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# Whistling Upon Deaf Ears: Dodd-Frank Whistleblower Protection of Internal Disclosures

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## I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>1</sup> (Dodd-Frank) provides a private cause of action to certain persons who notify the government of illegalities occurring within the financial industry, then subsequently experience employer retaliation for such notification.<sup>2</sup> These persons are generally referred to as “whistleblowers.” Confusion has arisen over who merits protection because the Dodd-Frank definition of whistleblower arguably conflicts with the statute’s anti-retaliation provision.<sup>3</sup> Although the Securities and Exchange Commission (SEC) has issued regulations which attempt to resolve the potential ambiguity created by the statutory conflict,<sup>4</sup> courts have taken varying approaches leading to conflicting conclusions as to whether statutory ambiguity exists, and if so, whether to defer to the SEC’s interpretation of the statute. I begin with a brief overview of the legislative backdrop to Dodd-Frank and proceed to analyze the statutory text and the SEC’s implementation thereunder. Next, I provide taxonomy of the case law addressing the statute: opinions protecting whistleblowers who report to entities other than the SEC;<sup>5</sup> courts finding the statute to be ambiguous, but nonetheless deferring to the SEC;<sup>6</sup> and a third group of cases finding Dodd-Frank to require whistleblowers to make disclosures directly to the SEC.<sup>7</sup> I then conclude that employer anti-retaliation protection should only be available to whistleblowers who provide the SEC with information in a manner subject to the SEC’s discretion. Under my theory, the Commission was given direct authority to establish the manner in

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<sup>1</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>2</sup> 15 U.S.C. § 78u-6 (2012).

<sup>3</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>4</sup> 17 C.F.R. § 240.21F-2(b) (2014).

<sup>5</sup> *See, e.g.*, Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

<sup>6</sup> *See, e.g.*, Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 331 (S.D.N.Y. 2013) (citing six district court cases).

<sup>7</sup> *See, e.g.*, Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).

which it would receive information, and pursuant to this authority, the Commission established this manner through various regulations which implement Dodd-Frank.<sup>8</sup>

## II. Legislative Backdrop to the Dodd-Frank Whistleblower Program

In 2010, Congress enacted Dodd-Frank after determining that reform of existing securities laws were generally necessary due to the terrible toll which the 2008 financial crisis exacted on the U.S. economy.<sup>9</sup> Congress included a new and robust “Whistleblower Program”<sup>10</sup> to motivate persons possessing reasonable belief of potential securities laws violations to inform the SEC of their suspicion.<sup>11</sup> Generally, Congress favorably views persons who notify the government of potential illegalities, customarily termed “whistleblowers,” because the information which the government receives frequently helps rectify illegal behavior.<sup>12</sup> Specifically, Congress designed the Whistleblower Program to motivate persons possessing reasonable belief of potential securities laws violations to inform the SEC of their suspicion.<sup>13</sup>

Congress attempted to provide whistleblower protection because the information provided by whistleblowers would often not be easily discovered through external SEC investigations.<sup>14</sup> Therefore, Congress sought to incentivize whistleblowers to file more reports, which, in turn, would improve the transparency of the financial system and decrease the likelihood of another financial crisis materializing.<sup>15</sup> Certified Fraud Examiner and Madoff whistleblower Harry Markopolos demonstrated the historical efficiency of whistleblower programs when he testified in front of the

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<sup>8</sup> 17 C.F.R. § 240.21F-2(b).

<sup>9</sup> S. Rep. No. 111-176, at 39-40.

<sup>10</sup> 15 U.S.C. § 78u-6 (2012).

<sup>11</sup> S. Rep. No. 111-176, at 39-40.

<sup>12</sup> *Id.* at 40.

<sup>13</sup> *Id.* at 38.

<sup>14</sup> *Id.* at 39-40.

<sup>15</sup> The Dodd-Frank Act declares its purpose: “To promote the financial stability of the United States by improving ... transparency in the financial system ... to protect consumers from abusive financial services practices, and for other purposes.” The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

Senate Banking Committee<sup>16</sup> urging enactment of the Whistleblower Program. Markopolos cited statistics showing the historical efficacy of such programs where “whistleblower tips detected 54.1% of uncovered fraud schemes in public companies,”<sup>17</sup> while SEC exam teams, and all other external auditors, “detected a mere 4.1%.”<sup>18</sup> Notably, whistleblower tips were also shown to be thirteen times more effective than all external audits.<sup>19</sup>

Due to the demonstrated success of whistleblowing, Congress attempted to solve the historical impediments faced by whistleblowers. The most significant of such impediments is the deterrence factor which prevents employees who may wish to notify the government of wrongdoing from doing so due to the potential risk of adverse employment action in retaliation for such whistleblowing. The concept is not new; other federal statutes afford anti-retaliation protection to whistleblowers,<sup>20</sup> making illegal employer discrimination against such employees. Per Dodd-Frank, Congress expanded whistleblower protection within the financial industry through various means.

The broader scope of the new Whistleblower Program seeks to increase motivation for “potential whistleblowers to come forward and help the government identify and prosecute fraudsters,”<sup>21</sup> by incentivizing whistleblowers with monetary awards, and through expanding the definition of whistleblower and thereby extending anti-retaliation protection to more persons.<sup>22</sup> Congress incentivized whistleblowers by authorizing monetary awards for whistleblowers who provide information which leads to government recoveries equaling or exceeding one million dollars.<sup>23</sup> The new anti-retaliation provision protects whistleblowers from employers who

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<sup>16</sup> S. Rep. No. 111-176, at 110-11.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, 1 Lit. Wrong. Discharge Claims § 2:86 (listing federal statutes containing anti-retaliation provisions).

<sup>21</sup> S. Rep. No. 111-176, at 112-114.

<sup>22</sup> *See, e.g.*, 18 U.S.C. § 1514A (2012) (clarifying that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers).

<sup>23</sup> 15 U.S.C. § 78u-6(b).

“discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment.”<sup>24</sup> Specifically, this provision prohibits employer retaliation stemming from lawful acts committed by whistleblowers in providing information to, or assisting the SEC with, investigations or actions concerning their employers’ potential securities law violations, and in making disclosures that are required or protected under any other law, rule, or regulation within the SEC’s jurisdiction.<sup>25</sup> Congress directly delegated authority to the SEC to develop specific regulations implementing such provisions.<sup>26</sup>

Pursuant to such authority, the SEC proposed 17 C.F.R. § 240.21F-2(b),<sup>27</sup> and, as is customary in administrative agency rule issuance, interested groups and individuals submitted comments which the SEC considered before finalizing the rules.<sup>28</sup> The National Whistleblowers Center (NWC)<sup>29</sup> submitted one such comment which informed the SEC of the results of its study on *qui tam*<sup>30</sup> actions filed between 2007 and 2010. In the NWC conducted study, nearly all whistleblowers were found to have first attempted to resolve matters through internal means by speaking with their superiors, filing an internal complaint, or both.<sup>31</sup> In finalizing § 240.21F-2(b), the SEC expressly sought to “ensure that the whistleblower program does not undermine the willingness of individuals to make whistleblower reports internally at their companies before they

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<sup>24</sup> 15 U.S.C. § 78u-6(h)(1).

