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Clarifying What is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank

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I. INTRODUCTION

"*Honesty is the best policy—when there is the most money in it.*"[1]

The Securities and Exchange Commission ("SEC") seems to fully support this statement. The 2014 fiscal year was a momentous one for whistleblower actions with over 3,600 whistleblower tips received and a record-breaking whistleblower award.[2] In September 2014, the SEC announced an award of more than $30 million,[3] more than double the previous record of $14 million in 2013.[4] The Chief of the SEC Office of the Whistleblower, Sean McKessy, "hope[s] that awards like this one will incentivize company and industry insiders, or others who may have knowledge of possible federal securities law violations, both in the [United States] and abroad, to come forward and report their information promptly to the Commission."[5]

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"),[6] Congress sought to increase corporate accountability and transparency by incentivizing the reporting of potential securities law violations.[7] To do this, the whistleblower program provides for "monetary awards, retaliation protection, and

1. *Mark Twain Tells of His Business Ventures*, N.Y. TIMES, Mar. 31, 1901, at 2.

2. OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM'N., 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1–3 (2014), *available at* http://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

3. Press Release, U.S. Sec. & Exch. Comm'n., SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VC9e0PldXgk.

4. Rachel Louise Ensign, *SEC to Pay $30 Million Whistleblower Award, Its Largest Yet*, WALL ST. J. (Sept. 22, 2014), http://online.wsj.com/articles/sec-to-pay-30-million-whistleblower-award-its-largest-yet-1411406612.

5. OFFICE OF THE WHISTLEBLOWER, *supra* note 2, at 1.

6. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(h)(1)(A) (2012).

7. S. REP. NO. 111-176, at 38 (2010).

confidentiality protection."[8] It is unclear, however, who is considered a whistleblower under the Dodd-Frank anti-retaliation protections.[9] Courts have split within the last few years over whether a whistleblower must report suspected violations directly to the SEC, or if internal reporting is sufficient to claim the benefits of Dodd-Frank's anti-retaliation provisions.[10] In *Asadi v. G.E. Energy*,[11] the United States Court of Appeals for the Fifth Circuit followed the narrow definition of "whistleblower" found in § 78u–6(a)(6) ("Definition Section") of Dodd-Frank, holding that an employee must report directly to the SEC to be protected by Dodd-Frank's anti-retaliation provisions. This narrow Definition Section directly conflicts with § 78u–6(h)(1)(A)(iii) ("Anti-retaliation Section"),[12] which permits a civil action by an employee for an adverse employment action if the employee has made an internal disclosure protected under the Sarbanes-Oxley Act of 2002 ("SOX").[13] SOX provides protection for whistleblowers who report only internally and not to the SEC.[14] To reconcile this conflict, district courts in the First, Second, Third, Sixth, and Eighth Circuits held that the Anti-retaliation Section extends protections under Dodd-Frank to those who choose to report internally and not directly to the SEC.[15] The Fifth Circuit, however, is the only circuit court that has addressed who is protected by Dodd-Frank's whistleblower provisions.[16] Thus, currently

8. OFFICE OF THE WHISTLEBLOWER, *supra* note 2, at 1.

9. Steve Kardell, *2014: A Big Year in Whistleblower Laws*, JDSUPRA BUS. ADVISOR (June 5, 2014), http://www.jdsupra.com/legalnews/2014-a-big-year-in-whistleblower-laws-52978/.

10. *Id.*

11. 720 F.3d 620, 625–26 (5th Cir. 2013).

12. This Note focuses on one of three categories of protected actions listed in the anti-retaliation provisions found in Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 922(h)(1)(A), codified at 15 U.S.C. § 78u-6(h)(1)(A) (2012). The Anti-retaliation Section refers to only Dodd-Frank § 922(h)(1)(A)(iii), codified at 15 U.S.C. § 78u-6(h)(1)(A)(iii).

13. Sarbanes-Oxley Act of 2002 (SOX) § 806, 18 U.S.C. § 1514A (2012).

14. *Id.*

15. *See* Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519 (S.D.N.Y 2014); Khazin v. TD Ameritrade Holding Corp., No. 13-4149 (SDW) (MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014); Berman v. Neo@Ogilvy LLC, No. 1:14-cv-523-GHW-SN, 2014 U.S. Dist. LEXIS 168840, at *1 (S.D.N.Y. Dec. 4 2014); Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *1 (M.D. Fla. May 12, 2014); Verfuerth v. Orion Energy Sys., No. 14-C-352, 2014 U.S. Dist. LEXIS 156620, at *1 (E.D. Wis. Nov. 4, 2014); Wagner v. Bank of Am. Corp, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *1 (D. Colo. July 19, 2013).

16. The Eighth Circuit declined to hear an interlocutory appeal on the issue and the Second Circuit denied an appeal on other grounds. Bussing v. COR Clearing, LLC, No.

in some jurisdictions, employees must report to the SEC to be protected under the Dodd-Frank whistleblower provisions.[17]

This Note argues that the Fifth Circuit's holding should be disregarded and the definition of a whistleblower should be expanded to include those who report potential securities laws violations internally, in addition to those who report directly to the SEC.[18] This Note proceeds in four parts. Part II explains the differences between the anti-retaliation provisions of SOX and Dodd-Frank.[19] Part III provides an overview of the approach taken by the Fifth Circuit in adopting a restrictive definition of whistleblower in *Asadi*.[20] Part IV discusses how the majority of courts choose not to follow the Fifth Circuit after correctly applying either the two step process set forth in *Chevron v. Natural Resources Defense Council, Inc*.[21] or the new textualism doctrine.[22] Part V concludes with an analysis of the practical implications of a narrow definition for employees, employers' internal compliance programs, and the SEC.[23]

II. THE WHISTLEBLOWER PROVISIONS: SOX AND DODD-FRANK

The Dodd-Frank whistleblower provisions were not Congress's first attempt to protect corporate whistleblowers.[24] Section 806 of SOX provides that "no company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any

8:12-CV-238, 2014 WL 3548278, at *1 (D. Neb. July 17, 2014) (interlocutory appeal denied); Meng-Lin Liu v. Siemens AG, 978 F. Supp. 2d 325 (S.D.N.Y. Oct. 21, 2013) (holding Dodd-Frank does not apply interterritorially). There is currently an appeal in the Third Circuit, where the SEC has filed an amicus brief in favor of overruling the Fifth Circuit's narrow definition of a whistleblower. Brief for the Sec. & Exch. Comm'n, as Amicus Curiae in Support of the Appellant, Safarian v. American DG Energy, No. 14-2734 (3rd Cir. Dec. 12, 2014).

17. *Id.*

18. Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013).

19. *See infra* Part II.

20. *See infra* Part III.

21. 467 U.S. 837 (1984).

22. *See infra* Part IV.

23. *See infra* Part V.

