressed presumptions.”¹⁴¹ Thus, if a statute’s definition does not comport with the backdrop in which the statute was created, this definition does not assist in interpreting the statute. Thus, the Court suggested that ambiguity should not be evaluated exclusively based on the text, but also through the statute’s pragmatic application and purpose.¹⁴²

¹³⁶ 15 U.S.C. § 78u-6(h)(1).

¹³⁷ Securities Exchange Act of 1934, 48 Stat. 881 (1934).

¹³⁸ *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013).

¹³⁹ *Id.* at 625.

¹⁴⁰ *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014).

¹⁴¹ *Id.* at 2088 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

¹⁴² *Bond*, 134 S. Ct. at 2091.

Understanding Congress's intent, through 15 U.S.C. § 78u-6(h)(1)(A)'s legislative history furthers the argument that ambiguity exists within the statute. This inquiry begins with the Obama Administration's proposal to Congress. This proposal broadly supports making whole employees retaliated against because they provided information to the Commission.¹⁴³ The House of Representatives passed the Administration's proposal, specifying that 15 U.S.C. § 78u-6(h)(1)(A) should prohibit retaliation against an employee for "providing information to the Commission."¹⁴⁴ The House's proposal did not include the word "whistleblower," and instead used "employee."¹⁴⁵ Furthermore, the section did not have a specific subdivision to define the three categories currently available.¹⁴⁶ The Senate version of this bill substituted "whistleblower for "employee"" and specified that a whistleblower would be protected "(i) in providing information to the Commission in accordance with subsection (b); or (ii) in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information."¹⁴⁷ Still the Senate's version lacked any mention of the third category. To this point, then, it might fairly be said that Congress was concerned only with reports to the SEC. The third category, however, appeared for the first time in the House Conferees' conference base text, added after the first and second categories.¹⁴⁸ The question then is, what effect the addition of this category was intended to have on the overall provision, and it seems certain that it was intended to broaden the thrust of the statute. One way in which that could be achieved is reading subdivision (iii) to reach internal disclosures.¹⁴⁹

¹⁴³ Financial Services Oversight Council Act of 2009, 124 Stat. 1326 (July 22, 2009) http://www.llsdc.org/assets/DoddFrankdocs/dodd-frank-act_admn-reg-reform-bill.pdf.

¹⁴⁴ H.R. 4173, 111th Cong. (2009).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 152 n.8 (2d Cir. 2015).

¹⁴⁹ *Id.* at 155.

Dodd-Frank was enacted less than a month after the addition of subdivision (iii), leaving no further indication of the subdivision's intended purpose.¹⁵⁰ Because legislative history fails to provide the intended purpose of subdivision (iii), the only purposes that are related to this subdivision are the purposes of Dodd-Frank and the Securities Exchange Act of 1934. The addition of subdivision (iii) was a last minute attempt to reconcile the House and Senate bills.¹⁵¹ This attempt resulted with a provision that does not fit well with the statute's definition of "whistleblower."¹⁵² It is unclear whether the conferees intended subdivision (iii)'s incorporation to be limited by the definition of "whistleblower" or to protect employees who report internally, without reporting to the Commission.¹⁵³ Thus, the text and legislative history result in ambiguity, noting this possibility because "[t]rue ambiguity is almost always the result of carelessness or inattention."¹⁵⁴

Dodd-Frank was enacted with the purpose of transparency in the financial system, and implemented whistleblower protection to fulfill this purpose.¹⁵⁵ By limiting whistleblower protection to only individuals who report to the SEC, courts hinder Dodd-Frank's purpose. Transparency in the financial system may also include the transparency of a company. Thus, courts should encourage employees to first raise concerns about possible securities violations to their companies, furthering the methods of transparency. A company could then conduct an investigation, remedy the problem, and avoid any unnecessary governmental interference.¹⁵⁶ The

¹⁵⁰ *Id.* at 152 n.8.

¹⁵¹ *Id.* at 155.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Berman*, 801 F.3d at 154 n.10.

¹⁵⁵ Dodd-Frank Wall Street Reform And Consumer Protection Act, 124 Stat. 1376 (2010).