<sup>25</sup> *Id.*

<sup>26</sup> 15 U.S.C. § 78w (2010).

<sup>27</sup> 17 C.F.R. § 240.21F-2(b).

<sup>28</sup> Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,488 (Nov. 17, 2010) [hereinafter Proposed Rules].

<sup>29</sup> See NWC Comment to Proposed Rules, Impact of *Qui Tam* Laws on Internal Compliance: A Report to the Securities Exchange Commission, at 6 (Dec. 17, 2010) [hereinafter NWC Comment].

<sup>30</sup> See, e.g., 31 U.S.C. § 3730 (2012) (illustrating *qui tam* actions filed by relators).

<sup>31</sup> NWC Comment at 8.

make reports to the Commission.”<sup>32</sup> In light of documented whistleblower discrimination, the SEC determined the decision of “whether or not to internally report is best left for whistleblowers.”<sup>33</sup>

While the anti-retaliation provision generally prohibits employer discrimination by reason of whistleblower notification of potential employer illegality pertaining to securities laws, since its enactment, federal courts are divided over whether protection is solely available to whistleblowers who provide information directly to the SEC, or whether protection is also available to whistleblowers who report violations internally, do not notify the SEC, and subsequently experience employment retaliation. This inconsistency creates the likelihood that employees will first report to the SEC, even though the SEC provides strong incentives<sup>34</sup> for individuals to report internally in the first instance, if appropriate.<sup>35</sup>

### **III. The Text of the Whistleblower Program**

The Whistleblower Program provides a private cause of action for whistleblowers who experience adverse employment action from their employers. Confusion has arisen over who merits protection because the statutory definition of the term whistleblower has been found to conflict with statutory enumerations of whistleblower activities protected under the anti-retaliation provision.

The Whistleblower Program provides the following definition of whistleblower:

The 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.<sup>36</sup>

This clause, when read in isolation, would seem to require an individual to submit information directly to the Commission in order to fall within this definition. However, various courts have

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<sup>32</sup> Proposed Rules at 70,490.

<sup>33</sup> See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,326-34,327 (June 13, 2011) [hereinafter Adopting Release].

<sup>34</sup> Adopting Release at 34,301.

<sup>35</sup> Adopting Release at 34,322.

<sup>36</sup> 15 U.S.C. § 78u-6(a)(6).

found the anti-retaliation provision in Dodd-Frank to be irreconcilable with this statutory definition. The anti-retaliation provision prohibits employer retaliation by reason of three distinct whistleblower undertakings:

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 the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.”<sup>37</sup>

Under the first two subsections, the Dodd-Frank anti-retaliation provision explicitly prohibits employer discrimination against whistleblowers who provide information to the Commission, or assist the Commission in an action based upon information which was provided to the Commission.<sup>38</sup> Unlike the first two subsections, the third subsection does not require direct disclosure to the Commission; employer discrimination is prohibited against whistleblowers who make required or protected disclosures which fall into one of four categories, which, in many instances, do not involve the Commission. Thus, it is this third subsection that merits further attention.

The first category within the third subsection of the anti-retaliation provision prohibits discrimination against whistleblowers who make required or protected disclosures under the Sarbanes-Oxley Act of 2002 (SOX). The SOX provides whistleblower protection for employees of publicly traded companies where any employee is threatened “in the terms and conditions of

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<sup>37</sup> 15 U.S.C. §§ 78u-6(h)(1)(A)(i)-(iii) (emphasis added).

<sup>38</sup> 15 U.S.C. §§ 78u-6(h)(1)(A)(i)-(ii).

employment” because of acts committed to assist in an investigation regarding conduct reasonably believed to be in violation of any SEC rule or regulation, “or any provision of Federal law relating to fraud against shareholders,” where

- [I] information or assistance is provided to, or the investigation is conducted by:
  - (A) a Federal regulatory or law enforcement agency;
  - (B) any Member of Congress or any committee of Congress; or
  - (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).<sup>39</sup>

Whistleblowers making required or protected disclosures under “this chapter, including section 78j-1(m) of this title”<sup>40</sup> fall into the second category of the third subsection of the Dodd-Frank anti-retaliation provision. Section 78j-1(m) specifies audit reporting requirements.<sup>41</sup> The third category within the third subsection of the anti-retaliation provision, enumerating required or protected whistleblower disclosures, are those made under “section 1513(e) of Title 18.”<sup>42</sup> Under § 1513(e), “whoever knowingly, with the intent to retaliate,” takes any harmful action “for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense,” is in violation of the statute.<sup>43</sup> The final category incorporates whistleblower disclosures which are required or protected under “any other law, rule, or regulation subject to the jurisdiction of the Commission.”<sup>44</sup> This is the catchall provision.

#### **A. SEC Implementation of the Whistleblower Program**

Congress explicitly mandated the SEC to issue regulations implementing the Dodd-Frank Whistleblower Program.<sup>45</sup> Within one such regulation,<sup>46</sup> the SEC distinguished between the term

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<sup>39</sup> 18 U.S.C. § 1514A.

<sup>40</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>41</sup> 15 U.S.C. § 78j-1(m) (2010).

<sup>42</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>43</sup> 18 U.S.C. § 1513(e) (2008).

<sup>44</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>45</sup> 15 U.S.C. § 78u-7(a).

<sup>46</sup> 17 C.F.R. § 240.21F-2.

whistleblower as it pertains to persons eligible to receive awards, and as to persons subject to anti-retaliation protection.<sup>47</sup> Under the former, for potential award eligibility:

You are a whistleblower if, alone or jointly with others, you provide the Commission with information ... and the information relates to a possible violation of the federal securities laws.<sup>48</sup>

The regulation proceeds:

For purposes of the protections afforded by [the anti-retaliation provision] ... you are a whistleblower if you provide information in a manner described in [the anti-retaliation provision].<sup>49</sup>

Therefore, the SEC has taken the stance that whistleblowers must disclose to the SEC in order to be eligible to receive an award, but doing so is not necessary in order to receive anti-retaliation protection. This is so because the regulation incorporates the required or protected disclosures found within the four categories of the third subsection of the Dodd-Frank anti-retaliation provision into the definition of whistleblower for purposes of determining who warrants employer retaliation protection. The regulation then confirms: “The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.”<sup>50</sup>

## **B. Judicial Interpretation of the Whistleblower Program**

Under the Dodd-Frank Whistleblower Program, courts mainly fall into two different camps concerning the issue of whether employment retaliation protection is solely available for whistleblowers who provide information of potential securities laws violations directly to the SEC, or whether protection may also be available for whistleblowers who exclusively report violations internally to their employers. The majority view among the district courts holds that direct disclosure to the SEC is not necessary, provided at least one of the other required or protected

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<sup>47</sup> *Id.*

<sup>48</sup> 17 C.F.R. § 240.21F-2(a)(2).

