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FOR WHOM THE WHISTLE BLOWS: THE ROLE OF PRIVATE ENFORCEMENT IN DODD-FRANK’S REGULATORY FRAMEWORK

MICHAEL M. KRAUSS, JULIE R. LANDY, AND JEREMY R. HARRELL¹

The primary stated purpose of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)² is to “promote the financial stability of the United States by improving accountability and transparency in the financial system.”³ In signing Dodd-Frank into law, the President attributed the precipitating crisis to “a breakdown in our financial system.”⁴

Congress saw flawed and inadequate regulation as the principal cause of this breakdown. Without a regulator taking a systemic view, seemingly disparate risks and market forces combined to cripple the economy. No one entity could see the whole picture. According to the Senate Banking Committee Report: “The United States’ financial regulatory structure, constructed in a piecemeal fashion over many decades, remains hopelessly inadequate to handle the complexities of modern finance.”⁵ In assaying the causes of the financial crisis, the Senate report identified “gaps in the regulatory structure” that allowed risks “to flourish outside the view of those responsible for overseeing the financial system.”⁶

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

3. *Id.* at 1376.

4. President Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

5. S. Rep. No. 111-176, at 40 (2010).

6. *Id.* at 43.

Dodd-Frank revamped the regulatory framework that oversees the financial system, creating new government entities and strengthening existing ones. Dodd-Frank was remarkable not just in the breadth and depth of its regulatory regime but also in its almost exclusive reliance on the government to enforce its rules and requirements. What's missing from the statute's 2319 pages: Any significant role for private parties in enforcement. Dodd-Frank almost nowhere authorizes or requires private parties to take the lead in deterring misconduct and enforcing action against violations. Private rights of action against wrongdoers for their underlying financial misconduct are nearly nonexistent. Unlike the Sarbanes-Oxley Act of 2002 ("SOX"), Dodd-Frank does not rely on companies' internal compliance programs to detect and correct misconduct.

Instead, Dodd-Frank puts enforcement power and responsibility in hands of government agencies. Five years later, however, we see pushback from both those agencies and the courts, effectively questioning whether it makes sense to sideline private parties. We examine this phenomenon through the prism of Dodd-Frank's whistleblower program within the Securities and Exchange Commission ("SEC"). Courts nationwide are considering whether employees who report alleged infractions only internally—and not to the SEC—enjoy Dodd-Frank's protections against retaliation. With few exceptions, most courts have joined the SEC in saying yes. In doing so, they overlook a key aspect of Dodd-Frank's underlying framework: The statute vests enforcement authority with government regulators, particularly the SEC, and not private parties. By limiting retaliation claims to those who notify the SEC, the statute as written encourages employees to report suspected securities violations to government regulators—which is critical to Dodd-Frank's scheme. While there may be good policy reasons to encourage individuals to report internally—without ever going to the SEC—such an approach would deviate from the over-arching scheme. Because of a recent split among the federal Courts of Appeals, the Supreme Court is now likely to address this issue, and wade into the ongoing debate over the roles that government, companies, and individuals should play in realizing Dodd-Frank's ultimate goals.

I. DODD-FRANK VESTS THE SEC WITH NEW AND EXPANDED POWERS, WHILE LARGELY IGNORING PRIVATE LITIGANTS

Dodd-Frank's biggest regulatory innovations—including the new Bureau of Consumer Financial Protection and the new Financial Stability Oversight Council—consumed most headlines in 2010. Dodd-Frank, however also made a particular point of empowering the SEC. Even aside from the whistleblower incentives and protection program detailed below, Dodd-Frank's Title IX—also known as the Investor Protection and

Securities Reform Act of 2010—vests the SEC with sweeping new and expanded authority. These changes reflected Congress’s determination that “[s]erious and far reaching problems were caused by . . . ineffective SEC regulation of investment banks such as Lehman Brothers and broker dealers such as Madoff.”⁷ A few examples of this include:

Funding increases. Dodd-Frank nearly doubled the SEC’s budget over four years, from \$1.3 billion in 2011 to \$2.25 billion in 2015.⁸ It also established a \$100 million reserve account.⁹

Credit rating agencies. Dodd-Frank gave the SEC significant responsibility to regulate credit rating agencies like Moody’s and S&P, which were blamed for handing high ratings to toxic mortgage-backed securities.¹⁰ The SEC’s new Office of Credit Ratings oversees the rating agencies and implements the enhanced rules and regulations under Dodd-Frank.¹¹ The SEC must create and enforce rules governing credit rating procedures and methodologies, including rules to prevent sales and marketing considerations from affecting ratings.¹² Among other things, the SEC must conduct an annual exam of each rating agency.¹³ It may also, in part, fine agencies for various violations and suspend or revoke their registration with respect to a particular class of security if the SEC determines the agency lacks the resources to produce credit ratings with integrity.¹⁴

New litigation enforcement tools. Dodd-Frank handed the SEC new and enhanced litigation tools to enforce the securities laws. The SEC may now:

- **Bring aiding and abetting claims** under all of the federal securities statutes and may recover with proof that the defendants “recklessly” (not just knowingly) provided substantial assistance to another person in violation of the securities laws;¹⁵

- **Seek monetary penalties in administrative cease-and-desist proceedings** against any public company and its directors, officers, and employees without a jury trial and discovery before an Article III judge;¹⁶

7. *Id.* at 36.

8. 15 U.S.C. § 78kk (2012).

9. 15 U.S.C. § 78d(i) (2012).

10. 15 U.S.C. § 78o-7(p) (2012).

11. *Id.*

12. 15 U.S.C. § 78o-7(h) (2012).

13. 15 U.S.C. § 78o-7(p) (2012).

14. 15 U.S.C. § 78o-7(d) (2012).

15. 15 U.S.C. §§ 77o, 78t, 80a-47, 80b-9 (2012). Before Dodd-Frank, the SEC could sue for aiding and abetting only under the Exchange Act and only for “knowing” violations. Now, it may also bring aiding and abetting claims under the Securities Act, the Investment Advisors Act, and the Investment Company Act and may also recover for “reckless” violations.

16. 15 U.S.C. §§ 77h-1, 78u-2, 80a-9, 80b-3 (2012).

● **Pursue securities fraud violations internationally.** The SEC may bring enforcement actions where there is either: (1) “conduct occurring outside the United States that has a foreseeable substantial effect within the United States”; or (2) “conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors”;¹⁷

● **Compel production of audit work papers** by accounting firms outside the United States;¹⁸ and,

● **Share information** with federal, state, and foreign securities and law enforcement authorities without waiving privilege.¹⁹

Contrast with private litigants. Unlike the SEC, private plaintiffs were entrusted with few significant and new tools to recover for financial wrongdoing. In particular, Dodd-Frank amended the Exchange Act to create a private right of action against credit rating agencies.²⁰ A rating agency’s statements are subject to the same liability under Section 11 as statements by a registered public accounting firm or securities analyst.²¹ To recover damages, the investor must prove that the rating agency knowingly or recklessly failed: (1) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (2) to obtain reasonable verification of such factual elements from other sources the agency considered competent and that were independent of the issuer and underwriter.²²

Otherwise, Dodd-Frank largely authorizes “studies” of whether private litigants should be able to pursue causes of actions that today belong solely to the SEC. For example, while Dodd-Frank enables the SEC to pursue securities violations abroad, it does not extend extraterritorial enforcement

17. 15 U.S.C. § 78AA (2012). In *Morrison v. Nat’l Australia Bank*, the Supreme Court found no “affirmative indication” in the Exchange Act that Section 10(b) applies outside the United States. 561 U.S. 247, 265 (2010). It held: “Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.” *Id.* at 273. Dodd-Frank supplied the missing “affirmative indication”—but only as to enforcement actions brought by the SEC and Department of Justice.

18. 15 U.S.C. § 7216(b) (2012).

19. 15 U.S.C. § 78x(f) (2012).

20. 15 U.S.C. §§ 78o-7(m), 78u-4 (2012).

21. 15 U.S.C. § 78o-7(m) (2012).