24. Stephen M. Kohn, *Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers*, NAT'L WHISTLEBLOWERS CTR., http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 (last visited Oct. 4, 2014).

lawful act done by the employee."[25] This SOX anti-retaliation provision protects employees of public companies and their subsidiaries[26] who internally report potential securities law violations.[27] Dodd-Frank includes anti-retaliation protections that mirror the SOX protections.[28] Dodd-Frank also created a bounty program,[29] which recently resulted in an over $30 million reward, that provides a monetary incentive for whistleblowers who report directly to the SEC.[30] Under the bounty program, a whistleblower whose original information leads to successful enforcement of the covered judicial or administrative action is entitled to receive between 10% and 30% of the monetary sanctions imposed.[31] Therefore, whistleblowers are more likely to bring a claim under Dodd-Frank because of its plaintiff-friendly benefits.[32]

There are three key differences between SOX and Dodd-Frank that could influence under which law an employee decides to bring a claim.[33] First, under SOX, an employee may be eligible to receive back pay following a retaliatory discharge,[34] while under Dodd-Frank, the

25. Sarbanes-Oxley Act of 2002 (SOX) § 806(a), 18 U.S.C. § 1514A(a) (2012).

26. SOX provisions provide "anti-retaliation protections for employees of *public companies*, subsidiaries whose financial information is included in the consolidated financial statements of public companies, and nationally recognized statistical rating organizations." Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34304 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249) (emphasis added).

27. *See* Meng-Lin Liu v. Siemens AG, 978 F. Supp. 2d 325, 330 (S.D.N.Y. Oct. 21, 2013) (offering whistleblower protection for violations of mail fraud, wire fraud, bank fraud, federal laws relating to fraud against shareholders, or any rule or regulation of the Securities and Exchange Commission); SOX § 806(a)(1)(C), 18 U.S.C. § 1514A(a)(1)(C).

28. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922(h)(1)(A), 15 U.S.C. § 78u-6(h)(1)(A) (2012).

29. The monetary award program is separate from the retaliation protections. It does not require an adverse employment action to receive an award under Dodd-Frank. The anti-retaliation provisions are meant to protect employees, who may be motivated by the reward, that suffer an adverse employment action as a result of coming forward. *See* Dodd-Frank § 922, 15 U.S.C. § 78u-6; OFFICE OF THE WHISTLEBLOWER, *supra* note 2.

30. LINDA SHEN, WEIL, GOTSHALL & MANGES LLP, UPDATE: COURTS CONTINUE TO BE DIVIDED OVER THE SCOPE OF DODD-FRANK'S ANTI-RETALIATION PROTECTIONS 4 (July 2014), *available at* https://interact.weil.com/reaction/mailings/Employer_Update_July_2014.pdf.

31. Dodd-Frank § 922(b)(1), 15 U.S.C. § 78u-6(b)(1).

32. Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. May 21, 2014).

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

34. Back pay damages under are restitutionary damages intended to "make the employee whole." Walton v. Nova Info. Sys., 514 F. Supp. 2d 1031, 1034 (E.D. Tenn. 2007). The back pay awarded is the amount the whistleblower "would have received had their employment not been terminated." Schmidt v. Levi Strauss & Co., 621 F. Supp. 2d 796, 804 (N.D. Cal. 2008).

employee is eligible for double the back pay.[35] Second, under SOX, an employee must first file a claim with the Occupational Safety and Health Administration ("OSHA").[36] If 180 days pass without a final agency order, then the whistleblower may file an action in federal district court.[37] Dodd-Frank, on the other hand, gives a whistleblower direct access to district court to file a claim.[38] Third, the statute of limitations under SOX to report a claim is 180 days from the violation or knowledge of the violation.[39] Dodd-Frank requires an action be brought no more than six years after the date on which the violation occurred or no more than three years after the material facts of the violation first became known.[40] The statute of limitations period, however, cannot be tolled for more than ten years after the date on which the violation occurred.[41]

Federal courts are split on whether the Dodd-Frank anti-retaliation provisions apply to whistleblowers who only report internally and not to the SEC.[42] The Dodd-Frank Definition Section 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[43] *to the [SEC]*, in a manner established, by rule or

35. *Compare* Dodd-Frank § 922(h)(1)(C)(ii), 15 U.S.C. § 78u-6(h)(1)(C)(ii), *with* SOX § 806(c)(2)(B), 18 U.S.C. § 1514A(c)(2)(B).

36. SOX § 806(b)(1)(A), 18 U.S.C. § 1514A(b)(1)(A); OCCUPATIONAL SAFETY AND HEALTH ADMIN. U.S. DEP'T OF LABOR, OHSA FACT SHEET: FILING WHISTLEBLOWER COMPLAINTS UNDER THE SARBANES-OXLEY ACT (Dec. 2011) [hereinafter FILING WHISTLEBLOWER COMPLAINTS], *available at* https://www.osha.gov/Publications/osha-factsheet-sox-act.pdf.

37. FILING WHISTLEBLOWER COMPLAINTS, *supra* note 36, at 2.

38. Shen, *supra* note 30, at 4.

39. SOX § 806(b)(2)(D), 18 U.S.C. § 1514A(b)(2)(D); FILING WHISTLEBLOWER COMPLAINTS, *supra* note 36, at 2.

40. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922(h)(1)(B)(iii), 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2012).

41. Id.

42. Catherine Foti, *If You See Something, Say Something, But Maybe Only to the SEC*, JDSUPRA BUS. ADVISOR (June 19, 2014), http://www.jdsupra.com/legalnews/if-you-see-something-say-something-but-77891/.

43. It also has been recently held that to be protected by Dodd-Frank, an employee's disclosure must "relate to a violation of the securities laws." Zillges v. Kenney Bank & Trust, No. 13-C-1287, 2014 WL 2515403, at *5 (E.D. Wis. June 4, 2014). This is not a new development since the statute, courts, and the SEC use the phrase "securities laws" when referring to the violations that must be reported. *See* Dodd-Frank § 922(a)(6), 15 U.S.C. § 78u-6(a)(6); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249); *see, e.g.*, Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012).

regulation, by the [SEC]."[44] Dodd-Frank also outlines three categories of protected actions protecting, whistleblowers from employer retaliation for any act taken 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 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.[45]

Despite this language, the Anti-retaliation Section appears to protect employees who *have not reported* to the SEC[46] because the SOX provisions *protect internal disclosures* made to "a person with supervisory authority over the employee."[47] Thus, the Dodd-Frank Anti-retaliation Section directly conflicts with the Definition Section that requires reporting to the SEC.[48] Although most courts have resolved this conflict by holding that the Dodd-Frank Anti-retaliation Section protects internal reports made under SOX, the Fifth Circuit in *Asadi* applied a strict interpretation of the statute and rejected the notion that a conflict existed.[49]

To clarify these conflicting provisions, the SEC promulgated regulations in 2011 that clarified the scope of whistleblower programs to potential whistleblowers.[50] According to the SEC's regulations, you

44. Dodd-Frank § 922(a)(6), 15 U.S.C. § 78u-6(a)(6) (emphasis added).

45. Dodd-Frank § 922(h)(1)(A), 15 U.S.C. § 78u-6(h)(1)(A).

46. Khazin v. TD Ameritrade Holding Corp., No. 13-4149 (SDW) (MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014).