<sup>49</sup> 17 C.F.R. § 240.21F-2(b)(1)(i)-(ii).

<sup>50</sup> 17 C.F.R. § 240.21F-2(b)(1)(iii).

disclosures set out in the anti-retaliation provision are met.<sup>51</sup> There are two means by which courts reach this conclusion. Under one approach, courts find that the Whistleblower Program is unambiguous and also find the anti-retaliation provision to constitute an implied exception to the statutory whistleblower definition. Under the second approach, courts reach this same conclusion by finding the Whistleblower Program to be ambiguous,<sup>52</sup> and then defer to SEC regulations.<sup>53</sup> Courts which have found the whistleblower definition and anti-retaliation provisions to conflict have noted that the latter would be rendered superfluous<sup>54</sup> if disclosure to the SEC was a necessary prerequisite for anti-retaliation protection. Courts in the opposing camp find that the Whistleblower Program is unambiguous in that it requires disclosure to the SEC to meet the definition. The issue is not ripe for Supreme Court review,<sup>55</sup> even though a majority of district courts have found the Whistleblower Program to be ambiguous, because the Fifth Circuit<sup>56</sup> remains the only circuit court to have directly ruled upon this issue.

### **1. District Courts Finding Whistleblower to Encompass Disclosure to Other-than-SEC Entities**

Prior to the SEC issuing final regulations, the Southern District of New York, in *Egan v. TradingScreen, Inc.*,<sup>57</sup> was confronted with a scenario where an employee of a financial software company reported his suspicion to the company's president that the CEO of the company illegally was diverting assets, and allegedly the reporting employee was then terminated.<sup>58</sup> The issue before

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<sup>51</sup> *Id.*

<sup>52</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>53</sup> Brief of the Securities and Exchange Commission, Amicus Curiae in Support of the Appellant, *Berman, v. Neo@Ogilvy L.L.C.*, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at 62 (S.D.N.Y. Dec. 5, 2014).

<sup>54</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001).

<sup>55</sup> *See, e.g., Lawson v. FMR L.L.C.*, 134 S. Ct. 1158, 1175 (2014) (extending whistleblower protection to employees of private contractors and to subcontractors serving public companies).

<sup>56</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

<sup>57</sup> *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*1 (S.D.N.Y. May 4, 2011).

<sup>58</sup> *Id.* at \*1-2.

the court was whether the internal report and subsequent termination provided the employee with a private cause of action under the Whistleblower Program.<sup>59</sup> The District Court held:

[T]he contradictory provisions of the Dodd–Frank Act are best harmonized by reading 15 U.S.C. § 78u6(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.<sup>60</sup>

Similarly, *Bussing v. COR Clearing, L.L.C.*<sup>61</sup> confronted the Federal District Court of Nebraska with a situation where a licensed Certified Public Accountant (CPA), working as an independent contractor for an independent securities clearing firm, complied with requests from the Financial Industry Regulatory Authority (FINRA), despite her employer’s request that she “stall, delay, stop digging, and stop responding”<sup>62</sup> to such requests. The CPA was subsequently terminated, allegedly for disclosing securities violations through internal means.<sup>63</sup> The District Court held that the CPA’s actions constituted protected activity under Dodd-Frank, and found “the result flows from the statute itself, and it is not necessary to determine if deference to the SEC’s construction of the statute is warranted.”<sup>64</sup> The court stated the anti-retaliation provision “covers a broad array of disclosures to entities other than the SEC,”<sup>65</sup> and by complying and cooperating with FINRA’s investigation and through preparing a report regarding violations, the CPA made disclosures which were “required by a rule subject to the jurisdiction of the SEC.”<sup>66</sup> The court acknowledged statutory definitions usually control the meaning of statutory words, then proceeded

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<sup>59</sup> *Id.* at \*3-4.

<sup>60</sup> *Id.* at \*5.

<sup>61</sup> *Bussing v. COR Clearing, L.L.C.*, No. 8:12-CV-238, 2014 WL 2111207, at \*1 (D. Neb. May 21, 2014) *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

<sup>62</sup> *Id.* at \*6.

<sup>63</sup> *Id.* at \*7.

<sup>64</sup> *Id.* at \*15.

<sup>65</sup> *Id.* at \*6.

<sup>66</sup> *Bussing v. COR Clearing, L.L.C.*, No. 8:12-CV-238, 2014 WL 2111207, at \*16 (D. Neb. May 21, 2014) *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

to read the anti-retaliation provision “using the word ‘whistleblower’ in its everyday sense.”<sup>67</sup> The court cited the Merriam-Webster Online Dictionary and the Black’s Law Dictionary and noted that, in its everyday use, a whistleblower is “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.”<sup>68</sup> The court opined “if this reading of the term ‘whistleblower’ is applied to the anti-retaliation provision—while maintaining the statutory definition for the other subsections, which deal solely with the bounty program—all parts of the statute fit together into a harmonious and coherent whole.”<sup>69</sup> The District Court justified its method by stating: “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,”<sup>70</sup> and noted that a failure to do so would render the anti-retaliation provision “insignificant, and its purpose—to shield a broad range of employee disclosures—[would] be thwarted.”<sup>71</sup>

A majority of district courts have reached this same result by plugging the statutory definition of whistleblower into the substantive anti-retaliation provision. Courts doing so find the resulting conflict to render the Whistleblower Program ambiguous. Courts find ambiguity because a literal reading of the definition of the term whistleblower, “any individual who provides ... information relating to a violation of the securities laws to the Commission,”<sup>72</sup> into the anti-retaliation provision, which protects whistleblowers who make disclosures to individuals or entities other than the SEC, potentially renders the anti-retaliation provision superfluous.<sup>73</sup> In *Rosenblum*

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<sup>67</sup> *Id.* at \*11.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at \*11-12.

<sup>70</sup> *Id.*

<sup>71</sup> *Bussing v. COR Clearing, L.L.C.*, No. 8:12-CV-238, 2014 WL 2111207, at \*11 (D. Neb. May 21, 2014) *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

<sup>72</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>73</sup> *See* 12 U.S.C. § 5302 (2008) (setting forth severability clause of Dodd-Frank).