22. 15 U.S.C. § 78o-7 (2012). Dodd-Frank also repealed Rule 436(g) under the Securities Act, which had exempted credit ratings from being deemed as a part of the registration statement or prospectus prepared or certified by an expert. Dodd-Frank, *supra* note 2, at § 939G. As a result, the issuer must get the rating agency’s consent to include a credit rating in the prospectus or registration, and the agency may then be subject to liability as an expert under Section 11. As a practical matter, however, the real-world impact is that rating agencies will decline such consent to avoid potential exposure.

to private claims.²³ Instead, it directed the SEC's staff to study the impact of extending the cross-border scope of private actions.²⁴ The resulting study was inconclusive.²⁵ While Dodd-Frank further expands the SEC's power to sue for aiding and abetting securities violations, private litigants still cannot bring such claims under any statute.²⁶ Dodd-Frank simply required the Comptroller General to study the impact of allowing private aiding and abetting claims under any statute.²⁷ The resulting study concluded that "[d]ebate continues."²⁸

II. THE SEC'S WHISTLEBLOWER PROGRAM REFLECTS CONGRESS'S DECISION TO RELY ON GOVERNMENT AGENCIES, NOT PRIVATE RIGHTS OF ACTION

The SEC's new whistleblower program may be its best-known expansion of authority under Dodd-Frank. It similarly reflects Congress's decision to rely on government agencies, and not private rights of action, to address the financial system's "breakdown."

Section 922 of Dodd-Frank amends the Exchange Act to add a new section titled "Securities Whistleblower Incentives and Protections." It establishes incentives and a structure for individuals to report securities law violations to the SEC. The Senate Banking Committee cited the testimony of Harry Markopolos, who in 2000, 2001, 2005, and 2007, warned the SEC about Bernard Madoff's massive Ponzi scheme.²⁹ In just one example—at the very end of his efforts—Markopolos emailed the SEC in June 2007, attaching "some very troubling documents that show the Madoff fraud scheme is getting even more brazen."³⁰ He cautioned: "When Madoff finally does blow up, it's going to be spectacular."³¹ The SEC's Inspector

23. 15 U.S.C. § 78aa (2012).

24. Dodd-Frank, *supra* note 2, at § 929Y.

25. SEC Staff, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934* (2012), available at <http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf>.

26. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (holding that only an entity with "ultimate authority" over allegedly false statement may be liable in Rule 10b-5 private right of action); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (holding that secondary actions were not primarily liable under Rule 10b-5 because investors had not relied on their fraudulent conduct); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (holding that Section 10(b) and Rule 10b-5 do not create implied private cause of action for aiding and abetting).

27. Dodd-Frank, *supra* note 2, at § 929Z.

28. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-664, *SECURITIES FRAUD LIABILITY OF SECONDARY ACTORS* (2011), available at <http://www.gao.gov/new.items/d11664.pdf>.

29. SEC, OFFICE OF INVESTIGATIONS, OIG-509, *INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 61* (2009), available at <http://www.sec.gov/news/studies/2009/oig-509.pdf>.

30. *Id.* at 41.

31. *Id.*

General later observed: “His email was ignored.”³²

The Inspector General investigated the SEC’s failure to uncover Madoff’s Ponzi scheme and concluded that the SEC could have acted as early as 1992.³³ His report states:

[D]espite numerous credible and detailed complaints, the SEC never properly examined or investigated Madoff’s trading and never took the necessary, but basic, steps to determine if Madoff was operating a Ponzi scheme. Had these efforts been made with appropriate follow-up at any time beginning in June of 1992 until December 2008, the SEC could have uncovered the Ponzi scheme well before Madoff confessed.³⁴

A. Basic Structure of the Whistleblower Program

The whistleblower program incorporates two basic lessons from the SEC’s failure to uncover Madoff’s fraud despite tips from Markopolos and others. First, private individuals are valuable resources in detecting fraud and should be encouraged to come forward.³⁵ Second, the SEC would benefit from a formal structure to receive, process, and investigate tips from the private sector.³⁶ Dodd-Frank therefore motivates whistleblowers to come forward and establishes a structure for the SEC to act on those complaints.

That said, the SEC retains control throughout. Whistleblowers exist to help the SEC, not to act on their own or through other private means. The Senate report explained: “The Whistleblower Program 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.”³⁷

To be eligible for an award, an individual must voluntarily provide to the SEC “original information” relating to a violation of the securities laws.³⁸ The information must lead the SEC to bring an enforcement action

32. *Id.*

33. *Id.* at 41, 59–61, 389, 456.

34. *Id.* at 41; *See also id.* at 456.

35. *See, e.g., id.* at 411–24 (analyzing private entities’ due diligence on Madoff’s operations).

36. For example, Markopolos testified: “In 2000, [SEC’s Boston Bureau Chief] warned me that relations between the New York and Boston regional offices was about as warm and friendly as the Yankees-Red Sox rivalry and that New York does not like to receive tips from Boston.” Allan Chernoff, Sr., *Madoff Whistleblower Blasts SEC*, CNN, Feb. 4, 2009, http://money.cnn.com/2009/02/04/news/newsmakers/madoff_whistleblower/.

37. S. Rep. No. 111-176, at 110 (2010) (emphasis added).

38. 15 U.S.C. § 78u-6(b)(1) (2012). In 2013, the SEC denied an award on grounds that information provided before Dodd-Frank was enacted is not “original information” under the

that results in monetary sanctions exceeding \$1 million.³⁹ If so, the SEC may pay the whistleblower no less than 10% and no more than 30% of the total money collected.⁴⁰ The SEC pays awards out of the Investor Protection Fund, which Congress created for this purpose.⁴¹ Entering the fiscal year of 2014, the SEC held approximately \$439 million in its Investor Protection Fund for paying awards.⁴²

To administer the program, the SEC established the Office of the Whistleblower (“OWB”) as a separate office within in its Division of Enforcement.⁴³ At the end of the fiscal year of 2014, the OWB had a staff of 14: a Chief, a Deputy Chief, nine attorneys, and three paralegals.⁴⁴ Complaints must be submitted under penalty of perjury on the SEC’s Form 2850, which is titled “Tip, Complaint or Referral” (“TCR”).⁴⁵ The Enforcement Division’s Office of Market Intelligence evaluates each TCR “and assigns specific, credible, and timely” complaints to SEC investigative staff.⁴⁶ The OWB may assist this triage process by contacting the whistleblower for more information.⁴⁷ Later, the OWB serves as the liaison between the whistleblower and SEC investigators.⁴⁸

Once a whistleblower comes forward, the SEC assumes control. The SEC decides whether to pursue an enforcement action, and the whistleblower has no recourse if the SEC chooses not to act. Dodd-Frank, thus, is unlike the False Claims Act, which permits a whistleblower to sue the wrongdoer herself if the government chooses not to and still collect up to 30% of the total recovery.⁴⁹ In contrast, Dodd-Frank simply commissioned a study of whether “it would be useful for Congress to consider” empowering whistleblowers with a private right of action.⁵⁰ The

statute. The whistleblower has appealed to the Second Circuit. *See* Stryker v. SEC, No. 13-4404 (2d Cir. heard on Sept. 29, 2014).

39. 15 U.S.C. § 78u-6(a)(1) (2012).

40. 15 U.S.C. § 78u-6(b)(1)(A)-(B) (2012).

41. 15 U.S.C. § 78u-6(b)(2), (g) (2012).

42. SEC, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 26 (2014), available at <http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2014.pdf> (hereinafter 2014 WHISTLEBLOWER REPORT). The fund also finances the suggestion program of the SEC’s Office of Inspector General. The amount was \$47,078.42 in FY 2014.

43. *Id.* at 1, 4.

44. *Id.* at 6; see also Stephanie Russell-Kraft, *SEC Whistleblower Head to Punish Cos. that Silence Tipsters*, *LAW360* Oct. 2014, available at <http://www.law360.com/securities/articles/587847> (referring to office director Sean McKessy “and his 14 staff members”).

45. SEC, FORM 2850, TIP, COMPLAINT, OR REFERRAL, available at <http://www.sec.gov/about/forms/formtcr.pdf>. [hereinafter TCR].

46. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 24.

47. *Id.* at 25.

48. *Id.*

49. False Claims Act, 31 U.S.C. § 3730(d)(2) (2012).

50. 15 U.S.C. § 78u-6(d) (2012).

