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# SECURITIES/ADMINISTRATIVE LAW—INTERNAL REPORTERS WHO BLOW THE WHISTLE: ARE THEY PROTECTED UNDER THE DODD-FRANK ACT'S ANTI-RETALIATION PROVISION?

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## NOTES

SECURITIES/ADMINISTRATIVE LAW – INTERNAL  
REPORTERS WHO BLOW THE WHISTLE: ARE THEY PROTECTED  
UNDER THE DODD-FRANK ACT’S ANTI-RETALIATION  
PROVISION?

*Kristin Goodchild \**

*In 2010, Congress enacted the Dodd-Frank Wall Street and Consumer Protection Act (the “Dodd-Frank Act”), which was a sweeping piece of legislation that required the implementation of new rules and regulations throughout the financial industry. Interpretative ambiguity exists within the Dodd-Frank Act’s whistleblower program, which provides a definition of who qualifies as a whistleblower, and an anti-retaliation provision, which is intended to protect whistleblowers from retaliation. The ambiguity arises because a whistleblower is defined as an individual who makes a report to the Securities and Exchange Commission (the “SEC”). However, the anti-retaliation provision describes three categories of protected whistleblowing activities, one of which can be construed as an exception to the whistleblower definition since it does not require disclosure to the SEC. The SEC sought to clarify this ambiguity by issuing a rule (the “SEC’s Rule”) explaining that retaliation protection under the Dodd-Frank Act extends to an individual who only reports possible securities law violations through his employer’s internal whistleblowing procedures.*

*The Second and Fifth Circuits and several district courts have weighed in. The Fifth Circuit and the minority of district courts have determined that there is no ambiguity and, according to the definition of whistleblower, an individual must report potential securities law violations to the SEC to receive retaliation protection. The Second Circuit and a majority of district courts have determined that there is ambiguity and the SEC’s Rule is a reasonable interpretation that should be given deference in order to provide retaliation protection to an*

*individual who only makes an internal report to his employer.*

*This Note will advocate that future circuit courts of appeal and district courts should follow the Second Circuit and majority of district courts' interpretation that the Dodd-Frank Act's anti-retaliation provision provides protection to employee-whistleblowers who report possible securities law violations internally from the retaliatory actions of their employers, as internal reporting has many important benefits. These benefits include: allowing a company to investigate allegations of misconduct and self-report violations to the SEC; assisting the SEC in avoiding costs associated with initiating investigations and enforcement actions; protecting employees who may face ethical dilemmas by reporting externally; and providing protection to loyal employees who prefer to report internally. By failing to protect employee-whistleblowers who report internally, future circuit courts of appeal and district courts will impair the very purpose of the Dodd-Frank Act and will encourage retaliation against the group of individuals who are the most in need of retaliation protection.*

## INTRODUCTION

Image this scenario: You have worked for XYZ, Inc. as an engineer and supervisor for twelve years.<sup>1</sup> You have always received positive performance reviews, have been awarded numerous discretionary bonuses, and have been told you are a valued employee.<sup>2</sup> At one point, you learn that one of your direct reports is possibly embezzling from the company, which you fear amounts to fraud against shareholders.<sup>3</sup> After your direct report refuses your directive to cease these actions, you report this conduct to your direct supervisor and ask that your direct report's

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1. See *Banko v. Apple, Inc.*, 20 F. Supp. 3d 749, 752 (N.D. Cal. 2013). This scenario was developed from the facts of the *Banko* case.

2. *Id.*

3. *Id.* See 18 U.S.C. § 1348 (2006 & Supp. 2009) (prohibiting securities fraud, including theft from investors).

employment be terminated.<sup>4</sup> When your direct supervisor does nothing, you report these inappropriate actions and possible securities law violations to upper management and again ask for your direct report's termination.<sup>5</sup> Even after upper management finds over forty instances of misconduct, your direct report still has her job and you are told to stop pursuing the matter.<sup>6</sup> Still believing this conduct could result in securities law violations, you notify the human resource department.<sup>7</sup> Following subsequent meetings that you are not invited to attend, your direct report's employment is terminated.<sup>8</sup> However, upper management is angry that you ignored their request to leave the matter alone and went to human resources.<sup>9</sup> Shortly thereafter, you receive praise for completing a new prototype before your holiday break.<sup>10</sup> Upon your return, you receive a large discretionary bonus.<sup>11</sup> Then, less than two weeks later, you are fired.<sup>12</sup>

This is a familiar scenario faced by many employees who blow the whistle and report potential securities law violations to their employers. These employee-whistleblowers usually face two reporting choices. First, they can report the possible securities law violations to their employers hoping their employers will remedy the situation, but may very well suffer employment retaliation, such as altered job responsibilities or termination.<sup>13</sup> Second, these employees can report the possible violations to the Securities and Exchange Commission (the "SEC"), which tends to be the less favored method for employee-whistleblowers for a number of reasons,<sup>14</sup> and still fear retaliation by their employers. While the second category of employee-whistleblowers is explicitly protected from retaliation under the Dodd-Frank Wall Street and Consumer Protection Act<sup>15</sup> (the "Dodd-Frank Act"), it is unclear whether the Dodd-Frank Act also protects the first category of employee-

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4. See *Banko*, 20 F. Supp. 3d at 752.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 752–753.

10. *Id.* at 753.

11. *Id.*

12. *Id.*

13. See *infra* Part III.C.

14. See *infra* Parts III.A–C.

15. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in various sections of Titles 7, 12, 15, 18, 22, 31, and 42 of the United States Code).

whistleblowers from retaliation by their employers. This Note will advocate that the Dodd-Frank Act's anti-retaliation provision should be interpreted to also protect the first category of employee-whistleblowers from their employers' retaliatory actions.

In response to the financial crisis of 2008,<sup>16</sup> Congress enacted the Dodd-Frank Act in 2010 to overhaul the United States financial industry.<sup>17</sup> At over 2,300 pages, the Dodd-Frank Act was a sweeping piece of legislation that required the implementation of over 400 new rules and regulations throughout the industry.<sup>18</sup> Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934<sup>19</sup> (the "Exchange Act") by adding Section 21F, titled "Securities Whistleblower Incentives and Protection"<sup>20</sup> (the "Whistleblower Program").<sup>21</sup> The Whistleblower Program includes an anti-retaliation provision,<sup>22</sup> a bounty provision,<sup>23</sup> provides a definition of who qualifies as a whistleblower<sup>24</sup> (the "whistleblower definition"), and gives the SEC broad rulemaking authority in order to implement the Whistleblower Program.<sup>25</sup>

Congress, tasked with responding to the financial crisis, was quick to implement the Dodd-Frank Act—and with it, the Whistleblower Program. This resulted in certain definitional and structural ambiguities and disconnects. As a result, there is interpretative ambiguity between the whistleblower definition and

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16. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 390–91 (Jan. 2011), <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<http://perma.cc/87YC-R5BW>]. From 2007 to the first quarter of 2009, \$17 trillion of household net worth was lost and, from 2007 to December 2009, 8.3 million jobs were lost. *Id.* The unemployment rate reached a high of 17.4% in October 2009. *Id.*

17. Recent Legislation, *Corporate Law – Securities Regulation – Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC.*, 124 HARV. L. REV. 1829, 1829 (2011) [hereinafter *Incentives for Whistleblowers*].