*v. Thomson Reuters (Markets) L.L.C.*,<sup>74</sup> a case which adequately summarizes the view held by a majority of district courts, the Southern District of New York opined, when considering the Dodd-Frank Whistleblower Program “as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement.”<sup>75</sup> There, an employee was allegedly harassed and ultimately terminated after informing his supervisors, as well as the Federal Bureau of Investigation (FBI), of a potential securities law violation.<sup>76</sup> Despite not notifying the SEC, the court found that SOX protected disclosures of this type, thus the employee plausibly stated protected activity under Dodd-Frank.<sup>77</sup> This caused the court to declare the Whistleblower Program ambiguous.<sup>78</sup> Next, the court found it appropriate to consider the SEC’s interpretation of the statute and regulations thereunder.<sup>79</sup> The court then stated “the 2011 rule promulgated by the SEC, which was given authority by Congress to implement [the Whistleblower Program], does not require a report to the SEC in order to obtain whistleblower protection.”<sup>80</sup>

## **2. Courts Finding the Whistleblower Program Unambiguous in its Requirement of Disclosure to the SEC**

The Fifth Circuit, in *Asadi v. G.E. Energy (USA), L.L.C.*,<sup>81</sup> also found the Whistleblower Program to be unambiguous, but unlike the Southern District of New York in *Egan v. TradingScreen, Inc.*,<sup>82</sup> nor the Federal District Court of Nebraska in *Bussing v. COR Clearing*,

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<sup>74</sup> *Rosenblum v. Thomson Reuters (Markets) L.L.C.*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013).

<sup>75</sup> *Id.* at 147-48.

<sup>76</sup> *Id.* at 145.

<sup>77</sup> *Id.* at 148.

<sup>78</sup> *Id.* at 146.

<sup>79</sup> *Rosenblum v. Thomson Reuters (Markets) L.L.C.*, 984 F. Supp. 2d 141, 149 (S.D.N.Y. 2013).

<sup>80</sup> *Id.* at 148.

<sup>81</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 620 (5th Cir. 2013).

<sup>82</sup> *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*1 (S.D.N.Y. May 4, 2011).

L.L.C.,<sup>83</sup> the Fifth Circuit found the statute, “standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a whistleblower for purposes of the anti-retaliation provision.”<sup>84</sup> In *Asadi v. G.E. Energy (USA), L.L.C.*, an employee served as G.E. Energy’s Iraq Country Executive in Amman, Jordan.<sup>85</sup> When Iraqi officials informed the employee “of their concern that GE Energy hired a woman closely associated with a senior Iraqi official to curry favor with that official in negotiating a lucrative joint venture agreement,”<sup>86</sup> the employee reported the potential Foreign Corrupt Practices Act (FCPA) violation to his supervisor as well as a G.E. Energy ombudsperson.<sup>87</sup> Thereafter, the employee allegedly received a negative performance review, was demoted, and eventually was terminated.<sup>88</sup> In finding the Whistleblower Program unambiguous, the court stated that the statutory language answers two questions: “(1) who is protected; and (2) what actions constitute protected activity.”<sup>89</sup> The court also found “under the plain language and structure of Dodd–Frank, there are not conflicting definitions of whistleblower.”<sup>90</sup> The Fifth Circuit decided that the third category of disclosures covered by the anti-retaliation provision<sup>91</sup> was not rendered superfluous because it would still protect individuals who first filed a complaint with the SEC, then experienced retaliation for required or protected disclosures under the securities laws, at a time when the employer lacked knowledge of the employee’s disclosure to the SEC.<sup>92</sup>

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<sup>83</sup> *Bussing v. COR Clearing, L.L.C.*, No. 8:12-CV-238, 2014 WL 2111207, at \*1 (D. Neb. May 21, 2014) *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

<sup>84</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013).

<sup>85</sup> *Id.* at 621.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013).

<sup>90</sup> *Id.* at 626.

<sup>91</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>92</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-628 (5th Cir. 2013).

Likewise, the Northern District of California, in *Banko v. Apple Inc.*,<sup>93</sup> followed the Fifth Circuit's *Asadi v. G.E. Energy (USA), L.L.C.*<sup>94</sup> holding and determined Dodd-Frank only affords whistleblower protection to individuals who meet the definition of whistleblower through disclosing information directly to the SEC.<sup>95</sup> In *Banko v. Apple Inc.*, an employee gained knowledge of a co-worker's retention incentives and reimbursement for personal expenses which potentially violated applicable securities laws.<sup>96</sup> The employee reported the conduct to the company's human resources department, and then the co-worker was terminated.<sup>97</sup> Shortly thereafter, the reporting employee experienced animosity from other co-workers, and then the reporting employee was terminated.<sup>98</sup> The court found that whistleblower protection is only available to individuals who meet the statutory definition of a whistleblower because "a contrary conclusion would ignore several canons of statutory interpretation."<sup>99</sup> The court stated that the words "to the Commission,"<sup>100</sup> within the whistleblower definition, would violate the surplusage canon if ignored, and that allowing individuals who do not satisfy the definition to bring a claim would contradict the anti-retaliation provision's title: "Protection of Whistleblowers."<sup>101</sup>

#### IV. Overview of Analysis

Employer anti-retaliation protection should only be available to whistleblowers, i.e. only if made by individuals who provide "information ... to the Commission, *in a manner established, by rule or regulation, by the Commission.*"<sup>102</sup> This notion reaches the same result as both the Southern

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<sup>93</sup> *Banko v. Apple, Inc.*, No. 13-02977 RS, 2013 WL 7394596, at \*1 (N.D. Cal. Sept. 27, 2013).

<sup>94</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-628 (5th Cir. 2013).

<sup>95</sup> *Banko v. Apple, Inc.*, No. 13-02977 RS, 2013 WL 7394596, at \*1 (N.D. Cal. Sept. 27, 2013).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*3-4.

<sup>98</sup> *Id.* at \*4.

<sup>99</sup> *Id.* at \*7.

<sup>100</sup> *Id.* at \*8.

<sup>101</sup> *Id.*

<sup>102</sup> 15 U.S.C. § 78u-6(a)(6) (emphasis added).

District of New York’s holding in *Egan v. TradingScreen, Inc.*, which held the “contradictory provisions of the Dodd-Frank Act are best harmonized by reading the anti-retaliation provision as a narrow exception to the whistleblower definition,”<sup>103</sup> and also the Federal District Court of Nebraska’s opinion in *Bussing v. COR Clearing, L.L.C.*, which construed the statute with dictionary definitions of whistleblower, then found protection for internal reports “flows from the statute itself.”<sup>104</sup> Unlike in *Egan v. TradingScreen, Inc.*, where the court could not defer to SEC regulations because the case was decided six days before the regulations were finalized, and dissimilar to *Bussing v. COR Clearing, L.L.C.*, which disregarded the statutory definition of whistleblower and instead deferred to two dictionaries,<sup>105</sup> the protection of persons who report to entities other than the SEC is warranted when Dodd-Frank, its predecessors, amendments and concomitant authorizations, as well as the regulations thereunder, are read as a whole. While the anti-retaliation provision protects whistleblowers who make disclosures to entities other than the SEC, these disclosures are still made by persons who satisfy the statutory definition of whistleblower. This is so because Congress explicitly delegated authority to the SEC to establish “by rule or regulation”<sup>106</sup> the manner in which it would receive information from whistleblowers. This authorization is directly found in the statutory definition of whistleblower.<sup>107</sup> This argument does not have known support from sources other than Dodd-Frank and the SEC rules and regulations thereunder.