SEC's Office of Inspector General has since recommended against creating any such private claims.⁵¹

The SEC likewise has substantial discretion in deciding whether to make an award at all, and if so, how much to pay within the mandated 10%–30% range.⁵² The SEC's Final Rules identify various factors that, in the SEC's discretion, "may increase" or "may decrease" the amount of any award.⁵³

Whistleblowers must be proactive in monitoring any subsequent enforcement proceedings and applying for an award. The OWB posts and circulates a notice of each SEC action that results in monetary sanctions of over \$1 million and so may be the basis of an award.⁵⁴ The notice is called a "Notice of Covered Action," or NoCA.⁵⁵ A whistleblower must apply for an award within 90 days of posting.⁵⁶ The OWB reviews each application.⁵⁷ Depending on the whistleblower's role and contribution, the OWB recommends "whether the applicant should receive an award and, if so, the percentage of the award."⁵⁸ The SEC's Claims Review Staff, consisting of five senior officers, then issues its Preliminary Determination.⁵⁹

A whistleblower may request reconsideration to contest denial of any award or to seek a larger amount.⁶⁰ At the end of the process, the Claims Review Staff issues a Proposed Final Determination for review by the five SEC Commissioners.⁶¹ The SEC then issues its Final Order. Denials may be appealed to the Court of Appeals, where the dissatisfied applicant must prove that the denial was arbitrary, capricious, and without rational basis—among the strictest standards in law.⁶²

51. SEC, OFFICE OF INSPECTOR GENERAL, SEC Rep. No. 511, EVALUATION OF THE SEC'S WHISTLEBLOWER PROGRAM 28-30 (2013), available at <http://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf>.

52. 17 C.F.R. § 240.21F-5 (2014).

53. 17 C.F.R. § 240.21F-6 (2014). As discussed below in more detail, certain factors are designed to encourage the whistleblower first to report securities law violations internally. Factors that may increase the award are: (1) the extent of the assistance that the whistleblower provides to the SEC in its investigation and enforcement proceeding (e.g., the whistleblower's role in explaining complex transactions and interpreting key evidence, timeliness of initial report, resources conserved because of the whistleblower's assistance, whether the whistleblower helped cause others to cooperate, etc.); and (2) the SEC's law enforcement interest in deterring violations of the securities laws by making awards. 17 C.F.R. § 240.21F-6(a) (2014). Factors that may decrease the award are: (1) the whistleblower's culpability in the securities violations; and (2) the whistleblower's unreasonable delay in reporting the violation. 17 C.F.R. § 240.21F-6(b) (2014).

54. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 6, 13.

55. *Id.*

56. 17 C.F.R. § 240.21F-10(a), (b) (2014).

57. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 13.

58. *Id.*

59. *Id.*

60. *Id.* at 13–14.

61. *Id.* at 14.

62. Dodd-Frank, *supra* note 2, at § 923(f).

B. Role of Internal Reporting

To qualify for an award, an employee need not report internally at her company before going to the SEC. The question was heavily debated during the SEC's rulemaking process. Despite lobbying by business groups, the SEC declined to require internal reporting in its Final Rules governing whistleblower award eligibility.

Business groups argued that, particularly since the SOX, companies had “adopted robust compliance programs with mechanisms for employees to promptly alert management and the board about potential or actual misconduct without fear of retribution.”⁶³ They expressed concern that, if employees could receive a substantial award by going directly to the SEC, it would undermine companies' ability to detect, investigate, and remediate securities law violations themselves. In voting against the Final Rule, one of the SEC's two Republican Commissioners said that “the [F]inal [R]ule permits a whistleblower to knowingly bypass a company's good-faith attempts to identify and investigate alleged violations.”⁶⁴ Both Republican Commissioners argued that companies nationwide collectively had more resources than the SEC alone to address violations quickly and at a high volume, rather than letting them fester and deepen.⁶⁵

Still, three of the five Commissioners declined to require whistleblowers to report a securities law violation internally before complaining to the SEC. The SEC chose to let the employee decide, based on her own individual circumstances and corporate environment, whether first to pursue internal compliance. SEC Chairman Mary L. Shapiro said:

63. *Business Roundtable Statement on Whistleblower Vote*, BUS. ROUNDTABLE (May 25, 2011), <http://www.fierceregovernmentit.com/press-releases/business-roundtable-statement-whistleblower-vote>. Business Roundtable charged that the Final Rule “impede[] the ethical standards and transparency that American companies have worked diligently to foster.” *Id.* The U.S. Chamber of Commerce likewise complained that whistleblowers would now “keep companies in the dark” and “leave[] expensive, robust compliance programs collecting dust.” *U.S. Chamber Warns New SEC Whistleblower Rule Will Undermine Corporate Compliance Programs*, U.S. CHAMBER OF COMMERCE (May 24, 2011, 8:00 PM), <https://www.uschamber.com/press-release/us-chamber-warns-new-sec-whistleblower-rule-will-undermine-corporate-compliance>. The National Whistleblowers Center had a different take, deeming the Final Rule “a major victory.” *SEC Rules Strengthen Whistleblower Protections*, NAT'L WHISTLEBLOWERS CENTER (May 25, 2011), http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1246&Itemid=207.

64. Troy A. Paredes, Comm'r, SEC, Speech by SEC Commissioner: Statement at Open Meeting to Adopt Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), available at <http://www.sec.gov/news/speech/2011/spch052511tap-item2.htm> (hereinafter “Paredes Speech”). See also Kathleen L. Casey, Comm'r, SEC, Statement by SEC Commissioner: Adoption of Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), available at <http://www.sec.gov/news/speech/2011/spch052511kcl-item2.htm> (hereinafter “Casey Statement”).

65. See Casey Statement, *supra* note 65; Paredes Speech, *supra* note 65.

“This makes sense as well because it is the whistleblower who is in the best position to know which route is best to pursue.”⁶⁶ Supporters reasoned this approach would encourage companies to maintain strong internal compliance programs and culture so that their employees will report first internally.⁶⁷ They also cited studies that whistleblowers overwhelmingly report within their companies even when they are not required to do so and have large monetary incentives to go to the government.⁶⁸ If a whistleblower lacks confidence in her company, the Final Rule provides a direct route to the SEC. Commissioner Elisse B. Walter explained the SEC could not encourage whistleblowers to come forward “without assuring those who fear for their jobs, their livelihood[,] and their families’ welfare that they have an avenue to come directly to the government. After-the-fact relief for retaliation alone is simply not sufficient.”⁶⁹

Accordingly, the SEC decided to encourage, but not require, internal reporting. In its Final Rules, participation in the company’s internal compliance systems is a factor that the SEC may use to increase a whistleblower’s award.⁷⁰ The SEC may increase the award percentage if the employee, for example, (1) “reported the possible securities law violations through internal whistleblower, legal[,] or compliance procedures before, or at the same time as, reporting” to the SEC; and (2) “assisted any internal investigation or inquiry.”⁷¹ Alternatively, the SEC may decrease the award if the employee knowingly interfered with her company’s internal compliance and reporting systems by, for example, providing false information.⁷² Likewise, if the whistleblower goes first to her company and the company self-reports to the SEC, the whistleblower gets credit for all

66. Mary L. Schapiro, Chairman, SEC, Speech by SEC Chairman Mary L. Schapiro, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), available at <http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm>.

67. *Id.* See also Luis A. Aguilar, Comm’r, SEC, Speech by SEC Commissioner: Incentivizing Whistleblowers to Bring Fraud to Light (May 25, 2011), available at <http://www.sec.gov/news/speech/2011/spch052511laa-item2.htm> (hereinafter “Aguilar Speech”); Robert S. Khuzami, Director of Enforcement, SEC, Speech by SEC Staff: Remarks at Open Meeting—Whistleblower Program (May 25, 2011), available at <http://www.sec.gov/news/speech/2011/spch052511rk.htm> (hereinafter “Khuzami Speech”).

68. Aguilar Speech, *supra* note 68.

69. Elisse B. Walter, Comm’r, SEC, Speech by SEC Commissioner: Opening Statement—May 25, 2011 Open Meeting—Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), available at <http://www.sec.gov/news/speech/2011/spch052511ebw-item2.htm> (hereinafter “Walter Speech”). See also Khuzami Speech, *supra* note 68.

70. 17 C.F.R. § 240.21F-6(a)(4) (2014).

71. 17 C.F.R. § 240.21F-6(a) (2014). In this vein, the SEC’s official whistleblower complaint form asks whether the tipster has reported internally to a supervisor, compliance officer, whistleblower, ombudsman, or someone else and seeks details. See TCR, *supra* note 45, at Questions 5b & 5c.