18. *Id.*; *Oversight of Dodd-Frank Act Implementation*, COMM'N ON FIN. SERVS., <http://financialservices.house.gov/dodd-frank/> [<http://perma.cc/PD37-NED4>] (last visited Sept. 21, 2015).

19. 15 U.S.C. § 78a *et seq.* (2014).

20. 15 U.S.C. § 78u-6 (2014).

21. *Incentives for Whistleblowers*, *supra* note 17, at 1831.

22. 15 U.S.C. § 78u-6(h)(1)(A) (2014). The anti-retaliation provision provides a private right of action to an employee-whistleblower for the retaliatory actions of his employer as a result of the employee's whistleblowing activity. *Id.*

23. 15 U.S.C. § 78u-6(b) (2014). Under the bounty provision, an individual is entitled to receive an award from the SEC for providing information to the SEC that leads to a successful enforcement action. *Id.* The amount of the award ranges from ten to thirty percent of the monetary sanction collected by the SEC in an enforcement action against the employer. *Id.*

24. 15 U.S.C. § 78u-6(a)(6) (2014).

25. 15 U.S.C. § 78u-6(j) (2014).

the anti-retaliation provision. The Dodd-Frank Act defines a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws *to the [SEC]*, in a manner established, by rule or regulation, *by the [SEC]*.”<sup>26</sup> On the other hand, the anti-retaliation provision describes three different categories of protected whistleblowing activities, one of which can be construed as an exception to the whistleblower definition since it *does not* require disclosure to the SEC.<sup>27</sup> If this subsection of the anti-retaliation provision is read as an exception to the whistleblower definition, it could provide anti-retaliation protection to an employee-whistleblower who only makes an internal report to his employer through his employer’s internal whistleblowing procedures, rather than making an external disclosure to the SEC.

Using its rulemaking authority,<sup>28</sup> the SEC interpreted the anti-retaliation provision as such.<sup>29</sup> The SEC recently submitted amicus curiae briefs in Second Circuit and Third Circuit cases to support its interpretation of the anti-retaliation provision.<sup>30</sup> The Second Circuit declined to rule on the issue<sup>31</sup> and the Third Circuit affirmed the district court’s ruling that the plaintiff did not disclose misconduct contained within subsection (iii) of the anti-retaliation

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26. 15 U.S.C. § 78u-6(a)(6) (emphasis added).

27. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2014).

28. 15 U.S.C. § 78u-6(j).

29. 17 C.F.R. § 240.21F-2 (West 2015), *invalidated by* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).

30. Brief of the SEC, Amicus Curiae in Support of the Appellant, *Safarian v. Am. DG Energy Inc.*, No. 10-6082, slip op. at 1 (D.N.J. Apr. 29, 2014), *aff’d in part, vacated in part, remanded to* No. 14-2734, 2015 WL 4430837 (3d Cir. July 21, 2015) (No. 14-2734) [hereinafter *Safarian Brief*]; Brief of the SEC, Amicus Curiae in Support of the Appellant, *Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014) (No. 13-4385) [hereinafter *Meng-Lin Brief*].

31. *Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2d Cir. 2014). Meng-Lin worked as a compliance officer in China for Siemens China, Ltd., a Chinese subsidiary of Siemens AG (collectively, “Siemens”), a German corporation listed on the New York Stock Exchange. *Id.* at 177. He discovered improper payments to certain North Korean and Chinese officials. *Id.* After he reported the improper payments to Siemens through its internal procedures, he was retaliated against by Siemens and ultimately fired. *Id.* After his termination, Meng-Lin reported the improper payments to the SEC. *Id.* The district court granted Siemens’ motion to dismiss on the ground that the Dodd-Frank Act’s anti-retaliation provision does not apply extraterritorially. *Id.* at 177–78. On appeal, the Second Circuit affirmed. *Id.* at 183. However, in a recent case, the Second Circuit held that there is ambiguity and the SEC’s Rule is a reasonable interpretation. *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*1, \*1 (2d Cir. Sept. 10, 2015).

provision.<sup>32</sup>

Unlike the Second and Third Circuits in these cases, very recently, the Second Circuit, the Fifth Circuit, and several district courts have weighed in on the issue. The Fifth Circuit and a minority of district courts in California, Colorado, Florida, Missouri, and Wisconsin have determined that the anti-retaliation provision is unambiguous and, according to the whistleblower definition, only protects individuals from retaliation who report securities law violations to the SEC.<sup>33</sup> In contrast, the Second Circuit and a majority of district courts in California, Colorado, Connecticut, Kansas, Massachusetts, Nebraska, New Jersey, New York, and Tennessee have found that the anti-retaliation provision is ambiguous.<sup>34</sup> These courts held that either, on its face, the anti-

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32. *Safarian v. Am. DG Energy Inc.*, No. 10-6082, slip op. at 1 (D.N.J. Apr. 29, 2014). Safarian worked as an engineer for American DG Energy, Inc. (“American”), a utility company. *Id.* at 1. He reported overbilling, improper construction, and failure to obtain necessary permits to American. *Id.* Safarian’s employment was later terminated. *Id.* The district court granted American’s motion for summary judgment, in part, because Safarian failed to disclose any misconduct listed in subsection (iii) of the anti-retaliation provision. *Id.* at 1, 4. The district court noted that it did not need to decide whether Safarian’s failure to make a report to the SEC precluded his claim. *Id.* at 4. The Third Circuit affirmed the district court’s ruling on the Dodd-Frank Act issue, but vacated the court’s ruling on other issues and remanded for further proceedings. *Safarian v. Am. DG Energy Inc.*, No. 14-2734, 2015 WL 4430837 at \*1, \*3 (3d Cir. July 21, 2015).

33. See *Lutzeier v. Citigroup Inc.*, 305 F.D.R. 107, 110 (E.D. Mo. 2015); *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014); *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at \*1, \*7 (M.D. Fla. May 12, 2014); *Banko v. Apple, Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at \*1, \*5 (D. Colo. 2013); see also *infra* Part II.C.1.