#### **A. Transparent Analysis of the SEC’s Judicature**

Congress explicitly authorized the SEC to make rules and regulations to “classify persons ... reports,”<sup>108</sup> and other matters within the SEC’s jurisdiction and to “prescribe greater, lesser, or

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<sup>103</sup> *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. May 4, 2011).

<sup>104</sup> *Id.*

<sup>105</sup> *Bussing v. COR Clearing, L.L.C.*, No. 8:12-CV-238, 2014 WL 2111207, at \*11 (D. Neb. May 21, 2014) *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

<sup>106</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>107</sup> *Id.*

<sup>108</sup> 15 U.S.C. § 78w(a)(1) (2000).

different requirements for different classes thereof.”<sup>109</sup> For purposes of the anti-retaliation provision, the authority to “classify persons” should include the power to designate persons who may be considered whistleblowers, and the authority to “classify reports” should provide the SEC with authority to designate internally filed reports as “subject to the jurisdiction of the Commission.”<sup>110</sup> Under the SEC regulations, persons are only required to directly provide the Commission with information for purposes of the bounty program;<sup>111</sup> for purposes of the anti-retaliation provision, protection is afforded where information is provided in a manner consistent with that provision.<sup>112</sup> Dodd-Frank is unambiguous in this regard. This outcome is similarly reached by finding the anti-retaliation provision to conflict with the statutory definition of whistleblower, then deferring to the SEC. Because this result encourages whistleblowing, courts in this camp further the basic policy behind the very existence of securities regulation, which is to improve transparency within the financial markets; achieving transparency is also the purpose of the Dodd-Frank Act.<sup>113</sup>

As previously noted, the Whistleblower Program defines a whistleblower 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*.”<sup>114</sup> The Commission established the manner:

To be considered a whistleblower under [the Whistleblower Program], you must submit your information about a possible securities law violation by either of these methods:

(1) Online, through the Commission’s website located at [www.sec.gov](http://www.sec.gov); or

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<sup>109</sup> *Id.*

<sup>110</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>111</sup> 17 C.F.R. § 240.21F-2(a)(2).

<sup>112</sup> 17 C.F.R. § 240.21F-2(b)(1)(i)-(ii).

<sup>113</sup> The Dodd-Frank Act declares its purpose: “To promote the financial stability of the United States by improving ... transparency in the financial system ... to protect consumers from abusive financial services practices, and for other purposes.” The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>114</sup> 15 U.S.C. § 78u-6(a)(6) (emphasis added).

(2) By mailing or faxing a Form TCR ... to the SEC Office of the Whistleblower.<sup>115</sup>

Form TCR stands for “Tips, Complaints, and Referrals.”<sup>116</sup> Separate government entities may use this form when referring matters to the SEC. The SEC has also provided that “the Commission may, in its sole discretion, waive any of these procedures based upon a showing of extraordinary circumstances.”<sup>117</sup> Congress provided the SEC with authority to establish regulations which implement Dodd-Frank. This authority included establishing the manner in which the SEC would receive information. Under this authority, the SEC issued a regulation which established the manner in which it would receive reports, and also issued a regulation which reserved its right to change the manner in which it would receive reports. Therefore, the manner in which the SEC will receive reports remains within the SEC’s discretion. When the Congressional authorization contained within the definition of whistleblower along with the regulations are viewed in the aggregate, the SEC has implied that one manner in which it will accept information is through referrals from separate agencies; under extraordinary circumstances, the SEC may also waive this requirement.<sup>118</sup> As previously mentioned, the SEC has provided: “the anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.”<sup>119</sup> Therefore, if an extraordinary circumstance is not found, a person not satisfying the aforementioned regulations should still be considered a whistleblower, and the anti-retaliation provisions should still provide protection, despite the fact that the whistleblower cannot receive an award. Further SEC rulemaking authority is explicit in the Whistleblower Program:

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<sup>115</sup> 17 C.F.R. § 240.21F-9 (2015) (emphasis added).

<sup>116</sup> 17 C.F.R. § 249.1800 (2015).

<sup>117</sup> 17 C.F.R. § 240.21F-8 (2014).

<sup>118</sup> 17 C.F.R. § 240.21F-2(b)(1)(iii).

<sup>119</sup> *Id.*

The Commission *shall have the authority* to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section *consistent with the purposes* of this section.<sup>120</sup>

The entire purpose of the whistleblowing strategy is to improve transparency in the financial system.<sup>121</sup> Restricting the definition of whistleblowers to only those individuals who report violations of the securities laws to the Commission becomes an unacceptable impediment to improving transparency in the financial system because various violations of the securities laws do not require direct reporting<sup>122</sup> of violations to the SEC.<sup>123</sup>

Similarly, because Congress included disclosure methods within the anti-retaliation provision which do not require direct disclosure to the SEC, legislative intent to protect persons who do not report directly to the SEC may be understood through the statutory text. This remains true despite the statutory definition of whistleblower. Specifically, the anti-retaliation provision prohibits employer retaliation by reason of three distinct whistleblower actions.<sup>124</sup> Only the first subsection explicitly prohibits employer discrimination against whistleblowers who provide information to the Commission.<sup>125</sup> The second subsection prohibits discrimination against whistleblowers “in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission.”<sup>126</sup> Therefore a whistleblower may receive protection for assisting the Commission with information provided by some other person or entity. The third

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<sup>120</sup> 15 U.S.C. § 78u-6(j) (emphasis added).

<sup>121</sup> See 15 U.S.C. § 78b (2010):

[T]ransactions in securities ... are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions ... to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities ... and to impose requirements necessary to make such regulation and control reasonably complete and effective ... and to insure the maintenance of fair and honest markets in such transactions.

<sup>122</sup> See, e.g., 17 C.F.R. §270.38a-1(a)(4) (2014) (requiring the chief compliance officer of a mutual fund to report the details of any material compliance matters to the fund’s board).

<sup>123</sup> Brief of the Securities and Exchange Commission, Amicus Curiae in Support of the Appellant, Berman, v. Neo@Ogilvy L.L.C., No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at 18 (S.D.N.Y. Dec. 5, 2014).

<sup>124</sup> 15 U.S.C. § 78u-6(h)(1)(A).