72. 17 C.F.R. § 240.21F-6(b)(3) (2014).

the information the company provides to the SEC—even if the initial internal report was only the tip of the iceberg.⁷³

C. *The Whistleblower Program in Practice*

The whistleblower incentives program became effective on August 12, 2011.⁷⁴ In October 2014, the Chief of the OWB reported his office “has seen a steady 5 to 10 percent increase in tips each year.”⁷⁵ Through the end of the 2014 fiscal year, the OWB received 10,193 complaints, including 3620 in 2014, 3238 in 2013, and 3001 in 2012.⁷⁶ In each of these years, the most common complaint categories were Corporate Disclosures and Financials, Offering Fraud, and Manipulation, which together compose about half of all tips.⁷⁷ Over this time, the OWB posted 570 NoCAs to its website, including 139 in 2014.⁷⁸

As of the end of the fiscal year of 2014, the SEC had issued awards to fourteen whistleblowers.⁷⁹ The SEC has disclosed that at least two awards were for 30% of the recoveries—which is the maximum statute allows.⁸⁰ Five of the award amounts were in the range of \$50,000 to \$400,000, and a

73. 17 C.F.R. § 240.21F-4(c)(3) (2014).

74. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 10, 20 n.39.

75. Stephanie Russell-Kraft, *SEC Whistleblower Head Admits to Award-Payout Struggles*, LAW360 (2014), available at <http://www.law360.com/articles/587846>.

76. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 20. The SEC also received 334 complaints during the first seven weeks of the program, from August 12, 2011 through the end of the fiscal year of 2011 on September 30, 2011.

77. *Id.* at 21-22, 27.

78. *Id.* at 13.

79. *Id.* at 10; see also *Final Orders of the Commission*, SEC (Nov. 18, 2013), <http://www.sec.gov/about/offices/owb/owb-final-orders.shtml> (the SEC’s orders denying or granting whistleblower awards from various years).

80. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 11-12. One award totaling 30% was shared among three claimants, with 15% to Claimant #1, 10% to Claimant #2, and 5% to Claimant #3 (In the Matter of the Claim for Award in Connection with Redacted Redacted [sic] Notice of Covered action Redacted, Exchange Act Release No. 72652, 2014 WL 3588057 (July 22, 2014), available at <http://www.sec.gov/rules/other/2014/34-72652.pdf>). Another award reaching 30% went to one whistleblower who stopped a multi-million fraud and, as of the end of FY 2014, had collected over \$385,000. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 12; Order Determining Whistleblower Award Claim, SEC Rel. Co. 67698, File No. 2012-1 (Aug. 21, 2012). Another reported award percentage was for 20% (In the Matter of the Claim for Award in Connection with Redacted Notice of Covered Action Redacted, Exchange Act Release No. 72947, 2014 WL 4258232 (Aug. 29, 2014), available at <http://www.sec.gov/rules/other/2014/34-72947.pdf>); one was for 15% (In the Matter of the Claim for Award in Connection with Redacted Redacted [sic] Notice of Covered Action Redacted, Exchange Act Release No. 72301, 2014 WL 2466464 (June 3, 2014), available at <http://www.sec.gov/rules/other/2014/34-72301.pdf>); and two were not disclosed (In the Matter of the Claim for Award in Connection with Redacted, Exchange Act Release No. 73174, 2014 WL 4678597 (Sept. 22, 2014), available at <http://www.sec.gov/rules/other/2014/34-73174.pdf>; In the Matter of the Claim for Award in Connection with Redacted (Administrative Proceeding File No. Redacted) Notice of Covered Action Redacted, Exchange Act Release No. 72727, 2014 WL 3749705 (July 31, 2014), available at <http://www.sec.gov/rules/other/2014/34-72727.pdf>).

sixth award was for \$875,000.⁸¹ Two award amounts dwarfed the others. On September 30, 2013, the SEC awarded over \$14 million to one whistleblower.⁸² On September 22, 2014, the SEC awarded \$30 million to another whistleblower, stating that the amount would have been higher but for an “unreasonable” delay in reporting the violations.⁸³

According to the SEC, “over 40% of the individuals who received awards were current or former company employees” and “an additional 20% . . . were contractors, consultants, or were solicited to act as consultants for the company committing the securities violation.”⁸⁴ Over 80% of the current or former employees to receive an award reported internally before going to the SEC.⁸⁵

D. Anti-retaliation Protections for Whistleblowers

To protect whistleblowers against employer retaliation, Dodd-Frank provides whistleblowers with a private right of action with meaningful recovery.⁸⁶ The statute defines “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.”⁸⁷ A whistleblower may recover if she suffers an adverse employment action because she either: (i) gave information to the SEC; (ii) participated in the SEC’s subsequent investigation or proceeding; or (iii) made any disclosure that is required or protected under SOX, the Exchange Act, or any other law, rule, or regulation within the SEC’s jurisdiction.⁸⁸

Statutory remedies include reinstatement with equivalent seniority, double back pay with interest, and litigation fees and costs.⁸⁹ The limitations period is long: a whistleblower may sue within six years of the violation or within three years of reasonable discovery.⁹⁰ In contrast, an employee who sues for retaliation under SOX may recover (among other remedies) back pay with interest but not two times back pay.⁹¹ A SOX retaliation plaintiff must also file a complaint with the Department of Labor

81. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 11-12.

82. *Id.* at 12; Order Determining Whistleblower Award Claim, SEC Rel. No. 70554, File No. 2013-4 (Sept. 30, 2013).

83. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 10; Order Determining Whistleblower Award Claim, SEC Rel. No. 73174, File No. 2014-10 (Sept. 22, 2014).

84. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 16.

85. *Id.*

86. 15 U.S.C. § 78u-6(h)(1)(B)(i) (2012).

87. 15 U.S.C. § 78u-6(a)(6) (2012).

88. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

89. 15 U.S.C. § 78u-6(h)(1)(C) (2012).⁴

90. 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2012).

91. Sarbanes-Oxley Act of 2002, PUB. L. NO. 107-204, 116 Stat. 745, § 806 (codified at 18 U.S.C. § 1514A(c) (2013)) [hereinafter SOX].

within 180 days.⁹²

The SEC's regulations include additional protection not found in the statute. First, the SEC may enforce the anti-retaliation provisions through civil enforcement actions in federal court or administrative proceedings.⁹³ The SEC cited its statutory authority to enforce the Exchange Act generally, which now includes Dodd-Frank's anti-retaliation provisions.⁹⁴ In June 2014, the SEC commenced administrative proceedings against a hedge fund, alleging that it demoted its head trader after learning that the trader reported a conflict of interest to the SEC.⁹⁵ The hedge fund and its principal ultimately agreed to pay \$2.2 million to settle the charges.⁹⁶

Second, the Final Rules prohibit "any action to impede" employees from reporting securities law violations to the SEC, including through "enforcing, or threatening to enforce, a confidentiality agreement"—such as those commonly included in severance contracts with departing employees.⁹⁷ The OWB Chief has stressed the SEC is "on the hunt for cases to bring against illegal employment or confidentiality agreements."⁹⁸ He has said: "We are going to bring a case where somebody has asked an employee or forced an employee to sign a document that in order of substance means they can't report to us [. . .] This is now the new thing that I've got people really enthusiastic for."⁹⁹

III. DOES DODD-FRANK PROTECT AN EMPLOYEE WHO DOES NOT REPORT TO THE SEC?

Dodd-Frank's provision prohibiting retaliation against "whistleblowers" highlights the tension between the exclusive authority vested in the SEC and the practical and policy concerns that favor an active role for private actors in strengthening our financial system. Courts nationwide have encountered multiple lawsuits by employees who sued for retaliation under Dodd-Frank even though they did not go to the SEC. The employees reported suspected wrongdoing only internally and allege they were fired because of it.

92. Dodd-Frank, *supra* note 2, § 922(c).

93. 17 C.F.R. § 240.21F-2(b)(2) (2014).

94. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 18.

95. *SEC Charges Hedge Fund Adviser With Conducting Conflicted Transactions and Retaliating Against Whistleblower*, SEC (June 16, 2014)

<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542096307>; In the Matter of Paradigm Capital Management, Inc. and Candace King Weir, Respondents, Exchange Act Release No. 72393, Investment Act Release No. 3857, 2014 WL 270411 (June 16, 2014), *available at* <http://www.sec.gov/litigation/admin/2014/34-72393.pdf>.

96. 2014 WHISTLEBLOWER REPORT, *supra* note 42, at 18.

97. 17 C.F.R. § 240.21F-17(a) (2014).

98. Stephanie Russell-Kraft, *SEC Whistleblower Head to Punish Cos. that Silence Tipsters*, LAW360 (2014), *available at* <http://www.law360.com/securities/articles/587847>.