34. See *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*1, \*9 (2d Cir. Sept. 10, 2015); *Somers v. Dig. Realty Tr., Inc.*, No. C-14-5180 EMC, 2015 WL 4483955, at \*1, \*12 (N.D. Cal. July 22, 2015), *appeal filed* No. 15-80136, 2015 WL 4483955 (9th Cir. July 31, 2015); *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at \*1, \*6 (N.D. Cal. Oct. 28, 2014); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 732–33 (D. Neb. 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), slip op. 1, 6 (D.N.J. Mar. 11, 2014); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 147 (S.D.N.Y. 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*1, \*7 (S.D.N.Y. May 21, 2014); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at \*1, \*4–\*5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*1 (S.D.N.Y. May 4, 2011); see also *infra* Part II.C.2. It is interesting to note that there is a split in the district courts in California and Colorado.

retaliation provision protects individuals who only make internal reports,<sup>35</sup> or the SEC's construction of the anti-retaliation provision (the "SEC's Rule" or the "Rule")<sup>36</sup> is a reasonable interpretation and should be given deference.<sup>37</sup> Thus, the majority of courts currently believe that employee-whistleblowers who report securities law violations through their employer's internal whistleblowing procedures should also be protected from retaliation pursuant to the Dodd-Frank Act's anti-retaliation provision.<sup>38</sup>

This Note will argue that future district courts and circuit courts of appeal should adopt the SEC and majority of courts' view that the anti-retaliation provision is ambiguous and should give the SEC's Rule deference in order to protect employee-whistleblowers who only report securities law violations internally from the retaliatory actions of their respective employers. The SEC's Rule

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35. See *Bussing*, 20 F. Supp. 3d at 732–33; *Yang*, 18 F. Supp. 3d at 534; *Genberg*, 935 F. Supp. 2d at 1106; *Nollner*, 852 F. Supp. 2d at 994; *Egan*, 2011 WL 1672066, at \*1; see also *infra* Part II.C.2.b.

36. The SEC's Rule provides as follows:

For purposes of the anti-retaliation protections afforded by [the anti-retaliation provision] . . . you are a whistleblower if: (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . that has occurred, is ongoing, or is about to occur, and; (ii) You provide that information in a manner described in [subsections (i)-(iii) of the anti-retaliation provision's protected activities] . . . (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

17 C.F.R. § 240.21F-2(b)(1) (West 2015), *invalidated by* *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

37. See *Berman*, 2015 WL 5254916, at \*1; *Somers*, 2015 WL 4483955, at \*13; *Connolly*, 2014 WL 5473144, at \*6; *Khazin*, No. 13-4149 (SDW)(MCA), slip op. at 6; *Rosenblum*, 984 F. Supp. 2d at 147; *Ellington*, 977 F. Supp. 2d at 45; *Murray*, 2013 WL 2190084, at \*7; *Kramer*, 2012 WL 4444820, at \*4–5; see also *infra* Part II.C.2.a.

38. See *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*1, \*9 (2d Cir. Sept. 10, 2015); *Somers v. Dig. Realty Tr., Inc.*, No. C-14-5180 EMC, 2015 WL 4483955, at \*1, \*12 (N.D. Cal. July 22, 2015), *appeal filed* No. 15-80136, 2015 WL 4483955 (9th Cir. July 31, 2015); *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at \*1, \*6 (N.D. Cal. Oct. 28, 2014); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 732–33 (D. Neb. 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), slip op. 1, 6 (D.N.J. Mar. 11, 2014); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 147 (S.D.N.Y. 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*1, \*7 (S.D.N.Y. May 21, 2014); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at \*1, \*4–\*5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*1 (S.D.N.Y. May 4, 2011).



and its interpretation of the Dodd-Frank Act's anti-retaliation provision is in line with the SEC's enforcement objectives; will encourage employees to report internally through their employers' whistleblowing procedures; and will protect such employees from retaliation by their employers.<sup>39</sup> Further, it will obviate the need for employees to acquire expert legal advice before engaging in whistleblowing in order to determine which available whistleblowing activity provides the maximum retaliation protection.

Internal reporting using a company's whistleblower procedures is a useful tool that allows a company to investigate allegations of misconduct and self-report violations to the SEC.<sup>40</sup> Self-reporting violations of corporate misconduct is important to a company's long-term reputation in the marketplace and allows the SEC to impose reduced fines and sanctions.<sup>41</sup> Self-reporting is also beneficial to the SEC, since the SEC will not need to incur the costs associated with initiating a hostile investigation and enforcement proceeding against a company.<sup>42</sup> In particular, the SEC is understaffed to investigate potential misconduct solely on its own initiative.<sup>43</sup>

Further, employees and corporate officers are subject to certain fiduciary duties or hold professional designations in which they are required to adhere to certain confidentiality and ethical rules to act in the best interests of their clients and/or employers.<sup>44</sup>

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39. *Meng-Lin Brief*, *supra* note 30, at 18–20.

40. See Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 40 (2013); see also *infra* Part III.B.

41. See Bishara et al., *supra* note 40; see also Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 20 AM. BUS. L.J. 177, 191 (2002).

42. Terry Morehead Dworkin, *Whistleblowing, MNCS, and Peace*, 35 VAND. J. TRANSNAT'L L. 457, 463 (2002); Bishara, *supra* note 40, at 39.

43. "Governments, strapped for resources, facing shrinking budgets, global competitive pressures to liberalized trade, and corporate regulatory resistance, are increasingly experimenting with approaches that rely on organizations themselves to complement standard-setting and enforcement activities." Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1267 (2009).

44. Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875, 883 (2002); see CFA INST., CODE OF ETHICS & STANDARDS OF PROFESSIONAL CONDUCT § III (2014), <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2014.n6.1> [<http://perma.cc/KEY2-K9YT>]; AM. INST. OF CPAS, AICPA CODE OF PROFESSIONAL CONDUCT 5-7 or §0.300.060.020-.070 (2015), <http://www.aicpa.org/Research/Standards/CodeofConduct/DownloadableDocuments/2014December15Cont>

These employees face ethical dilemmas without a clear prevailing regulatory mandate that they are not to fear retaliation for only reporting internally. In addition, employee-whistleblowers tend to be long-term employees who feel loyal to their respective employers and believe the internal reporting of misconduct is in the companies' best interests.<sup>45</sup> As such, these employee-whistleblowers prefer to report misconduct internally first and most often turn to external reporting only when they fear retaliation by their employers.<sup>46</sup>

In order to better understand the more inclusive treatment of whistleblowers under the SEC's Rule, Part I of this Note will provide a brief history of the creation of the SEC and its mission and strategic goals; the shifting public policy regarding whistleblowing; and a brief examination of a previously implemented securities law whistleblower statute and its failure to adequately protect whistleblowers seeking its protection. Part II will discuss the implementation and scope of the Dodd-Frank Act; the SEC's Rule; the Fifth Circuit and minority courts' view that the anti-retaliation provision is unambiguous and requires reporting to the SEC in order to receive protection from retaliation; the Second Circuit and majority courts' view that the anti-retaliation provision is ambiguous and should be construed as an exception to the whistleblower definition in order to provide retaliation protection to employee-whistleblowers who report securities law violations internally; and the SEC's interpretation that the anti-retaliation provision also provides protection to employee-whistleblowers who only make internal reports to their employers. Part III begins with a consideration of the confidentiality and ethical obligations of employees holding professional designations and corporate officers' fiduciary duties; the benefits advanced by protecting internal reporters, including company incentives for self-reporting violations of misconduct; employer behavior towards employee-whistleblowers and employee loyalty; and, finally, public policy considerations.