<sup>125</sup> 15 U.S.C. § 78u-6(h)(1)(A)(i).

<sup>126</sup> 15 U.S.C. § 78u-6(h)(1)(A)(ii).

subsection prohibits employer discrimination against whistleblowers who make required or protected disclosures which fall into one of four categories, and many of these disclosures are permissibly made to entities other than the SEC.<sup>127</sup> Under the first category, the anti-retaliation provision incorporates “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.”<sup>128</sup> Thus, the statutory language suggests that persons who notify entities pursuant to SOX reporting procedures should be afforded Dodd-Frank anti-retaliation protections. For example, in certain situations, SOX protects disclosures made to “a person with supervisory authority over the employee.”<sup>129</sup> Thus, persons who receive protection under SOX should also receive anti-retaliation protection under Dodd-Frank.

Whistleblowers making required or protected disclosures under “this chapter, including section 78j-1(m) of this title”<sup>130</sup> fall into the second category of the third subsection of the anti-retaliation provision. Section 78j-1(m) specifies audit reporting requirements, while the Whistleblower Program specifically disallows awards “to any *whistleblower* who gains the information through the performance of an audit of financial statements.”<sup>131</sup> This inclusion within the anti-retaliation provision evidences the fact that one may be a whistleblower for purposes of the anti-retaliation provision while one may not concurrently be privy to receive an award. Furthermore, section 78j-1 requires audit committees to establish procedures for “the confidential, *anonymous submission by employees* ... of concerns regarding questionable accounting or auditing matters.”<sup>132</sup> Notifications submitted pursuant to required procedures should constitute protected

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<sup>127</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>128</sup> *Id.*

<sup>129</sup> 18 U.S.C. § 1514A.

<sup>130</sup> 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii).

<sup>131</sup> 15 U.S.C. § 78u-6(c)(2)(c) (emphasis added).

<sup>132</sup> 15 U.S.C. § 78j-1(m)(4)(b) (emphasis added).

disclosures and therefore should be considered lawful acts “done by the whistleblower,”<sup>133</sup> retaliation for which is prohibited.

The third category within the third subsection of the anti-retaliation provision specifies disclosures made under “section 1513(e) of Title 18.”<sup>134</sup> Under section 1513(e), “whoever knowingly, with the intent to retaliate,” takes any harmful action “for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense,”<sup>135</sup> is in violation of the statute. This situation came to fruition in *Rosenblum v. Thomson Reuters (Markets) L.L.C.*,<sup>136</sup> where an employee notified an FBI agent of potential securities violations and then received protection under the anti-retaliation provision. The anti-retaliation provision explicitly includes disclosures made to law enforcement officers; this further evidences Congress’s intent not to restrict the definition of whistleblower.

## **B. Case Law Analysis**

### **1. District Court Cases: *Egan v. TradingScreen, Inc.*, and *Bussing v. COR Clearing, L.L.C.***

Under the explicit statutory language, anti-retaliation protection is only available to individuals who provide “information ... to the Commission, *in a manner established*, by rule or regulation, *by the Commission.*”<sup>137</sup> Thus, the statute may be interpreted to support my interpretation; amending the statute is unnecessary, but would provide clarity and prevent dispensable litigation. In the split among the courts, my interpretation reaches the same conclusion as courts which find the anti-retaliation provision to constitute an implied exception to the statutory whistleblower definition. These decisions include the Southern District of New York in *Egan v.*

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<sup>133</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>134</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>135</sup> 18 U.S.C. § 1513(e).

<sup>136</sup> *Rosenblum v. Thomson Reuters (Markets) L.L.C.*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013).

<sup>137</sup> 15 U.S.C. § 78u-6(a)(6) (emphasis added).

*TradingScreen, Inc.*,<sup>138</sup> and the Federal District Court of Nebraska's in *Bussing v. COR Clearing, L.L.C.*<sup>139</sup> My interpretation is also in accordance with the majority of district court decisions, including the Southern District of New York in *Rosenblum v. Thomson Reuters (Markets) L.L.C.*<sup>140</sup> Courts in this camp find the Whistleblower Program to be ambiguous and then defer to SEC regulations.

Further analysis of circuit cases reveals the imminence of a circuit split. One such case which nearly aligned with the majority of district courts was *Khazin v. TD Ameritrade Holding Corp.*,<sup>141</sup> where an employee discovered that certain products were priced in a manner which potentially violated relevant securities regulation, then proceeded to inform a company supervisor instead of the SEC.<sup>142</sup> On appeal, the Third Circuit referred to this circumstance as a “Dodd–Frank cause of action,”<sup>143</sup> but the issue before the court concerned whether or not Dodd-Frank amended the SOX anti-arbitration provision. The Third Circuit held: “The text and structure of Dodd–Frank compel the conclusion that whistleblower retaliation claims ... are not exempt from predispute arbitration agreements.”<sup>144</sup> This holding suggests the court would have found the person to be a statutory whistleblower, or would have deferred to the SEC regulations. Because the court did not affirm the decision below: “the Dodd–Frank Act is ambiguous with respect to who qualifies as a whistleblower for purposes of the anti-retaliation provision of the statute” and “the SEC's rule is a

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<sup>138</sup> *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. May 4, 2011).

<sup>139</sup> *Bussing v. COR Clearing, L.L.C.*, No. 8:12-CV-238, 2014 WL 2111207, at \*1 (D. Neb. May 21, 2014) *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

<sup>140</sup> *Rosenblum v. Thomson Reuters (Markets) L.L.C.*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013).

<sup>141</sup> *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703, at \*1 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014).

<sup>142</sup> *Id.* at \*2.

<sup>143</sup> *Id.* at \*4.

<sup>144</sup> *Id.* at \*5.

permissible construction of the statute and warrants judicial deference,”<sup>145</sup> the Third Circuit’s stance on the issue remains speculative.<sup>146</sup>

A Second Circuit case also provides insight. In *Meng–Lin Liu v. Siemens A. G.*,<sup>147</sup> the Second Circuit affirmed a district court’s grant of an employer’s motion to dismiss because the anti-retaliation provision does not apply extraterritorially.<sup>148</sup> There, an employee of a Chinese subsidiary whose German parent listed securities on an American exchange brought FCPA violations to the attention of his supervisors in China and Germany.<sup>149</sup> The employee then allegedly experienced retaliation.<sup>150</sup> Although the FCPA is situated among the securities laws, the court declined to determine whether “internal reporting of alleged misconduct, with or without his subsequent disclosures to the SEC, qualified him as a whistleblower under the Dodd–Frank Act.”<sup>151</sup> Here, the District Court had previously held that section 806 of SOX does not require or protect disclosures of FCPA violations.<sup>152</sup> Although withholding judgment on the issue of the direct conflict within the Whistleblower Program of Dodd-Frank, the Second Circuit noted the most direct consequence of the SEC regulations thereunder is that “anti-retaliation provisions protect even whistleblowers who, for various reasons enumerated in the statute, cannot collect a bounty.”<sup>153</sup> The court stated that this “broadly suggests a separation between the conditions triggering the anti-retaliation provision and those triggering the bounty provision.”<sup>154</sup> Whether or not the Second Circuit would have deferred

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<sup>145</sup> *Id.* at \*6.