¹⁵⁶ Jason M. Halper & Carrie H. Lebigre, *Second Circuit Splits With Fifth Circuit Setting Up Possible Supreme Court Review: Are Internal Whistleblowers Protected Under Dodd-Frank?* (Sept. 11, 2015), <https://www.orrick.com/Events-and-Publications/Pages/Second-Circuit-Splits-With-Fifth-Circuit-Setting-Up-Possible-Supreme-Court-Review.aspx>.

Supreme Court’s current trend of determining ambiguity based on considerations of text, purpose, and pragmatic use suggests that 15 U.S.C. § 78u-6(h)(1)(A)(iii) is ambiguous.

B. SEC Deference

Chevron commands that courts not attempt to resolve the ambiguity by themselves, and instead should defer to the SEC’s interpretation of 15 U.S.C. § 78u-6(h)(1)(A). There is no serious question of the SEC’s competency and authority to interpret Dodd-Frank as the protection against retaliation provision within Dodd-Frank is also an amendment to the Securities Exchange Act.¹⁵⁷ Courts do, however, need to determine that the SEC’s interpretation is permissible.¹⁵⁸ The hasty addition of subdivision (iii) suggests that Congress implicitly left the gap in 15 U.S.C. § 78u-6(h)(1)(A). Accordingly, courts “may not substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”¹⁵⁹ Applying the SEC’s interpretation is a permissible measure in order to sort through the ambiguity.

As suggested earlier, the SEC has given some guidance over the last few years, with its most recent interpretation of 15 U.S.C. § 78u-6(h)(1)(A) in August 2015.¹⁶⁰ This interpretation, along with the SEC’s previous rule in August 2011, should be given deference by courts, as the statute is ambiguous and Congress implicitly left a gap. The SEC’s August 2011 rule specifies the requirements to be considered a whistleblower.¹⁶¹ No part of the agency’s text requires reporting to the Commission. Instead, the SEC classifies a whistleblower as someone who has “a reasonable belief” of a possible securities law violation, and that information be provided in a manner proscribed in 15 U.S.C. § 78u-6(h)(1)(A).¹⁶² This section comprises of the three possible

¹⁵⁷ *Id.*

¹⁵⁸ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

¹⁵⁹ *Id.*

¹⁶⁰ 90 Fed. Reg. 47829.

¹⁶¹ 17 C.F.R. 240.21F-2.

¹⁶² *Id.*

whistleblower protection categories, including subdivision (iii), which has no mention of providing information “to the Commission.”¹⁶³ Therefore, the SEC reads the statute as making it unnecessary for an individual to report to the SEC in order to receive whistleblower protection remedies.

The SEC’s August 2015 interpretation supports the goals of the whistleblower program and reaffirms its previous August 2011 rule.¹⁶⁴ By affording protection to individuals who report internally, the interpretation explains that the SEC “avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally . . . and thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting.”¹⁶⁵ The interpretation looks beyond language to policy. Thus, the SEC’s rule and interpretation, supplement what Congress failed to do.

The consideration of policy includes employers, employees, and the government as potential victims of the ambiguous language of 15 U.S.C. § 78u-6(h)(1)(A). Employee protection for internal reporting is likely to encourage companies to design “robust compliance procedures,” limiting possible claims of securities violations.¹⁶⁶ This would make for stronger companies, and more effective companies nationwide. If an internal whistleblower is not afforded the same protection as an employee who reports to the SEC, the employee will not be incentivized to report internally. Accordingly, internal reporting will inevitably decline, leading to the possibility of more external reports.¹⁶⁷ By protecting internal reporting, the government would greatly benefit.

¹⁶³ 15 U.S.C. § 78u-6(h)(1)(A).

¹⁶⁴ 90 Fed. Reg. 47829.

¹⁶⁵ 90 Fed. Reg. 47829.

¹⁶⁶ Jonathan Stempel, *Whistleblower wins U.S. appeals court victory; split created*, REUTERS (Sept. 10, 2015, 2:55 PM), <http://www.reuters.com/article/2015/09/10/wpp-whistleblower-idUSL1N11G18O20150910> (internal quotations omitted).