47. Sarbanes-Oxley Act of 2002 (SOX) § 806(a)(1)(C), 18 U.S.C. § 1514A(a)(1)(C) (2012).

48. Rosenblum v. Thomson Reuters (Mkts.) LLC, 984 F. Supp. 2d 141, 147 (S.D.N.Y. Oct. 25, 2013).

49. Catherine Foti, *When Is a 'Whistleblower' Not Really a 'Whistleblower'?*, FORBES (Aug. 7, 2013, 11:22 AM), http://www.forbes.com/sites/insider/2013/08/07/when-is-a-whistleblower-not-really-a-whistleblower/.

50. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249).

are a whistleblower if you have a reasonable belief of a possible securities law violation, and if you have provided information in any manner described in the Dodd-Frank Anti-retaliation Section whistleblower provisions, which includes reports made under SOX.[51] While the majority of courts have accepted and deferred to the SEC's regulations, a minority of courts have held that the Anti-retaliation Section only protects employees who report directly to the SEC.[52]

III. FIFTH CIRCUIT: REQUIRING WHISTLEBLOWERS TO REPORT TO THE SEC

In *Asadi v. G.E. Energy*, the Fifth Circuit held, contrary to five federal district courts,[53] that employees who only reported internally and not to the SEC were not protected under the Dodd-Frank Anti-retaliation Section.[54] Asadi, an employee at General Electric Energy ("G.E. Energy"), reported a potential Foreign Corrupt Practices Act ("FCPA") violation internally to his supervisor.[55] Shortly thereafter, he began receiving negative performance reviews and was subsequently fired.[56] Asadi asserted that G.E. Energy violated Dodd-Frank's whistleblower protection provisions by retaliating after he reported the potential FCPA violation to his supervisor, but not the SEC.[57] The Fifth Circuit held that Asadi was not entitled to protection under Dodd-Frank because he did not provide information directly to the SEC.[58]

The Fifth Circuit began and ended its analysis with the determination that the statutory language in Dodd-Frank was plain and unambiguous.[59] Asadi conceded that he was not within the Dodd-

51. Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b)(i) (2014) (referring to Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) §922(h)(1), 15 U.S.C. § 78u-6(h)(1) (2012)).

52. Connolly v. Remkes, No. 5:14-CV-01344-LHK, 2014 U.S. Dist. LEXIS 153439, at *13 (N.D. Cal. Oct. 28, 2014).

53. Murray v. UBS Secs., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *1 (S.D.N.Y. May 21, 2013); Kramer v. Trans–Lux Corp., No. 3:11cv1424 (SRU), 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011).

54. Foti, *supra* note 49.

55. Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 621 (5th Cir. 2013).

56. *Id.*

57. *Asadi*, 720 F.3d at 623.

58. Foti, *supra* note 42.

59. *Asadi*, 720 F.3d at 623.

Frank's definition of a whistleblower since he did not report directly to the SEC.[60] Nevertheless, he argued that employees who took the actions listed in the Dodd-Frank Anti-retaliation Section were protected.[61] Specifically, Asadi argued he was entitled to anti-retaliation protection as an employee who reported a potential securities law violation to his superiors because Dodd-Frank incorporates the SOX whistleblower provisions.[62] The Fifth Circuit stated that Asadi was "correct that individuals may take [a] protected activity yet still not qualify as a whistleblower," but maintained the term "whistleblower" must be defined narrowly.[63] As a result, retaliation is prohibited only for actions taken by whistleblowers who report to the SEC in accordance with the Definition Section.[64]

The Fifth Circuit reasoned that Congress's repeated use of the term "whistleblower" in the Anti-retaliation Section was intentional.[65] According to this section, "[n]o employer may discharge . . . or in any other manner discriminate against, a *whistleblower* . . . because of any lawful act done by the *whistleblower*."[66] Had Congress used the terms "individual" or "employee," then Asadi's interpretation of the whistleblower protections would make more sense.[67] "The use of such broader terms would indicate that Congress intended any individual or employee—not just those individuals or employees who qualify as a 'whistleblower'—to be protected from retaliatory actions by their employers."[68] Because of this strict reading of the text, the court held that Dodd-Frank only protects actions and disclosures listed in the Anti-retaliation Section if the employee also disclosed information to the SEC.[69]

To reach its interpretation, the Fifth Circuit analyzed the Definition Section and Anti-retaliation Section using two key canons of

60. *Id.* at 624.
61. *Id.*
62. *Id.* at 626.
63. *Id.* at 627.
64. *Id.* at 629.
65. *Id.* at 626 (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922(h)(1)(A), 15 U.S.C. § 78u-6(h)(1)(A) (2012)).
66. *Id.* (emphasis added).
67. *Id.*
68. *Id.*
69. *Id.* at 627.

statutory construction.[70] The court not only tried to interpret the two sections in "a manner that render[ed] them compatible, not contradictory,"[71] but also tried to prevent any phrase from becoming "superfluous, void, or insignificant."[72] Asadi argued that by requiring an employee to report to the SEC in the Definition Section, the Anti-retaliation Section is rendered moot.[73] The court noted, however, that Asadi's reading not only makes the words "provide information . . . to the Commission" superfluous, but also undermines SOX as a whole.[74] If the Anti-retaliation Section incorporated SOX whistleblower provisions for all employees, no individual would ever choose to raise a SOX anti-retaliation claim over a Dodd-Frank claim.[75]

To avoid surplusage, the Fifth Circuit gave effect to every word in the Dodd-Frank whistleblower provisions by clarifying that internal reporting under the Anti-retaliation Section only protects who report to the SEC.[76] The court posed a hypothetical of a mid-level manager who reported securities law violations to his company's CEO and to the SEC.[77] If the manager was fired before the CEO knew of the report to the SEC,[78] the manager could still bring a claim under the Dodd-Frank Anti-retaliation Section.[79] The manager met the requirement in the Definition Section of reporting to the SEC, but was retaliated against for internal reporting, which is a protected action under the Anti-retaliation Section.[80] The manager would still have the option to bring either a SOX or Dodd-Frank anti-retaliation claim.[81]

In interpreting the Dodd-Frank Definition Section and Anti-retaliation Section, the court used traditional tools of statutory

70. *Id.* at 622.

71. *Id.* (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

72. *Id.* (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

73. *Id.* at 628.

74. *Id.*

75. *Id.*

76. *Id.* at 629.

77. *Id.* at 627.