99. *Id.*

Are these employees “whistleblowers” entitled to Dodd-Frank’s statutory protection against retaliation? Not under the statutory definition of “whistleblower,” which requires disclosure to the SEC. As noted earlier, Dodd-Frank defines “whistleblower” as “any individual who provides, or 2 [sic] 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.”¹⁰⁰

Even though the statute defines a “whistleblower” as one who reports to the SEC, it also protects disclosures that are not made to the SEC. The statute protects a “whistleblower” from retaliation for reports not just to the SEC but also to other government agencies—and, critically, to internal company officials. The statute reads:

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.¹⁰¹

Subsections (i) and (ii) plainly protect whistleblowers who provide information to the SEC or otherwise directly interact with the SEC. The problem is subsection (iii), which does not require a whistleblower to report to or interact with the SEC. It protects, for example, disclosures under SOX, which covers disclosures made only internally, without any report to the SEC.¹⁰² Indeed, the main thrust of SOX was mandating internal compliance,

100. 15 U.S.C. § 78u-6(a)(6) (2012) (emphasis added).

101. 15 U.S.C. § 78u-6(h)(1)(A) (2012) (emphasis supplied).

102. SOX, PUB. L. NO. 107-204, 116 Stat. 745. Courts have noted that “subsection (iii) contains a catch-all provisions which protects any disclosures required by any law, rule, or regulation subject to the jurisdiction of the SEC.” *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014). As another example, “FINRA Rule 8210 is a rule ‘subject to the jurisdiction

corporate governance, and audit functions in the wake of the massive accounting frauds at Enron, WorldCom, Tyco, and other companies. SOX protects from retaliation employees of public companies who disclose internal securities violations or other fraud against shareholders.¹⁰³ As noted earlier, SOX's anti-retaliation provisions have a much shorter limitations period and lower potential damages compared to Dodd-Frank's.

Does subsection (iii) entitle employees who report misconduct internally, as protected under SOX, to sue under Dodd-Frank's expansive anti-retaliation provisions—even if they did not also notify the SEC? The question turns on whether Dodd-Frank requires a “whistleblower” to communicate with the SEC.

The SEC itself says no. Its Final Rules implementing the whistleblower program do not require disclosure to the SEC for statutory protection against retaliation. The Final Rule states that:

[f]or the purposes of the retaliation protections afforded by [Dodd-Frank], you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).¹⁰⁴

In its comments, the SEC stated that “the rule reflects the fact that 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.”¹⁰⁵

of the Commission,” which requires the disclosure to FINRA (and not the SEC) “of information related to any investigation authorized by FINRA’s by-laws or rules.”

103. SOX § 806 (codified at 18 U.S.C. § 1514A).

104. 17 C.F.R. § 240.21F-2(b)(1) (2014).

105. SEC Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300–01 (codified at 17 C.F.R. 240, 249 (2014), available at 2011 WL 2293084, at *34304 (June 13, 2011)).

A. The Vast Majority of District Courts Conclude an Employee Need Not Communicate with the SEC to Sue for Retaliation under Dodd-Frank

The vast majority of federal district courts, to consider the issue, have agreed with the SEC. These courts held that a plaintiff may sue for retaliation as a Dodd-Frank “whistleblower” even though she did not provide information to the SEC.¹⁰⁶ In these cases, the employees reported alleged infractions internally within their companies, but they did not report to SEC or in the manner required by the SEC.¹⁰⁷ Each employee was fired, and then sued under a variety of common-law and statutory theories, including for retaliatory termination under Dodd-Frank.¹⁰⁸ This table summarizes what each employee said, and to whom:

Case	Allegations	Reported To
<i>Egan v. Trading screen, Inc.</i> , Fed. Sec. L. Rep. (CCH) ¶ 96,307 (S.D.N.Y. May 4, 2011).	CEO was diverting company income to another company under the CEO’s control.	President of company, then to independent directors, and last to Latham & Watkins, which was hired by independent directors to

106. *E.g.*, *Connolly v. Remkes*, 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014); *Peters v. LifeLock Inc.*, No. 2:14-cv-00576, Dkt. 47, slip op. 6-13 (D. Ariz. Sept. 19, 2014); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014); *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703 (D.N.J. Mar. 11, 2014); *Azim v. Tortoise Capital Advisors, LLC*, 2014 WL 707235 (D. Kan. Feb. 24, 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42 (D. Mass. 2013); *Murray v. UBS Secs., LLC*, Fed. Sec. L. Rep. ¶ 97,423 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Kramer v. Trans-lux Corp.*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627 (D. Conn. Sept. 25, 2012); *Egan v. Tradingscreen, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 96,307 (S.D.N.Y. May 4, 2011).

107. In *Egan*, there was a factual dispute about whether the employee had actually reported the infractions to the SEC. (The types of allegations that *Egan* made did not qualify for protection under subsection (A)(iii).) The employee’s up-the-chain disclosure prompted an internal investigation of his claims, and the investigation substantiated the claims. *Egan*, Fed. Sec. L. Rep. (CCH) ¶ 96,307 (S.D.N.Y. May 4, 2011). The employee alleged the investigators most likely had reported the infractions to the SEC, and that such a report could qualify under Dodd-Frank’s allowance for “joint” notice to the SEC. But the employee alleged nothing more than his suspicion that a report had been made. The employee was granted leave to amend his complaint. After the amendment, *Egan*’s case was dismissed because he failed to allege that he acted jointly with someone who provided information to the SEC. *Egan*, Fed. Sec. L. Rep. (CCH) ¶ 96,307 (S.D.N.Y. May 4, 2011). In *Kramer*, meanwhile, the employee sent the SEC a letter outlining his allegations, but a letter, all parties agreed, was not the manner of communication required by the SEC. *Kramer*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627. In the other cases, the employees said nothing to the SEC.

108. *E.g.*, *Murray*, Fed. Sec. L. Rep. ¶ 97,423; *Genberg*, 935 F. Supp. 2d 1094; *Nollner*, 852 F. Supp. 2d 986; *Kramer*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627; *Egan*, Fed. Sec. L. Rep. (CCH) ¶ 96,307.

		investigate the claims.
<i>Nollner v. S. Baptist Convention, Inc.</i> , 852 F. Supp. 2d 986 (M.D. Tenn. 2012).	Executives bribed foreign officials to obtain building permits and other favors in violation of Foreign Corrupt Practices Act.	Two supervisors.
<i>Kramer v. Trans-lux Corp.</i> , 96 Empl. Prac. Dec. (CCH) ¶ 44,627 (D. Conn. Sept. 25, 2012).	CEO and CFO caused a missed distribution to company's pension plan, and then amended pension plan without notifying the SEC.	CEO and CFO, then the company's audit committee, and last a letter to the SEC.
<i>Genberg v. Porter</i> , 935 F. Supp. 2d 1094 (D. Colo. 2013).	Company violated SEC proxy rules, and CEO engaged in insider trading and violated other securities laws.	Head of the board's audit committee by letter.
<i>Murray v. UBS Secs., LLC</i> , Fed. Sec. L. Rep. ¶ 97,423 (S.D.N.Y. May 21, 2013).	UBS coerced its analyst into skewing research reports so that they were favorable to UBS's trading and loan-origination businesses.	Two supervisors, including a managing director.
<i>Ellington v. Giacomakis</i> , 977 F. Supp. 2d 42 (D. Mass. 2013).	Company was distributing misleading investment reports to existing and prospective clients.	SEC. One day after the employee made allegations internally, he was terminated. This led to the recovery of some \$200,000 in civil penalties for willful violations of securities regulations.
<i>Rosenblum v. Thomson Reuters (Markets) LLC</i> , 984 F. Supp. 2d 141 (S.D.N.Y. 2013).	Certain customers received financial information before others, giving them an advantage in financial transactions.	The FBI and the company's ethics committee.
<i>Khazin v. TD Ameritrade Holding Corp.</i> , 2014 WL 940703 (D.N.J. Mar.	Financial product was improperly priced, would result customers paying additional overhead, and so	Supervisor

11, 2014).	did not comply with securities regulations	
<i>Yang v. Navigators Group, Inc.</i> , 18 F. Supp. 3d 519 (S.D.N.Y. 2014).	Market risk assessments of certain investment portfolios used improper models and so substantially underestimated investment risks	CFO, various oversight committees, and general counsel
<i>Bussing v. COR Clearing, LLC</i> , 20 F. Supp. 3d 719 (D. Neb. 2014).	Violations of various bank secrecy and anti-money laundering statutes and regulations	Company management, including CEO, COO, and directors
<i>Azim v. Tortoise Capital Advisors, LLC</i> , 2014 WL 707235 (D. Kan. Feb. 24, 2014).	False representations to potential investors and false filings with the SEC	Supervisor
<i>Peters v. LifeLock Inc.</i> , No. 2:14-cv-00576, Dkt. 47 (D. Ariz. Sept. 19, 2014).	Initial risk assessment revealed fraud against shareholders, including failures to audit and manipulating client alerts to elderly customers	CFO and to supervisor, the Chief Information Officer
<i>Connolly v. Remkes</i> , 2014 WL 5473144 (N.D. Cal. Oct. 28, 2014).	Financial advisor made payment directly into client's account, violating rules of the Financial Industry Regulatory Authority	Compliance officers and to owner

The employers all moved to dismiss the Dodd-Frank claims. They argued the employees were not “whistleblowers,” because the employees had not properly reported the alleged infractions to the SEC. The employees countered that reporting the violations to the SEC was not necessary because § 78u-6(h)(1)(A)(iii) protects disclosure made only internally.