## I. CREATION OF THE SEC AND PREVIOUS SECURITIES LAW

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entAsof2015April23CodeofConduct.pdf [http://perma.cc/TK4X-62R8]. See also *infra* Part III.A.

45. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1142 (2006). See *infra* Part III.C.

46. Callahan et al., *supra* note 41, at 195; Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 110–19 (2012).

## WHISTLEBLOWER STATUTE

A. *SEC: Its History, Mission, and Strategic Objectives*

Prior to the stock market crash in 1929, little federal regulation of the securities markets existed.<sup>47</sup> Following the end of World War I in 1918,<sup>48</sup> there was a surge of investment activity as small to large investors, inspired by “rags to riches” stories and readily available credit, set out to make their fortunes in the stock market.<sup>49</sup> After the stock market crashed in October 1929, nearly half of the \$50 billion of new securities offered since the end of World War I became worthless, causing investors and the banks that loaned to those investors to lose great sums of money.<sup>50</sup> As a result, public confidence in the securities markets deteriorated.<sup>51</sup>

It was agreed that, in order for the economy to recover, public confidence in the securities markets needed to be restored and maintained.<sup>52</sup> After hearings to identify problems and solutions, Congress passed the Securities Act of 1933<sup>53</sup> (the “Securities Act”) and the Exchange Act<sup>54</sup> in an effort to restore investor confidence in the securities markets, provide investors and the markets with reliable information, and establish rules regarding honest dealing.<sup>55</sup> Together, the Securities Act and the Exchange Act created the SEC to “enforce the newly-passed securities laws, to promote stability in the markets and, most importantly, to protect investors.”<sup>56</sup>

The SEC’s mission “is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>57</sup> To achieve its mission, the SEC seeks to establish and maintain an

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47. *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. AND EXCH. COMM’N, <http://www.sec.gov/about/whatwedo.shtml> [<http://perma.cc/4EXZ-6UGM>] (last visited Sept. 21, 2015) [hereinafter *Investor’s Advocate*].

48. *World War I History*, HIST., <http://www.history.com/topics/world-war-i/world-war-i-history> [<http://perma.cc/S9EF-GL8T>](last visited Sept. 21, 2015).

49. *Investor’s Advocate*, *supra* note 47.

50. *Id.*

51. *Id.*

52. *Id.*

53. 15 U.S.C. § 77a *et seq.* (2014).

54. 15 U.S.C. § 78a *et seq.* (2014).

55. *Investor’s Advocate*, *supra* note 47.

56. *Id.*

57. U.S. SEC. AND EXCH. COMM’N, STRATEGIC PLAN FISCAL YEARS 2014–2018 (2014), <http://www.sec.gov/about/sec-strategic-plan-2014-2018.pdf> [<http://perma.cc/V6P6-GJKL>].

effective regulatory framework, promote and enforce compliance with the securities laws, and facilitate investor access to information necessary to make informed investment decisions.<sup>58</sup> The SEC strives to promote quality disclosure to prevent abusive practices, to ensure capital markets operate in a fair, efficient, and transparent fashion, to ensure market participants understand and comply with their obligations under the federal securities laws, to detect and deter federal securities law violations, and to hold federal securities law violators accountable for their actions.<sup>59</sup> To help administer the Whistleblower Program and to further the SEC's mission, the SEC established the Office of the Whistleblower (the "OWB") to assist in identifying and stopping fraud quickly and early thus minimizing investor losses.<sup>60</sup>

#### B. *Securities Law Whistleblower Statute Before the Dodd-Frank Act*

Whistleblowing has a long history dating back to when Venice was a city-state between the seventh and eighteenth centuries.<sup>61</sup> In order to expose and deter official misconduct, in particular to curtail tax evasion and increase city-state security, the government of Venice established a system for citizens to provide anonymous reports regarding misconduct.<sup>62</sup> Citizens would insert reports of official misconduct into the carved head of a lion statue sitting outside a government building.<sup>63</sup>

Since then, public policy regarding whistleblowing has shifted from almost exclusively relying on external whistleblowing to also encouraging internal whistleblowing as regulators seek to end wrongdoing rather than to strictly punish a company.<sup>64</sup> Internal

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58. *Id.* at 5–6.

59. *Id.* at 5.

60. U.S. SEC. AND EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 4 (2014), <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf> [<http://perma.cc/N5K5-S4XQ>] [hereinafter *2014 Annual Report*].

61. Bishara et al., *supra* note 40, at 39. The history of Venice as a city-state dates back to the sixth century and continued until the eighteenth century when Napoleon and his army forced Venice to adopt a pro-French democratic government. Robert Wilde, *Venice: The History of Venice, Italy*, ABOUT EDUC., <http://europeanhistory.about.com/od/italyandthecitystates/a/venice.htm> [<http://perma.cc/S53H-HYAV>] (last visited Sept. 22, 2015).

62. Bishara, *supra* note 40, at 38 & n.2.

63. *Id.* at 39.

64. Dworkin, *supra* note 42. "With recent scandals in both the private and public sectors being exposed by internal whistleblowers, courts emphasize that '[p]ublic policy

whistleblowing is seen as an effective tool in deterring corporate misconduct and often reveals misconduct long before a governmental agency or external party would be able to discover it.<sup>65</sup> It also promotes corporate self-monitoring, is less harmful to the company, is more ethical since external reporting can be seen as disloyal, and saves regulatory agency resources by reducing investigating and monitoring costs.<sup>66</sup>

Following corporate scandals such as Enron<sup>67</sup> and Worldcom,<sup>68</sup> Congress, in its pursuit to combat and deter fraud in the securities markets and promote internal whistleblowing, enacted the Sarbanes-Oxley Act of 2002 (“SOX”).<sup>69</sup> SOX was enacted to foster investor confidence by “improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws”<sup>70</sup> and by providing more publicly available information on companies to assist investors in making informed investment decisions.<sup>71</sup> It also signified Congress’ “new approach to regulation that relies on internal monitoring [and internal] reporting.”<sup>72</sup>

SOX established a civil cause of action for whistleblowers who suffered retaliatory actions by their employers and criminalized

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favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.” Lobel, *supra* note 43, at 1251 (quoting *Joiner v. Benton Cmty. Bank*, 411 N.E.2d 229, 231 (Il. 1980)).

65. Bishara, *supra* note 40.

66. *Id.* at 39–40; Dworkin, *supra* note 42, at 463 & n.43.