78. The SEC has pointed out that this causes a problem because "if an employer is genuinely unaware that the employee has separately disclosed to the Commission, any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent—*i.e.*, the intent to punish the employee for engaging in a protected activity." Brief of the Sec. and Exch. Comm'n, *supra* note 16, at 23.

79. *Asadi*, 720 F.3d. at 627–28.

80. *Id.* at 628.

81. *Id.*

construction, but failed to truly follow the process outlined in the landmark case of *Chevron v. Natural Resources Defense Council, Inc.*[82] Because of this, courts widely cite *Asadi* when considering the issue of who qualifies for Dodd-Frank whistleblower protections, but the majority of federal district courts faced with the issue have declined to follow *Asadi's* interpretation.[83] Instead, courts are choosing to defer to the SEC's regulations that expand the definition of "whistleblower."[84] District courts are left without much guidance as the Fifth Circuit is the only circuit that has ruled on this issue.[85] Both the Court of Appeals for the Second and Eighth Circuits had the opportunity to clarify whistleblower protections, but both chose instead to sidestep the issue.[86]

In *Liu v. Siemens AG*,[87] the Second Circuit held that Dodd-Frank does not apply extraterritorially to a plaintiff who was a citizen of Taiwan, who worked for a Chinese corporation that had shares listed on the New York Stock Exchange.[88] In its opinion, the Second Circuit did not address the debate over the whistleblower definition.[89] Additionally, the Eighth Circuit refused to resolve the issue of whether an employee must report to the SEC to be protected by the Dodd-Frank

82. *Id.* at 630; Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

83. *See* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719 (D. Neb. May 21, 2014) (protecting internal reports); Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519 (S.D.N.Y. 2014) (same); Ellington v. Giacoumakis, 977 F. Supp. 2d 42 (D. Mass. 2013) (same). *But see* Verfuerth v. Orion Energy Sys., No. 14-C-352, 2014 U.S. Dist. LEXIS 156620, at *1, (E.D. Wis. Nov. 4, 2014) (requiring reports be made to the SEC); Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *1 (M.D. Fla. May 12, 2014) (same).

84. *See* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719 (D. Neb. May 21, 2014); Yang, 18 F. Supp. 3d 519 (S.D.N.Y. 2014).

85. Catherine Foti, *Did the Summer Shine Any Light on Dodd-Frank Whistleblower Land?*, FORBES (Sept. 11, 2014, 3:35 PM), http://www.forbes.com/sites/insider/2014/09/11/did-the-summer-shine-any-light-on-dodd-frank-whistleblower-land/.

86. Meng-Lin Liu v. Siemens, 2014 WL 3953672, at *6 (2d Cir. Aug. 14, 2014); Bussing v. COR Clearing, L.L.C., 2014 WL 3548278, at *2 (D. Neb. July 17, 2014) (interlocutory appeal denied); Bryan House et al., *A Review of Recent Whistleblower Developments*, JDSUPRA BUS. ADVISOR (Oct. 3, 2014), http://www.jdsupra.com/legalnews/a-review-of-recent-whistleblower-develop-40972/.

87. *Siemens*, 2014 WL 3953672.

88. House et al., *supra* note 86.

89. CHRISTOPHER MCEACHRAN, MCGUIREWOODS LLP, SECOND CIRCUIT DECIDES DODD-FRANK DOES NOT APPLY EXTRATERRITORIALLY, SKIPS ADDRESSING WHISTLEBLOWER PROTECTION FOR INTERNAL REPORTING (Sept. 23, 2014), *available at* http://www.subjecttoinquiry.com/sec/second-circuit-decides-dodd-frank-does-not-apply-extraterritorially-skips-addressing-whistleblower-protection-for-internal-reporting.

whistleblower protections when it declined to hear an interlocutory appeal.[90] In December 2014, the SEC filed an amicus brief for a pending appeal in the Third Circuit in support of overruling the Fifth Circuit's interpretation.[91]

Since there is only one federal court of appeals case, district courts have split on how to define "whistleblower."[92] In the Tenth Circuit, the District Court for the District of Colorado has decided two cases that contradict each other.[93] Additionally, in the Second Circuit, the District Court for the Southern District of New York has multiple conflicting judgments.[94] To promote uniformity in court decisions, courts should either correctly apply the *Chevron* process, or choose to follow the growing trend of new textualism[95] and extend Dodd-Frank anti-relation protections both to employees who report only internally as well as those who report directly to the SEC.

90. Bussing, 2014 WL 3548278, at *2; Yin Wilczek, *Federal Appeals Court Declines to Hear Case on Dodd-Frank Definition of 'Whistle-Blower'*, 103 Banking Rep. (BNA) No. 09, at 503 (Sept. 9, 2014) (noting that the *Bussing* case will continue in Nebraska district court).

91. Steven Pearlman & Noa Baddish, *SEC's Second Amicus Brief on Whether Dodd-Frank Protects Internal Reports*, PROSKAUER (Dec. 22, 2014), http://www.whistleblower-defense.com/2014/12/22/secs-second-amicus-brief-on-whether-dodd-frank-protects-internal-reports/.

92. *See* Wagner v. Bank of Am. Corp, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013). *But see* Englehart v. Career Educ. Corp., 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014).

93. *See Wagner*, 2013 WL 3786643, at *7 (following Asadi in holding violations must be reported to the SEC). *But see* Genberg v. Porter, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013) (holding the Anti-retaliation Section was an exception to the Definition Section of Dodd-Frank).

94. *See* Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519, 531 (S.D.N.Y. May 8, 2014) (protecting internal reports under Dodd-Frank); Rosenblum v. Thomas Reuters (Mkts.) L.L.C., 984 F. Supp. 2d 141, 148 (S.D.N.Y. Oct. 25, 2013); Murray v. UBS Secs., L.L.C., 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013); *see also* Egan v. Tradingscreen, Inc., 2011 U.S. Dist., 2011 WL 1672066, at*4 (S.D.N.Y. May 4, 2011). *But see* Berman v. Neo@Ogilvy L.L.C., 2014 U.S. Dist. LEXIS 115078, at *10 (S.D.N.Y. Aug. 15, 2014) (denying whistleblower protections).

95. *See infra* Part IV.B.