In each case listed above, the court concluded Dodd-Frank’s whistleblower protections do not require the plaintiff to provide information to the SEC. While the definition of “whistleblower” requires the individual to report a violation “to the Commission,” several courts noted a “contradiction” in § 78u-6(h)(1)(A)(iii).¹⁰⁹ That was because section (A)(iii) protects whistleblowing disclosures made under the SOX regime, which

109. See *Egan*, Fed. Sec. L. Rep. (CCH) ¶ 96,307, at *9; see also *Nollner*, 852 F. Supp. at 994 n.9; *Kramer*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627, at *9; *Genberg*, 935 F. Supp. 2d at 1106; *Murray*, Fed. Sec. L. Rep. ¶ 97,423, at *3.

requires only that the employee report a possible violation to a supervisor.¹¹⁰ A “literal reading” of the definition of a “whistleblower,” according to the one court, would “effectively invalidate § 78u-6(h)(1)(A)(iii)’s protection of whistleblower disclosures that do not require reporting to the SEC.”¹¹¹ The court read (A)(iii) as a “narrow” exception to the requirement that a report be made to the SEC. It held: “[t]he contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)’s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)’s definition of a whistleblower as one who reports to the SEC.”¹¹² Another court went so far as to substitute the “ordinary meaning” of whistleblower for its statutory definition,¹¹³ stating, if this was not done, “subsection (iii) [would] be rendered insignificant, and its purpose—to shield a broad range of employee disclosures—will be thwarted.”¹¹⁴

Other courts reached the same result, but did so by deferring to the SEC’s Final Rule interpreting the whistleblower provisions. These courts applied *Chevron* deference, determining the statute to be ambiguous, finding the SEC rule to be a permissible construction and therefore ruling the agency’s interpretation as binding.¹¹⁵ Another court similarly found the “SEC’s construction . . . persuasive.”¹¹⁶ That was because it was “apparent” that Congress intended “that an employee terminated for reported SOX violations to a supervisor or an outside compliance officer, and ultimately to the SEC, have a private right of action under Dodd-Frank whether or not the employer wins the race to the SEC’s door with a termination notice.”¹¹⁷

In several cases, the courts interpreted the anti-retaliation provision so that (A)(iii) would not be rendered “inoperable and moot.”¹¹⁸ Some courts cited Dodd-Frank’s stated goals to “improve the accountability and transparency of the financial system” and “create ‘new incentives and

110. *Egan*, Fed. Sec. L. Rep. (CCH) ¶ 96,307, at *10.

111. *Id.* at *10–11.

112. *Id.* at *13.

113. *Bussing*, 20 F. Supp. 3d at 729.

114. *Id.*

115. *See, e.g., Remkes*, 2014 WL 5473144, at *6; *Yang*, 18 F. Supp. 3d at 534; *Khazin*, 2014 WL 940803, at *6;

Kramer, 96 Empl. Prac. Dec. (CCH) ¶ 44,627, at *10–12; *Murray*, Fed. Sec. L. Rep. ¶ 97,423, at *6–7. Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, if a statute is ambiguous, courts defer to the interpretation of the agency that administers the statute as long as it is based on a permissible construction. 467 U.S. 837 (1984).

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

117. *Id.* at *9–10.

118. *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013); *See also Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012) (avoiding an interpretation that would make (A)(iii) “superfluous”); *Murray*, 2013 WL2190084 at *5–6 (same).

protections for whistleblowers.”¹¹⁹ They therefore dismissed arguments that expanding “whistleblower” under Dodd-Frank to include employees who report only internally would allow plaintiffs to pursue the same retaliation claims they would have sought under SOX—but with a longer statute of limitations, no administrative exhaustion requirement, and more generous relief.¹²⁰ The “problem is not a problem at all” because Dodd-Frank “appears to have been intended to expand upon the protections of [SOX].”¹²¹

B. The Fifth Circuit Concludes that Whistleblowers Must Report to the SEC to Assert a Private Right of Action under Dodd-Frank

Before September 2015, only one federal court of appeals had addressed whether a whistleblower who does not report to the SEC may sue under Dodd-Frank—the Fifth Circuit in *Asadi v. G.E. Energy (USA), LLC*.¹²² Asadi alleged GE Energy violated Dodd-Frank by terminating him after he internally reported a possible securities law violation.¹²³ Asadi was GE Energy’s Iraq Country Executive in Jordan.¹²⁴ He alleged that GE Energy had hired a woman closely associated with a senior Iraqi official to gain favor in negotiating a joint venture.¹²⁵ Believing this conduct violated the Foreign Corrupt Practices Act, Asadi reported it to his supervisor and a corporate ombudsperson.¹²⁶ According to Asadi, he then received a “surprisingly negative” performance review and was pressured to step down and accept a job with minimal responsibility.¹²⁷ Asadi refused, and GE Energy fired him.¹²⁸

GE Energy moved to dismiss, arguing that Asadi did not qualify as a “whistleblower” under Dodd-Frank and that Dodd-Frank’s whistleblower protection does not apply extraterritorially.¹²⁹ The district court dismissed Asadi’s whistleblower-retaliation claim on the latter ground and declined to reach whether Asadi qualified as a “whistleblower.”¹³⁰

On appeal, the Fifth Circuit framed the question as whether “an individual who is not a ‘whistleblower’ under the statutory definition of that

119. *Kramer*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627, at *10–11 (citation omitted); *See also Murray*, Fed. Sec. L. Rep. ¶ 97,423, at *6.

120. *See, e.g., Kramer*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627, at *12; *Murray*, Fed. Sec. L. Rep. ¶ 97,423, at *6–7.

121. *Kramer*, 96 Empl. Prac. Dec. (CCH) ¶ 44,627, at *12.

122. 720 F.3d 620 (5th Cir. 2013).

123. *Id.* at 621.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 621 (5th Cir. 2013).

129. *Id.*

130. *Id.*

term in § 78u-6(a)(6) may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision.”¹³¹ Relying on subsection (A)(iii), Asadi argued he qualified as a whistleblower even though he did not provide information to the SEC.¹³²

The Fifth Circuit disagreed. Relying on the statute’s plain language, the court concluded that only individuals who provide information relating to a securities law violation to the SEC are “whistleblowers.”¹³³ The Fifth Circuit found no conflict between the definition of “whistleblower” as one who reports to the SEC, and the protection of disclosures that are not made to the SEC.¹³⁴ The court stressed that the three categories of protected activity follow the phrase “[n]o employer may discharge . . . a *whistleblower* because of any act done by the *whistleblower*.”¹³⁵ The Fifth Circuit found it “significant” that Congress had chosen to use the word “whistleblower” instead of “individual” or “employee.” Since Congress had used the term “whistleblower” throughout the subsection, the court determined that it had to “give that language effect.”¹³⁶

The Fifth Circuit further concluded that the “interplay between § 78u-6(a)(6) [defining ‘whistleblower’ as one who reports to the SEC] and § 78u-6(h)(1)(A)(iii) [protecting disclosures not made to the SEC] did not render § 78u-6(h)(1)(A)(iii) superfluous.”¹³⁷ The category of protected activity under § 78u-6(h)(1)(A)(iii) had effect even if the protections from retaliation apply only to individuals who ultimately report to the SEC.¹³⁸ For example, (A)(iii) would apply to a mid-level manager who discovered a securities law violation and reported the violation to the company’s CEO *and* to the SEC.¹³⁹ If the manager were fired before the CEO became aware of the disclosure to the SEC, the manager could not prove retaliation *because he reported to the SEC*.¹⁴⁰ The manager could obtain relief only under (A)(iii): a “whistleblower” (because he also disclosed to the SEC) who made an internal disclosure protected under the anti-retaliation provision of SOX.¹⁴¹ The *Asadi* court refused to “read the words ‘*to the Commission*’ out of the definition of ‘whistleblower’ for the purposes of the whistleblower-protection provision.”¹⁴² The court concluded this construction would

131. *Id.* at 623.