67. A former Enron employee discovered accounting violations in which she believed Enron was using its own company stock to generate gains and losses on its income statement. Baynes, *supra* note 44, at 877. Days before Enron was to announce a huge third quarter loss, its external auditors warned Enron officials that its public explanation for the loss was potentially misleading. *Id.* at 880. On October 16, 2001, Enron announced a \$618 million loss. *Id.* The SEC initiated an investigation and determined that since 1997 Enron had overstated its earnings by approximately \$586 million. *Id.* Enron subsequently filed for bankruptcy in December 2001. *Id.*

68. Worldcom once operated “the world’s largest Internet network.” Lusia Beltran, *Worldcom filed largest bankruptcy ever*, CNNMONEY (July 22, 2002, 10:35 AM), [http://money.cnn.com/2002/07/19/news/worldcom\\_bankruptcy/](http://money.cnn.com/2002/07/19/news/worldcom_bankruptcy/) [<http://perma.cc/S53H-HYAV>]. In 1999, business began to decline. *Id.* Questions arose surrounding allegations that the company incorrectly accounted for \$3.8 billion in operating expenses and \$366 million in personal loans made to the CEO. *Id.* Worldcom filed for bankruptcy in 2002. *Id.* At the time, “Worldcom’s bankruptcy [was] the largest in United States history.” *Id.*

69. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended at 18 U.S.C.A. § 1514A) (amended 2015 not yet published); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67 (2007).

70. 116 Stat. 745.

71. See Baynes, *supra* note 44, at 890.

72. Lobel, *supra* note 43, at 1251.

retaliation.<sup>73</sup> SOX was intended “to motivate employees to blow the whistle by providing employees who make complaints with protection from employer retaliation in the workplace.”<sup>74</sup> It also required public companies to establish policies and procedures for anonymous employee disclosures of misconduct to the boards of directors.<sup>75</sup>

To receive protection under SOX, an employee must assist in an investigation by Congress, a federal agency, a supervisor, or anyone the employer authorizes to conduct an investigation.<sup>76</sup> If the employee suffers retaliation, the employee has 180 days to file a claim with the Secretary of Labor (the “Secretary”).<sup>77</sup> The Secretary has 180 days to issue a final order, but, if the Secretary fails to issue the final order within 180 days, the employee can bring a civil claim in a federal district court.<sup>78</sup>

However, SOX has failed to protect a great majority of employees who have sought its protection.<sup>79</sup> During the first three years after SOX’s enactment in 2002, 491 employees filed claims.<sup>80</sup> The Department of Labor (“DoL”) resolved 361 of these claims and found in favor of the employees in only thirteen cases or 3.6% of the time.<sup>81</sup> Ninety-three of these claims were appealed to an Administrative Law Judge in the DoL, who found in favor of the employee in six cases or 6.5% of the time.<sup>82</sup> Further, between 2005 and 2011 only ten employees succeeded in their SOX claims.<sup>83</sup> To put these statistics in perspective, from SOX’s enactment in 2002 until the end of 2011, a total of 1,260 claims were decided by the DoL and employees succeeded only 1.8% of the time.<sup>84</sup> Additionally, between 2006 and 2008 the DoL did not decide any

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73. 18 U.S.C. § 1514A(b) (2013) (civil action); 18 U.S.C. § 1513(e) (2013) (criminal penalty); Rapp, *supra* note 46, at 82.

74. Rapp, *supra* note 46, at 82.

75. 15 U.S.C. § 78j-1(m)(4)(B) (2014); Baynes, *supra* note 44, at 890.

76. 18 U.S.C. § 1514A(a) (2013); Baynes, *supra* note 44, at 890.

77. 18 U.S.C. § 1514A(b)(2)(D) (2013); Baynes, *supra* note 44, at 890.

78. 18 U.S.C. § 1514A(b)(1)(B) (2013); Baynes, *supra* note 44, at 890. Remedies available under SOX include compensatory damages (such as reinstatement and back pay with interest) and special damages (such as litigation costs and attorneys’ fees). 18 U.S.C. § 1514A(c) (2013); Baynes, *supra* note 44, at 890.

79. Moberly, *supra* note 69.

80. *Id.*

81. *Id.*

82. *Id.*

83. Richard Moberly, *Sarbanes-Oxley Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 28–29 (2012).

84. *Id.* at 29.

case in favor of an employee.<sup>85</sup> One of the reasons for the low employee success rate is that the DoL and the Administrative Law Judges frequently found that the employee violated a procedural rule or did not meet the then ninety-day statute of limitations to file their claims.<sup>86</sup> These figures illustrate that SOX has failed to fulfill its purpose of providing adequate anti-retaliation protection.<sup>87</sup> They further illustrate that when whistleblowing occurs, retaliation happens, and SOX anti-retaliation protection does not work as well as it should.

## II. IMPLEMENTATION AND SCOPE OF THE DODD-FRANK ACT, SEC'S RULE, AND CONFLICT BETWEEN THE WHISTLEBLOWER DEFINITION AND THE ANTI-RETALIATION PROVISION

### A. *Implementation and Scope of the Whistleblower Program*

In the wake of the financial crisis of 2008, Congress enacted the Dodd-Frank Act “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices . . . .”<sup>88</sup> The Dodd-Frank Act is considered “‘the first comprehensive statute of national scope’ protecting corporate whistleblowers.”<sup>89</sup> Congress sought to protect and encourage individuals to report possible securities law violations by enacting the Whistleblower Program as part of the Dodd-Frank Act, which includes the whistleblower definition, the anti-retaliation provision, and the bounty provision.<sup>90</sup>

The Whistleblower Program<sup>91</sup> defines a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or

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85. *Id.*

86. Moberly, *supra* note 69, at 71. At the time of publication of this article, the SOX statute of limitations was ninety days. When SOX was amended in 2010, the statute of limitations was increased to 180 days. See 18 U.S.C. § 1514A(b)(2)(D) (2013).

87. Moberly, *supra* note 69, at 74.

88. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (codified in scattered sections of Titles 7, 12, 15, 18, 22, 31, and 42 of the United States Code); *Incentives for Whistleblowers*, *supra* note 17.

89. *Incentives for Whistleblowers*, *supra* note 17 (quoting Robert G. Vaughn, *American's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV 1, 4 (2005)).

90. See 15 U.S.C. § 78u-6 (2014).

91. *Id.*

regulation, by the [SEC].”<sup>92</sup> The anti-retaliation provision affords an individual with a private right of action against his employer for retaliatory actions.<sup>93</sup> The anti-retaliation provision provides that:

[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any 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 [SEC] in accordance with this section;
- (ii) in initiating, testifying in, or assisting in an investigation or judicial or administrative action of the [SEC] based upon or related to such information; or
- (iii) in making disclosures that are required or protected under [SOX] . . . and any other law, rule, or regulation subject to the jurisdiction of the [SEC].<sup>94</sup>

(Subsections (i)–(iii) will hereinafter be referred to as the “protected activities.”) The bounty provision provides that:

[i]n any covered judicial or administrative action, or related action, the [SEC], under regulations prescribed by the [SEC] and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provide original information to the [SEC] that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

- (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
- (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.<sup>95</sup>

To ensure its purpose under the Whistleblower Program was achieved, Congress authorized the SEC to establish rules and regulations to implement the Whistleblower Program.<sup>96</sup> As such, to assist in its administration of the Whistleblower Program, the SEC established the OWB.<sup>97</sup>

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92. 15 U.S.C. § 78u-6(a)(6) (2014).