¹⁶⁷ Eric Havian, *Whistleblower Showdown Heads to Supreme Court*, CFO (Sept. 29, 2015), <http://ww2.cfo.com/legal/2015/09/whistleblower-showdown-heads-supreme-court/>.

Instead of the SEC being bombarded with futile claims, the SEC will receive “fewer and higher quality reports.”¹⁶⁸ This will aid in preserving limited government funds and resources, so that the SEC can focus on “the most salient employee accusations,” instead of baseless ones.¹⁶⁹

Further, affording internal reporters protection relieves courts of the need to split employees into two groups—lawyers/auditors and non-lawyers/non-auditors. Lawyers and auditors are not allowed to report the SEC without first reporting to the company.¹⁷⁰ Thus, if SEC reporting were required, this large group of employees would never receive protection under Dodd-Frank.

The SEC’s view on 15 U.S.C. § 78u-6(h)(1)(A) allows for the anti-retaliation provision’s protections to extend to those who make disclosures that are protected under SOX, whether or not the disclosures were made to the SEC.¹⁷¹ Opponents of the broad reading of 15 U.S.C. § 78u-6(h)(1)(A) argue that this reading would render the SOX anti-retaliation provision moot, and Congress could not have intended the agency to ignore this fact.¹⁷² The argument asserts that if all SOX protected activity falls within the protection of Dodd-Frank, then all SOX claimants would file under Dodd-Frank.¹⁷³ Claimants, regardless of the SEC reporting requirements, would not necessarily favor Dodd-Frank over SOX because SOX provides successful plaintiffs with monetary damages unavailable under Dodd-Frank.¹⁷⁴ While the wording of subdivision (iii) may have been hastily added, Congress intended to provide protection for internal reports of SOX violations, within this provision.¹⁷⁵ In effect, to limit 15 U.S.C. § 78u-6(h)(1)(A) would

¹⁶⁸ *Dressler v. Lime Energy*, 2015 U.S. Dist. LEXIS 106532, at *33 n. 10 (D.N.J. Aug. 13, 2015).

¹⁶⁹ *Id.*

¹⁷⁰ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015).

¹⁷¹ *Dressler*, 2015 U.S. Dist. LEXIS 106532, at *10–11.

¹⁷² *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620, 628 (5th Cir. 2013).

¹⁷³ *Dressler*, 2015 U.S. Dist. LEXIS 106532, at *33.

¹⁷⁴ *Id.*

¹⁷⁵ *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013)

“effectively invalidate [subdivision (iii)’s] protection of whistleblower disclosures that do not require reporting to SEC.”¹⁷⁶ It does not follow that Congress would have included SOX in 15 U.S.C. § 78u-6(h)(1)(A)(iii), only to limit its use.

IV. Conclusion

The protection against retaliation provision is intended to help and assist persons, who have knowledge of potential securities violations, make the decision to report his or her beliefs. More angst than clarity has resulted from the implementation of 15 U.S.C. § 78u-6(h)(1)(A), because it is unclear how it should be applied. Protecting only persons who report to SEC could not have been within Congress’s intent when it included 15 U.S.C. § 78u-6(h)(1)(A). Regardless of this fact, 15 U.S.C. § 78u-6(h)(1)(A) is ambiguous, both on its face and through its application. This ambiguity is best understood when considering the text, purpose, and pragmatic use of 15 U.S.C. § 78u-6(h)(1)(A).

While a court may often implement its own interpretation of a statute, when an appropriate agency has developed a rule or interpretation of the statute, the court must determine if that rule or interpretation is permissible. Here, the SEC interpretation of 15 U.S.C. § 78u-6(h)(1)(A) is permissible as it is a reasonable resolution of a statutory ambiguity. The SEC plainly and unambiguously provides that individuals who only report internally, and not to the SEC, are entitled to whistleblower protection remedies under Dodd-Frank. This is the best solution to answering the question of who can receive benefits for reporting potential securities violations. If other circuit courts, and ultimately the Supreme Court, follow this analysis and solution, employers, employees, and the government will reap the benefits.

¹⁷⁶ Egan v. Tradingscreen, Inc., No. 10-8202, 2011 U.S. Dist. LEXIS 47713, at *11 (S.D.N.Y. May 4, 2011).