132. *Id.* at 624, 626.

133. *Id.* at 629.

134. *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 626 (5th Cir. 2013).

135. *Id.* (emphasis in original).

136. *Id.*

137. *Id.* at 627.

138. *Id.*

139. *Id.*

140. *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 627–28 (5th Cir. 2013).

141. *Id.*

142. *Id.*

violate the “surplusage [*sic*] cannon.”¹⁴³

The Fifth Circuit also determined that construing Dodd-Frank’s whistleblower-protection provision to extend beyond the statutory definition of “whistleblowers” would render “[SOX’s] anti-retaliation provision, for practical purposes, moot.”¹⁴⁴ The court explained: “[A]n individual who makes a disclosure that is protected by [SOX] anti-retaliation provision could also bring a Dodd-Frank whistleblower-protection claim on the basis that the disclosure was protected by [SOX].”¹⁴⁵ The court doubted a person would choose to bring an anti-retaliation claim under SOX instead of Dodd-Frank because: (1) the Dodd-Frank whistleblower protection permits larger monetary damages; (2) individuals who bring an anti-retaliation claim under SOX must meet certain procedural requirements; and (3) Dodd-Frank’s whistleblower protection claims have a much longer limitations period.¹⁴⁶

The *Asadi* court finally refused to defer to the SEC’s regulation construing the Dodd-Frank whistleblower-protection provision.¹⁴⁷ The SEC adopted a final rule that expands the definition of a “whistleblower” to include individuals who do not report to the SEC, but the Fifth Circuit concluded the statute’s plain language did not support this expansion. The court rejected the “SEC’s expansive interpretation of the term ‘whistleblower’ for purposes of the whistleblower-protection provision” because § 78u-6(a)(6) unambiguously expresses Congress’s “intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank.”¹⁴⁸

The Fifth Circuit therefore concluded the “plain language” of § 78u-6 limits protection under the Dodd-Frank whistleblower-protection provision to those individuals who provide information relating to a violation of the securities laws to the SEC.¹⁴⁹ *Asadi* did not qualify as a whistleblower and his whistleblower protection claim under Dodd-Frank had been properly dismissed by the district court, because he did not provide information to the SEC.¹⁵⁰

At least five district courts have since followed *Asadi*, holding that the statutory definition of “whistleblower” is itself unambiguous.¹⁵¹ One such

143. *Id.* at 628.

144. *Id.*

145. *Id.* at 628.

146. *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 629 (5th Cir. 2013).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404 (S.D.N.Y. 2014), rev’d, ___ F.3d ___, 2015 WL 5254916 (2d Cir. Sept. 10, 2015); *Verfuert v. Orion Energy Servs.*, 65 F. Supp. 3d 640, 643-46 (E.D. Wis. 2014); *Englehart v. Career Educ. Corp.*, 2014 WL 2619501, at **3-9 (M.D.

court explained: “Reporting to the SEC is the precondition that triggers the anti-retaliation provisions of the statute. Only when one has reported to the SEC is that employee protected under all three prongs of the anti-retaliation provision.”¹⁵² The court characterized the real dispute as one over public policy. It wrote:

The surprising number of courts accepting the ambiguity argument appear to believe that because one may engage in protected activity and yet not qualify as a whistleblower, then there is something “ambiguous” in the statute. But that is an argument based solely on a disagreement about public policy, not statutory interpretation. . . . Congress could not have defined “whistleblower” more clearly, and yet the SEC apparently believes that entire definition should be cast aside on the flimsy grounds that Congress really didn’t mean it.¹⁵³

Another court stressed that SOX independently protects against retaliation of individuals who report internally, “subject to the requirement that they first file a complaint with the Department of Labor before bringing a private right of action.”¹⁵⁴ This court observed that “it appears to be the exception, not the rule, for Congress to grant an individual a private right of action to sue for damages arising from retaliation without requiring that individual to make contact with a federal agency first.”¹⁵⁵

C. Creating a Circuit Split, the Second Circuit Holds that the Statute Is Ambiguous and Defers to the SEC.

After the Fifth Circuit decided *Asadi*, other Courts of Appeals initially declined opportunities to address whether Dodd-Frank’s whistleblower anti-retaliation provision requires disclosure to the SEC. The Eighth Circuit refused an interlocutory appeal by an employer whose motion to dismiss was denied, even though the district court certified the question for interlocutory review.¹⁵⁶ Like the Fifth Circuit in *Asadi*, the Second Circuit encountered an appeal where an employee stationed abroad reported only

Fla. May 12, 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756-57 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 97,571 (D. Colo. July 19, 2013).

152. *Verfueth*, 65 F. Supp. 3d at 645.

153. *Id.* at 644.

154. *E.g., Berman*, 72 F. Supp. 3d at 409.

155. *Id.*

156. *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014), *interlocutory appeal denied*, No. 14-8015 (8th Cir. Sept. 4, 2014) (reversing the magistrate judge’s report and recommendation, which had ruled that *Asadi* had correctly decided the issue and that the employee could not sue under Dodd-Frank’s private right of action because she had not reported to the SEC.).

internally.¹⁵⁷ Unlike the Fifth Circuit, the Second Circuit affirmed on grounds that Dodd-Frank does not apply extraterritorially and chose not to address whether the employees “internal reporting of alleged misconduct, with or without his subsequent disclosures to the SEC, qualified him as a ‘whistleblower’ under the Dodd-Frank Act.”¹⁵⁸

The Second Circuit finally addressed the issue in September 2015, in a divided opinion that split with *Asadi*. In *Berman v. NeoOgilvy LLC*, the majority of a three-judge panel found ambiguity in § 78u-6(h)(1)(A)(iii) and so deferred to the SEC.¹⁵⁹ Berman alleged that he was fired as finance director after he discovered accounting fraud at his employer and reported his discovery internally.¹⁶⁰ Berman went to the SEC six months after he was terminated, at which point the limitations period for retaliation claims under SOX already had expired.¹⁶¹

Citing the SEC’s Final Rule, the majority held that Berman could pursue Dodd-Frank remedies for retaliation even though he reported to the SEC only after his termination.¹⁶² The Second Circuit drew on the Supreme Court’s recent decision in *King v. Burwell*.¹⁶³ In *King*, the Court held that income tax subsidies under the Affordable Care Act (“ACA”) were available to those who purchased health insurance on exchanges established by the federal government—even though the express statutory language referred only to exchanges “established by a state.”¹⁶⁴ The Second Circuit explained that, in *King*, the Supreme Court departed from the text because, otherwise, “the operation of the entire statute would be undermined” and so the Court “interpreted the Affordable Care Act as whole to provide income tax subsidies to those who purchased health insurance on federal exchanges.”¹⁶⁵

Applying this analysis to Dodd-Frank’s whistleblower retaliation provision, the Second Circuit reasoned that requiring employees to report to the SEC would leave § 78u-6(h)(1)(A)(iii) “with an extremely limited scope.”¹⁶⁶ Unlike the Fifth Circuit in *Asadi*, the Second Circuit did not deem it sufficient to protect individuals who report simultaneously to the

157. *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014).

158. *Id.* at 183.

159. *Berman v. Neo@Ogilvy LLC*, ___ F.3d ___, 2015 WL 5254916 (2d Cir. Sept. 10, 2015).

160. *Id.* at *4.

161. *Id.*

162. *Id.* at *4-*9.

163. *Id.* at *1, *5, *9 (citing *King v. Burwell*, ___ U.S. ___, 135 S. Ct. 2480 (2015)).

164. *Id.* at *5.

165. *Berman v. Neo@Ogilvy LLC*, ___ F.3d ___, 2015 WL 5254916, at *5 (2d Cir. Sept. 10, 2015).