93. 15 U.S.C. § 78u-6(h)(1)(A) (2014).

94. *Id.*

95. 15 U.S.C. § 78u-6(b)(1) (2014).

96. 15 U.S.C. § 78u-6(j) (2014).

97. 2014 *Annual Report*, *supra* note 60.



## B. *SEC's Rule*

Pursuant to its rulemaking authority under the Dodd-Frank Act,<sup>98</sup> the SEC issued Rule 21F-2(b), which provides in part:

(1) For purposes of the anti-retaliation protections afforded by [the anti-retaliation provision], you are a whistleblower if: . . .

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in [subsections (i)-(iii) of the anti-retaliation provision's protected activities].

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.<sup>99</sup>

In issuing its Rule, the SEC sought to clarify an ambiguity in the Dodd-Frank Act's anti-retaliation provision by directly stating that anti-retaliation protection extends to an individual who engages in whistleblowing activity described in subsection (iii) of the anti-retaliation provision's protected activities regardless of whether the individual also makes an external report to the SEC.<sup>100</sup>

## C. *Root of the Problem: How to Interpret Subsection (iii) of the Anti-Retaliation Provision's Protected Activities*

Conflict exists among the SEC, various district courts, and the Second and Fifth Circuits as to whether subsection (iii) of the anti-retaliation provision's protected activities affords an exception to the whistleblower definition. The conflict arises because the Dodd-Frank Act seems to create a "two-tiered structure of [anti-retaliation] protection[] where potential whistleblowers receive different sets of protections depending on whether they choose to report internally or externally."<sup>101</sup> For example, if an employee-whistleblower makes an external report of misconduct to the SEC, then the employee-whistleblower is protected under subsection (i) of the anti-retaliation provision's protected activities since the

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98. 15 U.S.C. § 78u-6(j).

99. 17 C.F.R. § 240.21F-2(b) (West 2015), *invalidated by* *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

100. *Meng-Lin Brief*, *supra* note 30, at 1.

101. *See Incentives for Whistleblowers*, *supra* note 17, at 1834.

disclosure was made directly to the SEC.<sup>102</sup> If that same employee-whistleblower only makes an internal report through his employer's internal procedures, then that employee-whistleblower may not be protected under the anti-retaliation provision, unless the employee-whistleblower's disclosure is protected under subsection (iii) of the anti-retaliation provision's protected activities.<sup>103</sup>

The question becomes: what type of anti-retaliation protection does subsection (iii) provide to an employee-whistleblower who makes an internal report to his employer pursuant to SOX, if SOX requires companies to establish policies and procedures for internal employee disclosures of misconduct?<sup>104</sup> This question illustrates the ambiguity that arises between the whistleblower definition, which specifically states that in order to be a whistleblower disclosure needs to be made to the SEC,<sup>105</sup> and subsection (iii) of the anti-retaliation provision's protected activities, which contemplates disclosures made pursuant to SOX.<sup>106</sup> The same ambiguity arises if the employee-whistleblower makes an internal report through his employer's procedures and also makes a concurrent disclosure to the SEC, of which the employer is unaware.<sup>107</sup>

1. Minority View: The Anti-Retaliation Provision is Unambiguous and Requires Reporting to the SEC to Receive Protection

The Fifth Circuit was the first circuit court of appeals to weigh in on this issue. In *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit held that the whistleblower definition is unambiguous and requires an individual to make a report to the SEC in order to qualify as a whistleblower and receive protection under the anti-retaliation provision.<sup>108</sup> Along with the Fifth Circuit, five district courts—in California, Colorado, Florida, Missouri, and Wisconsin—have also determined that the anti-retaliation

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102. *Id.*

103. *Id.*

104. 15 U.S.C. § 78j-1(m)(4)(B) (2014).

105. 15 U.S.C. § 78u-6(a)(6) (2014).

106. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2014).

107. “[T]his potential circumvention of internal reporting could have vast costs and indeed could undermine the very goal that [the Whistleblower Program] was enacted to promote—the effective and efficient detection of securities law violations.” *Incentives for Whistleblowers*, *supra* note 17, at 1835.

108. 720 F.3d 620, 629 (5th Cir. 2013).

provision is unambiguous and requires reporting to the SEC.<sup>109</sup>

In making its determination, the minority of courts have relied on the principles of statutory construction.<sup>110</sup> When issues of statutory construction arise, there is a series of steps that a court should take to determine the meaning of a statute.<sup>111</sup> Step one is to determine if the statutory language is ambiguous.<sup>112</sup> If the statutory language is plain and unambiguous, the statute must be applied according to its terms.<sup>113</sup> “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>114</sup> In construing the statutory language, a court should give effect to every word and provision, when possible, and interpret provisions in a manner that renders them compatible and not contradictory.<sup>115</sup> “If the statutory text is unambiguous, the inquiry begins and ends with the text.”<sup>116</sup>

If the statute is ambiguous, step two in the analysis is to determine if the agency’s interpretation warrants judicial deference.<sup>117</sup> In making this determination, a court must apply another two-step process established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>118</sup> The first step of the

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109. *Lutzeier v. Citigroup Inc.*, 305 F.R.D. 107, 110 (E.D. Mo. 2015) (stating that the plain language of the anti-retaliation provision demonstrates a whistleblower must report to the SEC to qualify for protection); *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014) (stating that the plain language of Congress should be given full effect); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at \*1, \*7 (M.D. Fla. May 12, 2014) (stating that Congress intended whistleblower protection to apply only to an individual who meets the whistleblower definition); *Banko v. Apple, Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013) (stating that the Whistleblower Program is unambiguous and only available to an individual who meets the whistleblower definition); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at \*1, \*5 (D. Colo. July 19, 2013) (stating that the third protected activity described in the anti-retaliation provision only applies to a whistleblower as defined in the whistleblower definition).

110. *Lutzeier*, 305 F.R.D. at 110 (agreeing with the Fifth Circuit’s reasoning); *Asadi*, 720 F.3d at 623 (explaining statutory construction analysis by the court); *Englehart*, 2014 WL 2619501, at \*7–\*8 (explaining statutory construction analysis); *Banko*, 20 F. Supp. 3d at 755–758 (applying rules of statutory construction); *Wagner*, 2013 WL 3786643, at \*4 (stating claim fails as a matter of statutory construction).

111. *Banko*, 20 F. Supp. 3d at 755.

112. *Id.*

113. *Id.* (citation omitted).

114. *Id.* (citation omitted).