IV. JUSTIFYING THE PROTECTION OF WHISTLEBLOWERS WHO REPORT INTERNALLY

A. Applying the Chevron Process

When courts review statutory provisions such as the Dodd-Frank Definition Section and Anti-retaliation Sections where Congress has delegated legislative power to an agency, the court must defer to the agency unless the agency's interpretation is "manifestly contrary to the statute."[96] To determine if the construction is permissible, courts must apply the two-step process set forth in *Chevron*.[97] First, the court must ask whether "Congress has directly spoken to the precise question at issue."[98] If Congress's intent is clear, the court's analysis ends.[99] However, if there is any ambiguity in the statute about Congress's intent, then the court must proceed to the second step of *Chevron* and ask if the agency's interpretation of the statute is "reasonable."[100] In *Chevron*, the Court held that if Congress delegated the power to create and interpret laws, courts must defer to reasonable interpretations."[101]

Asadi did not follow the *Chevron* process, but instead used canons of statutory construction to avoid contradicting sections of the statute and surplusage.[102] The *Chevron* court established that courts have the power to use "traditional tools of statutory construction" but *Chevron* only used legislative history to determine Congress's intent.[103] The *Asadi* court failed to review Congress's intentions for passing the Dodd-Frank whistleblower protections.[104] Little evidence of Congress's intent exists in its legislative history,[105] but according to the Senate Report, The Restoring American Financial Stability Act of 2010, Dodd-

96. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

97. Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 576–80 (1998).

98. *Chevron*, 467 U.S. at 842.

99. *Id.* at 842–43.

100. *Id.* at 844.

101. Mank, *supra* note 97, at 578.

102. Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 625 (5th Cir. 2013).

103. *Chevron*, 467 U.S. at 837 n.9, 851.

104. *Asadi*, 720 F.3d at 625.

105. Egan v. Tradingscreen, Inc., 2011 WL 1672066, at *4 (S.D.N.Y. May 4, 2011).

Frank "aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud."[106] The Fifth Circuit did not continue to *Chevron* step two and noted that it was not persuaded by Asadi's argument for deference to the agency's interpretation because the use of "whistleblower" in the federal regulations was inconsistent.[107] Therefore, by failing to defer to a reasonable agency interpretation of the statute, *Asadi* did not correctly apply the *Chevron* two-step test.

Asadi represents one of two possible interpretations of the relationship between the Definition Section and the Anti-retaliation Section.[108] Some courts followed *Asadi* in holding that the Definition Section identifies who is a whistleblower, while the Anti-retaliation Section identifies what actions are protected for whistleblowers.[109] Contrastingly, the majority of courts choose not to follow *Asadi* and hold that the Anti-retaliation Section could be viewed "as a narrow exception" to the Definition Section.[110] As a result, in most jurisdictions, an employee must prove he either reported to the SEC or that his disclosure was in the categories outlined in the Anti-retaliation Section.[111] The Dodd-Frank whistleblower provisions are facially ambiguous because they can be interpreted as contradictory.[112] Furthermore, "[t]he existence of these competing, plausible interpretations of the statutory provisions compels the conclusion that the statutory text is ambiguous in conveying Congress's intent."[113] Because the Dodd-Frank whistleblower protections are ambiguous, courts must proceed to the second step of *Chevron*.

Under the second step of *Chevron*, the reviewing court should defer to the agency's interpretation so long as it is "reasonable."[114] The

106. S. REP NO. 111-176, at 110 (2010).

107. *Asadi*, 720 F.3d at 630.

108. Yang v. Navigators Grp, Inc., 18 F. Supp. 3d 519, 533 (S.D.N.Y. 2014).

109. Englehart v. Career Educ. Corp., 2014 WL 2619501, at *8 (M.D. Fla. May 12, 2014).

110. Murray v. UBS Secs., L.L.C., 2013 WL 2190084, at *5 (S.D.N.Y. May 21, 2013) (quoting Egan v. Tradingscreen, Inc., 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011)).

111. *Id.*

112. *Id.* at *4.

113. *Id.* (quoting Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 120 (2d Cir. 2007) (internal quotation marks omitted)).

114. *See* Yang v. Navigators Grp, Inc., 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) (finding that the SEC's interpretation of whistleblower definition was reasonable).

SEC promulgated regulations in 2011 that "defined certain terms critical to the operation of the whistleblower program . . . and generally explained the scope of the whistleblower program to the public and to potential whistleblowers."[115] According to the SEC's regulations, individuals are whistleblowers if they have a reasonable belief of a possible securities law violation, and if they provided information in any manner described in the Dodd-Frank Anti-retaliation Section whistleblower provisions, which includes internal reporting.[116] The SEC clarified how the "statutory anti-retaliation protections apply to three different *categories of whistleblowers*, and the third category includes individuals who report to persons or governmental authorities other than the Commission."[117] Specifically, the SEC clarified that the Anti-retaliation Section expands the definition of a whistleblower, giving employees the benefit of the Dodd-Frank anti-retaliation provisions for reports made both internally and to the SEC.[118]

In determining the reasonableness of the SEC's interpretation, the court must ask if the agency's interpretation is "a permissible construction of the statute."[119] The court should not disturb the agency's interpretation unless it contradicts Congress's intent.[120] As previously stated, Congress intended for Dodd-Frank to encourage employees with information about potential securities law violations to come forward.[121] In creating the regulations that were passed in 2011, the SEC recognized that "anyone can, and should, be able to report to law enforcement at any time, while at the same time recognizing that companies and whistleblowers have good reasons to want complaints reported internally."[122] In recognizing the value and efficiency of

115. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300 (proposed June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249).

116. Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b) (2014) (referring to Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 15 U.S.C. § 78u-6(h)(1)(A) (2012)).

117. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34304 (emphasis added).

118. Khazin v. TD Ameritrade Holding Corp., 2014 WL 940703, at *15–16 (D.N.J. Mar. 11, 2014); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34304 ("However, the retaliation protections for internal reporting afforded by Section 21F(h)(1)(A) do not broadly apply to employees of entities other than public companies.").

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

120. *Id*. at 844.

121. S. REP. NO. 111-176, at 110 (2010).

122. Luis Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Speech on Incentivizing Whistleblowers to Bring Fraud to Light (May 25, 2011).

corporate compliance programs in monitoring potential violations, the SEC regulations encourage whistleblowers to report internally when appropriate, but still allows whistleblowers to go directly to the SEC.[123] Furthermore, to encourage participation in internal compliance programs, the SEC regulations incentivize reporting internally by providing protections for whistleblowers while maintaining employees eligibility for the bounty program without reporting to the SEC.[124]

Under Dodd-Frank, an employee must report information directly to the SEC to qualify as a whistleblower eligible for awards[125] under § 240.21F-9.[126] The SEC's regulations expand eligibility of the bounty program by providing that a whistleblower can receive a reward if the employee reports internally and the company later relays that information to the SEC.[127] Moreover, if an employee chooses to report internally and later reports to the SEC within 120 days, the regulation contains a look back provision that deems the employee to have "provided information as of the date of [his] original disclosure."[128] Furthermore, courts can consider participation, or lack thereof, in internal compliance systems as a factor in deciding whether to reduce or decline an award.[129]

The SEC hoped that with these incentives, employees would report internally and that internal compliance programs could continue

123. Mary Shapiro, Chair, U.S. Sec. & Exch. Comm'n, Opening Statement at SEC Open Meeting: Item 2 –Whistleblower Program (May 25, 2011).

124. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300–01 (proposed June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249).

125. *Asadi* referenced the SEC's regulations but claimed the inconsistencies in the way the regulations defined "whistleblower" did not strengthen the argument for an expanded whistleblower definition because it could not "reasonably effectuat[e] Congress's intent." Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 630 (5th Cir. 2013) (quoting Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007). Section 240.21F-2(b)(1) seemed to expand the definition of a whistleblower while § 240.21F-9 still required the employee to report to the SEC. Securities Whistleblower Incentives and Protections, 17 C.F.R. §§ 240.21F-2(b), 240.21F-9 (2014). In *Chevron*, it was noted that the EPA could use a broader definition for some purposes and a narrower definition for other purposes. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 856 (1984). Similarly, "whistleblower" in § 240.21F-2(b)(1) refers to those who report a reasonable belief of a potential securities laws violations, while § 240.21F-9 definition limits "whistleblower" only to those who be eligible for an award under the original Dodd-Frank whistleblower provisions. 17 C.F.R. §§ 240.21F-2(b), 240.21F-9. Thus, deference should still be given to the SEC's regulations.

126. Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-9.

127. § 240.21F-4(c)(3).

128. § 240.21F-4(b)(iv)(7).

129. § 240.21F-4(a)(4).

to be a "tool designed to increase the effectiveness of the enforcement program."[130] If courts choose to ignore the SEC's regulations and not expand whistleblower anti-retaliation provisions, it will be contrary to Congress's stated intent. It does not make sense that Congress and the SEC would intend to incentivize reporting yet leave employees in situations where "individuals who take socially-desirous actions fail to be granted protection."[131] Therefore, the SEC's regulations are a reasonable and permissible interpretation of the statute, and they should receive deference under the second step of the *Chevron* test. Accordingly, after a complete application of the *Chevron* doctrine, Dodd-Frank's whistleblower provisions should be expanded to protect employees who are identified as whistleblowers in the Definition Section and to those who make internal disclosures under the Anti-retaliation Section without reporting to the SEC.

B. Abandoning Chevron for New Textualism

An emerging trend in regulatory interpretation involves the courts willingness to abandon the key principles of *Chevron*, thereby shifting the focus from a search for congressional intent to one of textual clarity.[132] In deciding "whether Congress had directly spoken to the precise question at issue," a court may give less weight to the legislative history, and give more weight to the statute's text.[133] In Justice Scalia's concurrence in *Green v. Bock Laundry Mach. Co.*,[134] he argued that the legislative history of a statute should be ignored unless there is a justification for "a departure from the ordinary meaning of [a] word." The only justification he deemed strong enough was if there was evidence that the ordinary definition rendered the statute bizarre or absurd.[135] This new method of statutory interpretation has been termed

130. Robert Khuzami, Director, U.S Sec. & Exch. Comm'n, Remarks at Opening Meeting—Whistleblower Program (May 25, 2012).

131. Banko v. Apple Inc., 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013).

132. *See* Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 173–74 (2012).

133. *Id.* at 173–75 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

134. 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

135. *Id.*; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 651 (1990).

"new textualism."[136]

New textualist judges "may believe they are better able to interpret statutes than agencies are, and accordingly . . . [may] ignore the spirit of *Chevron*."[137] New textualist judges ignore legislative history and instead examine the "statute's structure, prior judicial opinions, established judicial 'canons' of statutory construction, administrative norms underlying the statute's implementation, comparisons with the accepted interpretations of comparable statutory provisions, and the dictionary meanings most congruous with ordinary English usage and applicable law."[138]

Bussing v. COR Clearing, LLC,[139] is exemplary of the new textualism approach in determining whether an employee must report to the SEC to be protected by the Dodd-Frank whistleblower provisions. In *Bussing*, an employee brought a retaliation claim under Dodd-Frank, asserting her employer terminated her after reporting to her employer potential violations of the Financial Industry Regulatory Authority ("FINRA") rules and federal securities laws.[140] The court acknowledged the tension between the Dodd-Frank Definition Section and the Anti-retaliation Section, but the court did not, ultimately, reach the second step of *Chevron* and defer to the SEC's regulation.[141]

Although, Dodd-Frank has a statutory definition of "whistleblower," the court held this was an unusual case where "whistleblower" should be given its ordinary meaning instead of its statutory definition.[142] According to the court, if the statutory definition was used, "subsection (iii) [of the Anti-retaliation Section would] be rendered insignificant, and its purpose—to shield a broad range of employee disclosures—[would] be thwarted."[143] Because the statutory definition should not be controlling if it defeats the purpose of the statute, under the new textualism approach the court applied the dictionary definition.[144] Under its dictionary definition, a

136. Eskridge, *supra* note 135, at 623.

137. Mank, *supra* note 97, at 576

138. *Id.* at 538–39.

139. 20 F. Supp. 3d 719, 731 (D. Neb. May 21, 2014) (finding that congressional intent was unclear, and that the court would have to "return[] to the text of the statute").

140. *Id.* at 719–26.

141. *Id.* at 729.

142. *Id.*

143. *Id.*

144. *Id.* nn.7–8.

"whistleblower" is "a person who tells police, reporters, etc., about something (such as a crime) that has been kept secret,"[145] or an "employee who reports employer wrongdoing to a governmental or law-enforcement agency."[146] By imputing the ordinary definition instead of the statutory definition, the court's interpretation focuses only on the text in the statute, avoids any surplusage, and still reaches the same result as the SEC's regulations.[147] Consequently, even if courts abandon the two-step process from *Chevron*, new textualism would still mandate that the whistleblower provisions of Dodd-Frank incorporate the SOX provisions—ensuring protection for internal disclosures of corporate wrongdoing.

V. PRACTICAL IMPLICATIONS OF DODD-FRANK WHISTLEBLOWER POLICIES

Under Dodd-Frank, "whistleblowers provide a vital early warning system to detect and expose fraud in the financial system."[148] Since the passage of Dodd-Frank whistleblower provisions, the SEC has received almost 10,200 tips and complaints from whistleblowers.[149] With the number of reports increasing each year, it is important for whistleblowers to be protected from employer retaliation. Hence, all parties who could be involved in a Dodd-Frank whistleblower claim must recognize the current legal landscape and the implications of the lack of a consensus on the definition of whistleblower.[150]

The split in the federal courts over whether Dodd-Frank whistleblower protections only apply to employees who report directly to the SEC impacts the decisions made by employees. First, the split affects where an employee will choose to report potential securities law violations. The court in *Bussing* argued that the narrow definition of a whistleblower was "under-inclusive" from the employee's perspective,

145. *Id.* (quoting Merriam–Webster Online Dictionary, s.v. "Whistleblower", http://www.merriamwebster.com/dictionary/whistleblower (last visited Oct. 5, 2014)).

146. *Id.* (quoting Black's Law Dictionary 1734 (9th ed. 2009)).