<sup>146</sup> *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703, at \*6 (D.N.J. Mar. 11, 2014), *aff’d on other grounds*, 773 F.3d 488 (3d Cir. 2014).

<sup>147</sup> *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325 (S.D.N.Y. 2013).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 330.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 333-334.

<sup>152</sup> *See* 18 U.S.C. § 1514A.

<sup>153</sup> *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 334 (S.D.N.Y. 2013).

<sup>154</sup> *Id.*

to the SEC’s interpretation, that a person may be protected by the anti-retaliation provision without being eligible for an award, also remains speculative.

## **2. The Fifth Circuit Wrongly Decided *Asadi v. G.E. Energy (USA)***

The Fifth Circuit, in *Asadi v. G.E. Energy (USA), L.L.C.*, held the Whistleblower Program “standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a whistleblower for purposes of the anti-retaliation provision.”<sup>155</sup> The court found that the anti-retaliation provision did not cause the Whistleblower Program to be ambiguous.<sup>156</sup> The court demonstrated its view, that the anti-retaliation provision was not superfluous, through a hypothetical scenario: if an employee simultaneously files one report internally and one with the SEC, the employee would receive protection under the anti-retaliation provision even if the employer only knows of the existence of the internally filed report when it discriminates against the employee.<sup>157</sup> The anti-retaliation provision would provide protection because the reporting employee would meet the statutory definition of a whistleblower as soon as any report is filed with the SEC. This case was wrongly decided. Under the court’s rationale, whether or not an employee receives anti-retaliation protection based on an internal report depends upon the existence of an external SEC report. This is mistaken because if an employer is unaware of a second disclosure, “any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent.”<sup>158</sup> This construction would impermissibly impose strict liability on an employer through excluding the necessary element of employer intent within a retaliation claim.<sup>159</sup>

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<sup>155</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 620 (5th Cir. 2013).

<sup>156</sup> *Id.* at 623.

<sup>157</sup> *Id.* at 627-628.

<sup>158</sup> Brief of the Securities and Exchange Commission, Amicus Curiae in Support of the Appellant, *Berman, v. Neo@Ogilvy L.L.C.*, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583, at 33 (S.D.N.Y. Dec. 5, 2014).

<sup>159</sup> *Id.*

The Southern District of New York adopted the *Asadi v. G.E. Energy (USA), L.L.C.* holding in *Berman v. Neo@Ogilvy L.L.C.*<sup>160</sup> There, the finance director of Neo@Ogilvy North America, a subsidiary of a publicly-traded foreign corporation, was responsible for compliance with Generally Acceptable Accounting Principles (GAAP) and proper financial reporting.<sup>161</sup> The subsidiary was obligated under U.S. securities laws to detect and internally report “accounting irregularities, fraud and material compliance failures.”<sup>162</sup> The District Court focused its attention on the reporting requirements contained in two other whistleblower laws passed alongside the Whistleblower Program.<sup>163</sup> In the court’s opinion, under the first law, contained in an amendment to the Commodity Exchange Act (CEA), Congress prohibited employers from retaliating against employees for reporting violations of the CEA, and “extended anti-retaliation protection only to those individuals who had reported such violations to the Commodity Futures Trading Commission”<sup>164</sup> (CFTC) or had “assisted in an investigation or judicial or administrative action of the CFTC based upon such information.”<sup>165</sup>

The protections mentioned mirror the first two subsections of the anti-retaliation provision of the Whistleblower Program. The court also commented that under the second law, contained in another section of Dodd–Frank, employers are prohibited from retaliating against employees who provide information about violations of any provision of law subject to the jurisdiction of the Bureau of Consumer Financial Protection (CFPB).<sup>166</sup> The court stated that under that law, “an

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<sup>160</sup> *Berman v. Neo@Ogilvy L.L.C.*, No. 14-CV-00523 GHW SN, 2014 WL 6865718, at \*1 (S.D.N.Y. Aug. 15, 2014) *report and recommendation adopted in part, rejected in part*, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583 (S.D.N.Y. Dec. 5, 2014).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at \*1-2.

<sup>163</sup> *Id.* at \*5.

<sup>164</sup> 7 U.S.C. § 26(h)(1)(A) (2010).

<sup>165</sup> *Id.*

<sup>166</sup> *Berman v. Neo@Ogilvy L.L.C.*, No. 14-CV-00523 GHW SN, 2014 WL 6865718, at \*5 (S.D.N.Y. Aug. 15, 2014) *report and recommendation adopted in part, rejected in part*, No. 1:14-CV-523-GHW-SN, 2014 WL 6860583 (S.D.N.Y. Dec. 5, 2014).

employee must first file a complaint with the Secretary of Labor and exhaust an administrative process before bringing a private action in district court.”<sup>167</sup> The District Court then opined that “allowing a private right of action without first requiring contact with a government agency ... seems ... extraordinary.”<sup>168</sup>

The provision<sup>169</sup> of the CFTC to which the Southern District of New York referred, in *Berman v. Neo@Ogilvy L.L.C.*, contains nearly identical language to the whistleblower protection provision at issue, and under the CFTC statute, Congress explicitly stated “nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law.”<sup>170</sup> Likewise, while the second law, which concerns information subject to the jurisdiction of the CFBP, provides preliminary authority to the Secretary of Labor and requires exhaustion of an administrative process before a claimant may bring a private action, the District Court failed to recognize that the statute also provides a process where the Secretary fails to act.<sup>171</sup> Under the CFPB provision, after a certain period of time has lapsed a “complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States having jurisdiction.”<sup>172</sup> This differs from the Dodd-Frank Whistleblower Program at issue because, unlike under the CFPB provision, here individuals are given standing for private causes of action in the first instance.<sup>173</sup>

## V. Incentives and Compliance

If future circuit opinions are plentiful and similarly reach the differing outcomes illustrated in the current district court and Fifth Circuit case law, whistleblowers would not retain incentives

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at \*5-6.

<sup>169</sup> 12 U.S.C. § 5567(c) (2010).

<sup>170</sup> 7 U.S.C. § 26(h)(3).

<sup>171</sup> 12 U.S.C. § 5567.