115. *Asadi*, 720 F.3d at 622 (citation omitted).

116. *Banko*, 20 F. Supp. 3d at 755 (citation omitted).

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

118. *Id.*; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837

*Chevron* analysis is to inquire as to whether Congress has spoken directly on the issue.<sup>119</sup> If Congress's intent is clear, then a court and the agency must give effect to the express intent of Congress.<sup>120</sup> However, if Congress has not directly spoken on the issue, then the second step is to determine whether the agency's interpretation is a permissible construction of the statute.<sup>121</sup> "If the agency[']s interpretation is reasonable, then [a court] must defer to it."<sup>122</sup> Thus, if ambiguity exists between Congress's definition of whistleblower and subsection (iii) of the protected activities, and the SEC's Rule is a reasonable interpretation, then the SEC's Rule should stand.

Applying these principles, the Fifth Circuit determined that its analysis ended with the statute.<sup>123</sup> A whistleblower is defined as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]."<sup>124</sup> The Fifth Circuit concluded that the whistleblower definition, on its own, is unambiguous and requires that an individual make a report to the SEC in order to qualify as a whistleblower.<sup>125</sup>

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(1984). In *Chevron*, the Supreme Court considered whether the Environmental Protection Agency's ("EPA") regulation using the bubble concept was based on a reasonable construction of the term "stationary source" as used in the Clean Air Act Amendments of 1977 (the "Clean Air Act"). *Id.* at 840. The Supreme Court reversed on the grounds that the court of appeals misconstrued the nature of its role in reviewing the regulation. *Id.* at 841–45, 865. Using the principles of statutory construction, the Supreme Court determined that the Clean Air Act did not reference the bubble concept, nor did it contain a specific definition of stationary source. *Id.* at 842–45. Since Congress did not specifically speak to the issue, the Supreme Court next reviewed the legislative history, which also did not specifically address the issue. *Id.* at 851. The Supreme Court then turned to the EPA's regulation stating that as long as it was a reasonable interpretation of Congress's mandate, then the regulation was entitled to deference. *Id.* at 865. "[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Id.* Thus, the Supreme Court held that the EPA's use of the bubble concept was a permissible construction of the statute and should be given deference. *Id.* at 865–66.

119. *Rosenblum*, 984 F. Supp. 2d at 147.

120. *Id.*

121. *Id.*

122. *Id.* (quoting *Kar Onn Lee v. Holder*, 701 F.3d 931, 936 (2d Cir. 2012) (second alteration in original)). The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle[s] of deference to administrative interpretations." *Chevron*, 467 U.S. at 844.

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

124. *Id.* See 15 U.S.C. § 78u-6(a)(6) (2014).

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

Asadi conceded that he did not qualify as a whistleblower under the whistleblower definition because he did not provide information to the SEC.<sup>126</sup> Instead, he argued that subsection (iii) of the anti-retaliation provision's protected activities should be construed to protect an individual who makes an internal disclosure to his employer, even if the individual does not also report to the SEC, because there is a conflict between the whistleblower definition and subsection (iii).<sup>127</sup> However, the Fifth Circuit stated that this perceived conflict rested on a misreading of the Whistleblower Program.<sup>128</sup>

The Fifth Circuit explained that there is only one category of whistleblower: an "individual[] who provide[s] information relating to a securities law violation to the SEC;"<sup>129</sup> whereas the protected activities listed in the anti-retaliation provision represent whistleblower protection claims.<sup>130</sup> The Fifth Circuit stated that the text of these three protected activities is unambiguous and, as such, subsection (iii) protects a whistleblower who makes a "disclosure[] that [is] required or protected under [SOX and] any [other] law, rule, or regulation subject to the jurisdiction of the SEC."<sup>131</sup>

Asadi stated he was not arguing that the language of subsection (iii) itself was ambiguous, but that subsection (iii) conflicts with the whistleblower definition.<sup>132</sup> He reasoned that an individual could make a disclosure that falls within subsection (iii), but if the individual does not also make a report to the SEC, he would not be considered a whistleblower under the whistleblower definition.<sup>133</sup> Asadi argued that such a reading of the anti-retaliation provision would make subsection (iii) superfluous.<sup>134</sup>

The Fifth Circuit rejected this argument stating that there would only be a conflict if the three categories of protected activities outlined in subsection (iii) were read as additional definitions of the term "whistleblower."<sup>135</sup> The Fifth Circuit stated that such a construction of the anti-retaliation provision was not

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126. *Id.* at 624.

127. *Id.*

128. *Id.* at 625.

129. *Id.* See 15 U.S.C. § 78u-6(a)(6) (2014).

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

131. *Id.* See 15 U.S.C. § 78u-6(h)(1)(A) (2014).

132. *Asadi*, 720 F.3d at 626.

133. *Id.*

134. *Id.*

135. *Id.*

supported by the structure of the Whistleblower Program.<sup>136</sup> Congress specifically used the term “whistleblower” in the anti-retaliation provision rather than the terms “individual” or “employee.”<sup>137</sup> The Fifth Circuit reasoned that, since the whistleblower definition clearly defines who qualifies as a whistleblower, the definition must be given effect and there can be no alternative definitions.<sup>138</sup>

The Fifth Circuit also stated that the interplay between the whistleblower definition and subsection (iii) of the anti-retaliation provision’s protected activities does not render subsection (iii) superfluous.<sup>139</sup> The Fifth Circuit reasoned that subsection (iii) “protects whistleblowers from retaliation, based not on the individual’s disclosure of information to the SEC but, instead, on that individual’s other possible required or protected disclosure(s).”<sup>140</sup>

To illustrate this point, the Fifth Circuit provided the following hypothetical:

Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company’s chief executive officer (“CEO”) and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a “whistleblower” as defined in Dodd-Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory authority over the mid-level manager, is protected under . . . [SOX]. Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level

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136. *Id.*

137. *Id.* The anti-retaliation provision provides that “[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*.” 15 U.S.C. § 78u-6(h)(1)(A) (2014) (emphasis added).

138. *Asadi*, 720 F.3d at 626–27.

139. *Id.* at 627.