166. *Id.*

SEC and to their employer.¹⁶⁷ Most significant to the Second Circuit, this reading would exclude employees “who cannot report wrongdoing to the [SEC] until after they have reported the wrongdoing to their employer,” chiefly auditors and attorneys.¹⁶⁸ The court concluded that, as a practical matter, “there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope.”¹⁶⁹ Just as the Supreme Court in *King* departed from the ACA’s plain text so as to avoid undermining “the operation of the entire statute,” the Second Circuit majority found ambiguity in the Dodd-Frank’s plain definition of “whistleblower” so as to avoid drastically limiting the scope of subdivision (iii).¹⁷⁰ It therefore deferred to the SEC and held that an employee’s failure to report to the SEC before termination did not bar a claim for retaliation under Dodd-Frank’s whistleblower provision.¹⁷¹

In dissent, Judge Jacobs characterized the majority as “rewriting” the provision.¹⁷² Calling *Asadi*’s interpretation “the more natural reading,” the dissent stressed that § 78u-6(h)(1)(A) applies only to “whistleblowers” as defined by statute, and not to generic “employees.”¹⁷³ Instead, employees are protected by SOX’s anti-retaliation provision, with its shorter limitations period and other restrictions.¹⁷⁴ The dissent challenged the majority’s focus on the “extremely limited scope” of subdivision (iii) if it were to protect only those who report to the SEC.¹⁷⁵ Judge Jacobs wrote: “The U.S. Code is full of statutory provisions with ‘extremely limited’ effect; there is no canon that counsels reinforcement of any sub-sub-sub-section that lacks a paradigm-shift.”¹⁷⁶ Finally, the dissent argued that *King v. Burwell* did not authorize judges to redraft statutes in order to avoid results that may be “sub-optimal.”¹⁷⁷ Instead, the Supreme Court sought to

167. *Id.* at *5-*7.

168. *Id.* at *6.

169. *Id.* at *7.

170. *Id.* at *9. The Second Circuit also observed that the legislative history was of no help, and that the inconsistency first appeared without comment or explanation in conference to reconcile the Senate and House versions. *Id.* at *7, *9. The court speculated that “no one noticed that the new subdivision and the definition of ‘whistleblower’ do not fit together neatly.” *Id.* at *9. It continued: “Ultimately, we think it doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the [SEC] reporting requirement in the ‘whistleblower’ definition in subsection 21F(a)(6).” *Id.*

171. *Berman v. Neo@Ogilvy LLC*, ___ F.3d ___, 2015 WL 5254916, at *9 (2d Cir. Sept. 10, 2015).

172. *Id.* at *10.

173. *Id.* at *11.

174. *Id.* at *12.

175. *Id.*

176. *Berman v. Neo@Ogilvy LLC*, ___ F.3d ___, 2015 WL 5254916, at *12 (2d Cir. Sept. 10, 2015).

177. *Id.* at *13.

prevent a small phrase buried in a statute from undoing the entire scheme.¹⁷⁸ The dissent observed: “The Court adapted wording to avoid what it considered the upending of a ramified, hugely consequential enactment: ‘Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.’”¹⁷⁹ In Dodd-Frank, by contrast, “Congress expressed its meaning [of ‘whistleblower’] in a ‘prominent manner’ in the definitions section,” which, the dissent explained, is precisely where the Supreme Court said that judges should look for “categorical guidance as to congressional intent.”¹⁸⁰ The dissent concluded: “‘If the statutory language is plain, we must enforce it according to its terms.’”¹⁸¹

IV. REQUIRING WHISTLEBLOWERS TO REPORT TO THE SEC COMPORTS WITH CONGRESS’S POLICY CHOICE IN DODD-FRANK TO ENFORCE THROUGH REGULATORY BODIES, NOT PRIVATE PARTIES.

The split among the Second and the Fifth Circuits likely will trigger Supreme Court review in the near future.¹⁸² Until then, it remains unsettled whether Dodd-Frank’s “whistleblower” protection extends to those who report only internally. As the dispute continues, it underscores the choices that Congress made in changing the financial system—principally, to prevent another “breakdown” through more regulation and government enforcement.

The Fifth Circuit’s *Asadi* decision hews to the statute’s text, particularly its definition and calculated use of the term “whistleblower” as one who reports to the SEC, and it is consistent with Dodd-Frank’s overall framework. Some district courts cited Dodd-Frank’s ultimate goals of improving the financial system’s accountability and transparency as a reason to protect employees who report only internally, but these courts ignored *how* Congress chose to achieve those goals: by further empowering the SEC, and other government entities, to police the financial system, rather than relying on companies and individuals. In the same vein, the Second Circuit in *Berman* cited *King v. Burwell* as a basis to avoid limiting the scope of one subsection, but the panel majority did so without considering Dodd-Frank’s overarching framework as a whole, which is predominantly *regulatory*.

From this perspective, § 78u-6(h)(1)(A) is not an outlier. In defining

178. *Id.* at *13-*14.

179. *Id.* at *13 (quoting *King*, 135 S. Ct. at 2496).

180. *Id.* at *14.

181. *Id.* (quoting *King*, 135 S. Ct. at 2489).

182. For a discussion of the significance of a circuit split in the Supreme Court’s decisions to grant or deny a petition for certiorari, see Emily Grant, Scott A. Hendrickson, and Michael S. Lynch, *The Ideological Divide: Conflict and the Supreme Court’s Certiorari Decision*, 60 CLEV. ST. L. REV. 559 (2012).

“whistleblower” as one who reports *to the SEC*, the statute reinforces Congress’s focus on combating securities fraud through governmental, not private, means. It also reflects Congress’s understanding that inadequate regulation was a primary cause of the financial “breakdown”—and in particular that it was the *SEC’s* disregard of whistleblowers like Harry Markopolos that allowed massive frauds to flourish. Congress sought to correct these deficiencies by strengthening the SEC. In summarizing Dodd-Frank’s Title IX (which includes the whistleblower incentives and protection), the Senate Banking Committee Report focused solely on the SEC’s role: “The SEC would get more power, assistance[,] and money at its disposal to be an effective securities markets regulator.”¹⁸³ Consistent with its overall statutory approach, Congress did not rely on private plaintiffs to pursue securities law violations; instead, enforcement flows through the SEC. The statute as written encourages individuals to report to the SEC because, otherwise, they would not enjoy the protection of the statute’s anti-retaliation provisions.

In concluding that an employee need not approach the SEC to enjoy statutory “whistleblower” protections, however, the SEC, the Second Circuit, and various district courts may have been recognizing reality. There are good policy reasons to protect those who report potential violations only internally, and without notifying the SEC. If employees are guaranteed protection only if they report to the SEC, then that is what they will do. Employees likely will either bypass their companies and internal compliance entirely or go to the SEC no matter the company’s response.

Sidelining the companies, however, hurts all parties: the SEC, the employers, and the employees. Less corporate self-policing damages the SEC’s efforts to combat securities violations because companies play a critical role in identifying, investigating, and remediating misconduct. It would also require the SEC to devote its limited resources to pursuing tips that companies could have addressed internally, at less public cost. Meanwhile, if employers are bypassed entirely, they have no opportunity to assess and redress before confronting an expensive, time-consuming, and publicized SEC investigation and enforcement action. Instead of policing itself, the company starts out defending itself, assuming a protective and litigation stance from the beginning. Finally, protecting only those who go to the SEC hurts those employees who prefer to address matters internally and be seen as someone who wants to help the company. Even an employee who would prefer not to be viewed as an adversary may feel compelled to go to the SEC to guarantee full legal protection against retaliation.

It is no coincidence that, even as the SEC’s rules do not require employees to report internally to enjoy protection against retaliation, its’

183. S. Rep. No. 111-176, at 37 (2010).

whistleblower program encourages employees to disclose first to their employers. The SEC's Associate Director of Enforcement, who "helped write the agency's rules," told the Society of Corporate Compliance and Ethics—an association of corporate compliance professionals—"that the purpose of the program is to bolster, not supplant, the compliance framework in the private sector."¹⁸⁴ Similarly, speaking at Stanford's Directors College, SEC Chairman Mary Jo White affirmed it was a "good thing" that, in practice, "in-house whistleblowers often have first reported the issue internally at their company."¹⁸⁵

Over time, more policymakers may come to support expanding the role for private litigants and companies that self-police, instead of vesting enforcement responsibility almost exclusively in regulatory bodies. If so, however, they should recognize that such an approach would reflect a significant departure from Dodd-Frank's statutory framework.

184. Stephen L. Cohen, SEC Assoc. Dir. of Enforcement, Remarks at SCCE's Annual Compliance & Ethics Institute (Oct. 7, 2013), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370539872783>.

185. Mary Jo White, SEC Chairman, A Few Things Directors Should Know About the SEC (June 23, 2014), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370542148863>.