<sup>172</sup> *Id.*

<sup>173</sup> 15 U.S.C. § 78u-6(h)(1)(B)(i).

to report initially through internal means. Currently, the SEC provides monetary incentives for individuals to report internally in the first instance, if appropriate.<sup>174</sup> Whistleblowers who initially file internal reports should automatically be afforded Dodd-Frank Whistleblower Program anti-retaliation protection because the report should be viewed as “protected” under the second category within the third subsection of disclosures enumerated within the anti-retaliation provision, which includes disclosures made under “this chapter, including section 78j-1(m) of this title.”<sup>175</sup> Because the SEC incentivizes whistleblowers initially to report internally, disclosures made pursuant to incentives are arguably made under “this chapter.”<sup>176</sup>

Incentives for internal compliance serve to enhance the SEC’s enforcement efforts because a company may have better insight into the claim and may make its findings available for the SEC.<sup>177</sup> Such screening of reports through internal means may limit false or frivolous claims, provide the entity an opportunity to resolve the violation and report its resolution to the Commission, and allow the Commission to use its resources more efficiently.<sup>178</sup> Thus, allowing individuals initially to report internally provides a mechanism by which erroneous tips may be eliminated, and also allows the SEC to avoid the incurring of costs to process and validate information.<sup>179</sup>

In determining the amount of an award to be paid, one SEC regulation expressly incentivizes the utilization of a company’s internal reporting system: “Factors that may increase the size of an award include ... the extent the whistleblower participated in a company’s internal compliance

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<sup>174</sup> 17 C.F.R. § 240.21F-4(c)(3) (2014) (providing that if an employee reports internally, and the company then provides information arising out of that report to the SEC, the employee will be eligible for a bounty as the original source of not only the information the employee provided to the company, but the information the company provided to the SEC).

<sup>175</sup> 15 U.S.C. § 78u-6(h)(1)(A)(iii).

<sup>176</sup> *Id.*

<sup>177</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,326-34,359 (June 13, 2011).

<sup>178</sup> Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,516 (Nov. 17, 2010).

<sup>179</sup> *Id.*

systems.”<sup>180</sup> The regulation also discourages the undermining of internal compliance: “Factors that may decrease the size of an award include ... any interference with or undermining of a company’s internal compliance systems.”<sup>181</sup>

Although the SEC encourages internal reporting in the first instance, a Company may be without recourse after it receives information through an internal report because one SEC rule “prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC.”<sup>182</sup> The SEC has asserted that an effective compliance program should allow for confidential submissions through channels which may include anonymous hotlines and ombudsmen.<sup>183</sup> The program should also include an effective process to investigate and respond to submissions.<sup>184</sup> After all, internal investigations “can be among the most powerful weapons in the law enforcement arsenal.”<sup>185</sup>

Admittedly, in practice the regulations may not actually serve to incentivize forward thinking whistleblowers to pursue a course of conduct which will, years later, increase the amount of their potential award. More than likely, if the only question at issue is the amount of an award to be paid, the SEC has already received information through some means and therefore the reporting person would satisfy the statutory definition of whistleblower. One practical effect of the anti-retaliation provision is that it prohibits employer retaliation by placing employers on notice that they may not retaliate against employees who engage in whistleblowing activities. In a situation such as the strict liability scenario proposed by the Fifth Circuit in *Asadi v. G.E. Energy (USA)*, an

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<sup>180</sup> 17 C.F.R. § 240.21F-6 (2014).

<sup>181</sup> *Id.*

<sup>182</sup> 17 C.F.R. § 240.21F-17(a) (2015).

<sup>183</sup> *A Resource Guide to the U.S. Foreign Corrupt Practices Act, By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission.* Available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

employer may be inclined to terminate an employee immediately after it receives an internal report because the necessary retaliatory intent element would not be present. An employer should do so in anticipation of losing this ability after it acquires knowledge of the SEC's involvement. If internal reports made in conformity with the anti-retaliation provision were unequivocally found to have been made by persons who satisfy the statutory definition of whistleblower, then employers would instantly be put on notice that "just cause," other than the fact that the employee betrayed the company through whistleblowing, must first exist before the whistleblower is terminated.

## VI. Conclusion

In conclusion, the potential ambiguity of the Whistleblower Program has caused courts to interpret the statute inconsistently, and judicial opinion to conflict. One possible reading of the statute holds that employer anti-retaliation protection should only be available to whistleblowers who provide "information ... to the Commission."<sup>186</sup> This reading is unsound because it causes the anti-retaliation provision to become superfluous, and is inconsistent with the purposes of security regulation. My interpretation of the statute and regulations thereunder reveals that employer anti-retaliation protection should only be available to whistleblowers who provide "information ... to the Commission, *in a manner established, by rule or regulation, by the Commission.*"<sup>187</sup> Under my theory, the Commission was given direct authority to establish the manner in which it would receive information, and the Commission established this manner through various regulations which implement Dodd-Frank.

Two of the three judicial approaches in existence reach conclusions which are in line with my theory. The first consists of a minority of courts which find the Whistleblower Program unambiguous, and also hold that it protects whistleblowers who make disclosures enunciated in the

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<sup>186</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>187</sup> *Id.*

anti-retaliation provision. Here, disclosures include those made to entities other than the SEC. The second consists of a majority of district courts which find the Whistleblower Program ambiguous, in that it contains provisions which directly conflict. Here, courts defer to the SEC's interpretation. The SEC's interpretation mirrors the first judicial approach which is in line with my theory. My theory differs in that it finds the Whistleblower Program to provide protection to individuals so long as the disclosure is within the jurisdiction of the SEC, and at some point in time the SEC assents that protection should be available. This causes disclosures explicitly provided for in the anti-retaliation provision to provide protection to whistleblowers because the SEC has issued regulations, for purposes of anti-retaliation protection, which incorporate anti-retaliation provision disclosures into the statutory definition of whistleblower. Because the SEC has authority to reclassify persons and reports, and has stated that it reserves the right to suspend requirements during extraordinary circumstances, the SEC possesses the power to extend anti-retaliation protection to any person who makes any report, as long as the disclosure is within the SEC's jurisdiction.

Lastly, the SEC provides incentives for companies to establish internal compliance programs, and also rewards employees who initially report securities violations through internal means. Typically, compliance programs also provide incentives for employees to report internally. This lowers the overall risk of penalties a company may face, as well as lowers costs the SEC must pay to investigate complaints. If whistleblowers who make internal reports concerning securities laws violations were not protected by the Dodd-Frank anti-retaliation provision, then employees would be discouraged from reporting internally. This may lead to an overall decline in corporate compliance as well as an increase of costs for both the company and the SEC. This risk constitutes even greater reason to find the Dodd-Frank Whistleblower Program unambiguous. Companies,

whistleblowers and the SEC all benefit where whistleblowers who notify entities other than the SEC concerning information which is within the jurisdiction of the Commission, are safeguarded by the anti-retaliation protection afforded under Dodd-Frank.