147. *Id.* at 730–31.

148. 156 Cong. Rec. S4066 (daily ed. May 20, 2010) (statement of Sen. Kaufman).

149. OFFICE OF THE WHISTLEBLOWER, *supra* note 2.

150. DANIEL P. WESTMAN & JEREMY B. MERKELSON, ASS'N OF CORP. COUNSEL, TOP TEN CONSIDERATIONS FOR PRIVATE COMPANIES NOW SUBJECT TO SOX WHISTLEBLOWER LAWSUITS (2014), *available at* http://www.acc.com/legalresources/publications/topten/ttcfpcnstswl.cfm?makepdf=1.

because it "fails to account for the fact that employees tend to report matters internally before going to the SEC."[151] Employees who are not enticed by the potential financial gain or who are loyal to their companies may first report internally to give their companies the opportunity to remedy the problem before going to the SEC.[152] If employees choose to report internally and not to the SEC, they would not qualify as whistleblowers under the strict *Asadi* interpretation of the Dodd-Frank whistleblower provisions.

Secondly, if an employee is fired after reporting internally, the courts disagree on which retaliation claims the employee is entitled to bring. In jurisdictions that follow a narrow "whistleblower" definition, an employee can only bring a SOX retaliation claim if no report was made to the SEC.[153] In jurisdictions that hold that the Dodd-Frank Anti-retaliation Section incorporates the SOX protection for internal reporting, employees may invoke the "plaintiff-friendly aspects of Dodd-Frank" that provides a longer statute of limitations, double back pay, and eligibility for the larger Dodd-Frank bounty program.[154] It is unreasonable to think Congress intended to "offer a broad array of protections with one hand, only to snatch it back with the other, leaving behind protection for only a narrow subset of whistleblower," yet this is the practical implication of *Asadi* for employees.[155]

Employers also have to deal with practical implications of *Asadi* and subsequent decisions. However, regardless of how the Supreme Court eventually rules, the outcome will have a negative impact on employees.[156] Companies, through their internal compliance programs, try to persuade employees to report internally first.[157] But, even if the current SEC rules are given deference, some critics do not think that the SEC's regulations are enough to encourage internal reporting.[158] SEC

151. *Bussing*, 20 F. Supp. 3d at 732.

152. *Id.*

153. Shen, *supra* note 30 at 3.

154. *Id.* at 4.

155. *Bussing*, 20 F. Supp. 3d at 733.

156. Shen, *supra* note 30 at 4.

157. JOSEPH M. MCLAUGHLIN, SIMPSON THACHER & BARTLETT LLP, CORPORATE LITIGATION; DODD-FRANK AND WHISTLEBLOWER PROTECTION: WHO QUALIFIES? (Aug. 8, 2013), http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1637.pdf?sfvrsn=2.

158. *See* Kathleen Casey, Comm'r, U.S Sec. & Exch. Comm'n, Adoption of Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011); Troy Paredes, Comm'r, U.S Sec. & Exch. Comm'n, Statement at

Commissioner Kathleen Casey expressed concern that the whistleblower program promulgated under the current regulations "significantly underestimates the negative impact on internal compliance programs."[159] If internal reports and disclosures are not protected, employees may skip internal reports and go directly to the SEC for a potential monetary award and for the protection of the Dodd-Frank anti-retaliation provisions.[160] Anytime that internal reporting is bypassed, internal compliance programs lose the opportunity to quickly identify if there is a violation that needs to be fixed, or if there has just been a simple misunderstanding.[161] Conversely, if the Dodd-Frank anti-retaliation provisions are expanded to those who report internally, employers face increased liability and vulnerability to retaliation claims, which could raise the cost of litigation and the amount of damages paid for retaliation claims.[162]

Furthermore, the conflicting holdings regarding who is protected by the Dodd-Frank anti-retaliation provisions have a significant impact on the SEC. Due to decreased reliance on internal reporting, disclosures that could be handled more efficiently internally will instead be sent to the SEC.[163] Commissioner Casey also believed the current SEC regulations "significantly overstat[e] [the SEC's] capacity to effectively triage and manage whistleblower complaints."[164] Ideally, the SEC would want fewer and higher quality tips, but with employees bypassing internal reporting, there could easily be a significant waste of corporate and government resources.[165] Because of the greater number of disclosures, the SEC could become burdened with an overwhelming number of claims, likely resulting in the SEC's inability to discover and address issues in a timely manner.[166]

To resolve the conflict in the courts, the Fifth Circuit's holding should be overruled by the Supreme Court. This would grant

Open Meeting to Adopt Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011).

159. Casey, *supra* note 158.

160. MCLAUGHLIN, *supra* note 157.

161. *Bussing*, 20 F. Supp. 3d at 733; Casey, *supra* note 158; MCLAUGHLIN, *supra* note 157.

162. Shen, *supra* note 30 at 4.

163. *Bussing*, 20 F. Supp. 3d at 733.

164. Casey, *supra* note 158.

165. *Id.*

166. Paredes, *supra* note 158.

employees the freedom to choose who they will report to, but will also assure protection from retaliation no matter what they decide. Simplifying the law by giving deference to the SEC's broad definition of a whistleblower, would also ensure an efficient working relationship between the SEC and internal compliance programs.[167] By viewing the Anti-retaliation Section as dictating categories of whistleblowers, not just actions protected for whistleblowers, employees will be protected if they report either internally or to the SEC.[168] Giving deference to the SECs regulations would protect any disclosures made under the Anti-retaliation Section, allowing compliance departments to focus more on issues being reported and less on the potential costs of litigation.[169] This clarification of the whistleblower policies under the Dodd-Frank is supported by the correct application of the *Chevron* process and the doctrine of new textualism. By creating a safe environment for employees to come forward internally, and also allowing employees to go directly to the SEC, the federal whistleblower program will be able to reach its full potential to monitor the financial system.

CAROLINE E. KEEN

167. MCLAUGHLIN, *supra* note 157.
168. MCLAUGHLIN, *supra* note 157.
169. Shen, *supra* note 30 at 4.

APPENDIX

Cases Citing Asadi and Defining "Whistleblower"		
Case	**Facts**	**Holding**
1st Circuit		
Ellington v. Giacoumakis, 977 F. Supp. 2d 42 (D. Mass. 2013).	Employee reported to compliance officer that the company was potentially violating security laws by distributing misleading investment reports.	Court found the SEC construction of the statute more persuasive and held Anti-retaliation Section protected internal disclosures.
2nd Circuit		
Berman v. Neo@Ogilvy LLC, 2014 U.S. Dist. LEXIS 168840 (S.D.N.Y. Dec. 5, 2014).	Employee was terminated for reporting internally, and after he was fired reported potential violations to the SEC.	Court required that the whistleblower report to the SEC to be protected based on the text of the statute and traditional canons of statutory construction.
Ulrich v. Moody's Corp., 2014 U.S. Dist. LEXIS 138082 (S.D.N.Y. Sept. 30, 2014).	Employee was based in Hong Kong and reported to the SEC.	Court did not extend whistleblower protections extraterritorially or comment on reporting to the SEC.
Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519 (S.D.N.Y. 2014).	Employee reported potential shareholder fraud and potential violations of securities laws and regulations. Sought damages under both Sarbanes-Oxley and Dodd-Frank.	Court upheld the SEC regulations resolved the ambiguity over the "whistleblower" definition and the employee was protected by Dodd-Frank even though she only reported

		internally.
Ahmad v. Morgan Stanley & Co., 2 F. Supp. 3d 491 (S.D.N.Y. 2014).	Employee made an internal report before the passage of the Dodd Frank.	Court would not apply the Dodd Frank retroactively to retaliatory actions that would have been covered by SOX.
Rosenblum v. Thomson Reuters (Mkts.) LLC, 984 F. Supp. 2d 141 (S.D.N.Y. 2013).	Employee was fired after internal reports and reports to the FBI concerning insider trading.	Court used Chevron analysis and deferred to the agency's interpretation, that if the employee met the requirements of SOX they were covered under Anti-retaliation Section.
Murray v. UBS Secs., LLC, 2013 WL 2190084 (S.D.N.Y. May 21, 2013).	Employee repeatedly told supervisors about research reports that were in violation of federal securities laws.	Court held there are two plausible interpretations of the Anti-retaliation Section, so it is inherently ambiguous, and courts should defer to the SEC.
Kramer v. Trans-Lux Corp., 2012 WL 4444820 (D. Conn. Sept. 25, 2012).	Employee reported concern about the conflict of interest, composition of the pension plan committee, and the failure to present the 2009 amendment to the appropriate bodies.	Court protected the whistleblower by deferring to the SEC's interpretation of the Anti-retaliation Section.
Egan v. Tradingscreen, Inc., 2011 WL 1672066 (S.D.N.Y. May 4, 2011).	Employee reported diversion of corporate assets to another company.	Court found that (iii) of the Anti-retaliation Section creates a narrow exception so that a plaintiff is required to show that

		he either provided information to the SEC or the disclosures fell under the four categories listed in (iii).
Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325 (S.D.N.Y. 2013).	Employee of a Chinese subsidiary who resided in Taiwan reported a potential violation of the Foreign Corrupt Practices Act.	Court did not "wade into the debate" over the whistleblower definition because the Dodd Frank and SOX protections do not apply extraterritorially.
Liu Meng-Lin v. Siemens, 2014 WL 3953672 (2d Cir. Aug. 14, 2014).	Employee of a Chinese subsidiary who resided in Taiwan reported a potential violation of the Foreign Corrupt Practices Act.	Court did not mention the definition of the whistleblower. Found nothing that suggested Congress intended extraterritorial application.
3rd Circuit		
Safarian v. Am. DG Energy Inc., 2014 WL 1744989 (D.N.J. Apr. 29, 2014) *cert. granted* (No. 14-2734).	Employee disclosed overbilling that was not close enough related to fraud.	Court does not weigh in on the definition of the whistleblower who failed to show that his disclosures fell under any of the protected actions of the Anti-retaliation Section.
Khazin v. TD Ameritrade Holding Corp., 2014 U.S. Dist. LEXIS 31142 (D.N.J. Mar. 11, 2014).	Employee reported that financial products offered to customers were not in compliance with relevant securities violations.	Court took the majority view of the statute being ambiguous and held that the employee had sufficiently pled a Dodd Frank Act.

5th Circuit		
Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620 (5th Cir. 2013).	Employee internally reported possible violation of the Foreign Corrupt Practices Act when a woman was hired to garter favor with a local official.	Court applied a strict definition of a "whistleblower" as defined in the statute and did not apply the Dodd-Frank protections to the whistleblower because he did not report internally and to the SEC.
6th Circuit		
Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. 2012).	Employer reported concerns about potential bribery to his supervisors under the Foreign Corrupt Practices Act.	Court held that reported violations did not relate to violations of securities laws and was not protected by Dodd-Frank.
7th Circuit		
Verfuerth v. Orion Energy Sys., 2014 U.S. Dist. LEXIS 156620 (E.D. Wis. Nov. 4, 2014).	Employer was the CEO but was removed by the board of directors after complaints of potential securities law violations.	Court held there was no ambiguity in the statute and an employee did not fall within the protections of the Anti-retaliation Section because he did not report to the SEC.
Zillges v. Kenney Bank & Trust, 24 F. Supp. 3d 795 (E.D. Wis. 2014).	Employee reported violations of banking regulations.	Acknowledges the disagreement among the federal courts but does not take sides on the issue. Failed to qualify as a whistleblower because he reported banking not securities

		law violations.
8th Circuit		
Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719 (D. Neb. 2014)	Employee reported violations of Financial Industry Regulatory Authority Rules as required under Rule 820 as part of an investigation.	Court applied the everyday definition of a whistleblower to provide protection to a full range of disclosures.
9th Circuit		
Connolly v. Remkes, 2014 U.S. Dist. LEXIS 153439, (N.D. Cal. Oct. 28, 2014)	Employee pled constructive discharge after she reported potential a violation of FINRA Rule 3240's ban on broker payments into client accounts.	Court adopted the majority view that the Anti-retaliation Section is ambiguous and that under *Chevron*, deference should be given to the reasonable SEC interpretation extending whistleblower protections.
Banko v. Apple Inc., 20 F. Supp. 3d 749 (N.D. Cal. 2013)	Employee reported to upper management fraud and embezzlement of company funds.	Court dismissed whistleblower's claim because it found no proof that the SEC issued its regulation because the Anti-retaliation Section was ambiguous.
10th Circuit		
Azim v. Tortoise Capital Advisors, LLC, 2014 U.S. Dist. LEXIS 22974 (D. Kan. Feb. 24, 2014)	Employee reported fraudulent representations to gain potential investments and investors and false filings with the SEC to supervisors.	Court pointed out that the 10th Circuit had not addressed the issue and allowed the employee to amend his complaint.

Wagner v. Bank of Am. Corp., 2013 WL 3786643 (D. Colo. July 19, 2013)	Employee reported of alleged violations of the Uniform Standards of Professional Appraisal Practice (USPAP).	Court was concerned that expanding the whistleblower definition would render SOX moot so it quoted and completely agreed with *Asadi*.
11th Circuit		
Englehart v. Career Educ. Corp., 2014 WL 2619501 (M.D. Fla. May 12, 2014)	Employee was placed on leave after voicing concerns about material misrepresentations, which violated Securities Exchange Act and anti-fraud provisions.	Court followed *Asadi* and did not apply Dodd-Frank protections because it was Congress's prerogative to define the term "whistleblower."