140. *Id.*

manager can state a claim under the Dodd-Frank whistleblower-protection provision because he was a “whistleblower” and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.<sup>141</sup>

The Fifth Circuit reasoned this hypothetical demonstrates that subsection (iii) of the anti-retaliation provision’s protected activities is not superfluous.<sup>142</sup> Subsection (iii) protects an individual from retaliation who qualifies as a whistleblower under the whistleblower definition based on his other required or protected disclosure.<sup>143</sup> The Fifth Circuit stated that Asadi’s construction would read the words “to the [SEC]” out of the whistleblower definition and violate the principles of statutory construction that every word must be given effect.<sup>144</sup>

Finally, Asadi argued that the Fifth Circuit should defer to the SEC’s Rule, which extends anti-retaliation protection to an individual who provides information in accordance with the anti-retaliation provision.<sup>145</sup> However, the Fifth Circuit rejected this argument as well, stating that the SEC’s Rule redefines whistleblower more broadly than Congress intended.<sup>146</sup> The SEC’s Rule provides that an individual can qualify as a whistleblower even though the individual does not make a disclosure to the SEC as long as the individual is engaged in one of the three protected activities listed in the anti-retaliation provision.<sup>147</sup> The Fifth Circuit stated that the plain language of the Whistleblower Program does not support the SEC’s expanded definition of whistleblower since Congress unambiguously defined the term “whistleblower.”<sup>148</sup>

The Whistleblower Program clearly expresses Congress’s intent that, to qualify as a whistleblower under the Dodd-Frank Act, an individual must make a disclosure to the SEC.<sup>149</sup> Since Congress directly addressed who qualifies as a whistleblower, the Fifth Circuit determined that it must reject the SEC’s Rule expanding the definition of whistleblower.<sup>150</sup> Therefore, the Fifth Circuit held that the anti-retaliation provision only provides

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141. *Id.* at 627–28.

142. *Id.* at 628.

143. *Id.*

144. *Id.* at 629.

145. *Id.*

146. *Id.* at 629–30.

147. *Id.* at 629.

148. *Id.* at 630.

149. *Id.*

150. *Id.*

retaliation protection to an employee-whistleblower who makes a disclosure to the SEC.<sup>151</sup>

Furthering the argument that, in order to receive protection under the anti-retaliation provision an individual must first qualify as a whistleblower under the whistleblower definition, the district courts in California and Florida looked at the anti-retaliation provision's section heading—"Protection of Whistleblowers."<sup>152</sup> These district courts acknowledged that while a section heading "cannot limit the plain meaning of the text," the section heading could lend support to the conclusion that the anti-retaliation provision only protects an individual who qualifies as a whistleblower under the whistleblower definition.<sup>153</sup>

## 2. Majority View: The Anti-Retaliation Provision is Ambiguous and Should be Construed to Also Protect Employee-Whistleblowers Who Only Make Internal Reports

In deciding whether subsection (iii) of the anti-retaliation provision's protected activities is intended to also protect an employee-whistleblower who makes only an internal report to his employer, the Second Circuit and majority of district courts take one of two approaches. The Second Circuit and district courts in California, Connecticut, Massachusetts, New Jersey, and New York utilize the first approach, the *Chevron*<sup>154</sup> deference test,<sup>155</sup> which is

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151. *Id.*

152. *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at \*1, \*8 (M.D. Fla. May 12, 2014); *Banko v. Apple, Inc.*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013); *see* 15 U.S.C. § 78u-6(h)(1)(A) (2014).

153. *Englehart*, 2014 WL 2619501, at \*8 (quoting *Florida Dep't of Revenue v. Picadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008)); *Banko*, 20 F. Supp. 3d at 757.

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

155. *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*1, \*9 (2d Cir. Sept. 10, 2015) (stating that the court need not resolve the ambiguity itself and will defer to the SEC's reasonable interpretation); *Somers v. Dig. Realty Tr., Inc.*, No. C-14-5180 EMC, 2015 WL 4483955, at \*1, \*12 (N.D. Cal. July 22, 2015) (finding that the SEC's Rule is a reasonable interpretation of the anti-retaliation provision and entitled to deference); *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at \*1, \*6 (N.D. Cal. Oct. 28, 2014) (finding that the whistleblower definition is ambiguous and the SEC's Rule is reasonable and warrants deference); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) (finding that the whistleblower definition and the anti-retaliation provision, when read in conjunction with each other, create a potential conflict and the SEC's Rule is a reasonable reading that resolves the ambiguity); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), slip op. 1, 6 (D.N.J. Mar. 11, 2014) (giving deference to the SEC's Rule since it "harmonizes the contradictory provisions of the Dodd-Frank Act while not rendering any word or



the same approach used by the Fifth Circuit and the minority of courts.<sup>156</sup> Under this approach, if there is ambiguity between the whistleblower definition and subsection (iii), and the SEC's Rule is a reasonable interpretation, a court must defer to it.<sup>157</sup> Under the second approach, district courts in Colorado, Nebraska, New York, and Tennessee have determined that, by its own terms, subsection (iii) does not require interaction directly with the SEC and provides retaliation protection to an employee-whistleblower who makes an internal disclosure required or protected by certain laws within the SEC's jurisdiction.<sup>158</sup>

a. *First approach: Chevron deference*

The first step of the *Chevron* deference test is to determine if the Whistleblower Program is ambiguous.<sup>159</sup> According to its terms, subsection (iii) of the anti-retaliation provision prohibits an

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section superfluous"); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 147 (S.D.N.Y. 2013) (giving the SEC's Rule deference since the Whistleblower Program is ambiguous and there is conflict in a narrow reading requiring disclosure to the SEC when read in conjunction with subsection (iii) of the anti-retaliation provision, which does not require reporting to the SEC); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (adopting the SEC's interpretation of the Whistleblower Program to provide anti-retaliation protection to an individual who only makes an internal report); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*1, \*7 (S.D.N.Y. May 21, 2013) (deferring to the SEC's interpretation because the SEC's Rule clarifies an ambiguity in the Whistleblower Program); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at \*1, \*4-\*5 (D. Conn. Sept. 25, 2012) (finding that the Whistleblower Program is ambiguous and the SEC's Rule should be given deference since it is a reasonable interpretation). See *supra* Part II.C.1 and text accompanying notes 110–122 for a discussion of statutory construction and the *Chevron* deference two-step analysis.

156. See *supra* Part II.C.1.

157. *Rosenblum*, 984 F. Supp. at 147–48.

158. *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 732–33 (D. Neb. 2014) (declining to give the SEC's Rule deference, since a plain reading of the Whistleblower Provision shows that an internal reporter is also protected under the anti-retaliation provision, even though the internal reporter would not qualify for a bounty under the bounty provision); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013) (stating that there is conflict between the whistleblower definition and the third subsection of the anti-retaliation provision and that the third subsection should be read as an exception to the whistleblower definition); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012) (harmonizing the whistleblower definition and the third subsection of protected activity in the anti-retaliation provision to demonstrate that an internal reporter is protected so long as the disclosure relates to a violation of the securities laws); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*1, \*5 (S.D.N.Y. May 4, 2011) (contradicting provisions of the Whistleblower Program are best read so that subsection (iii) of the anti-retaliation provision is an exception to the whistleblower definition).

159. *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 755 (N.D. Cal. 2013). See *supra* Part II.C.1 for an expanded explanation of the *Chevron* deference test.

employer from retaliating against a whistleblower for taking certain protected actions under SOX, which does not require disclosure to the SEC,<sup>160</sup> while whistleblower is defined as an individual who reports a securities law violation to the SEC.<sup>161</sup> Based on a reading of these provisions, ambiguity arises as subsection (iii) “contemplates a broader scope of protection.”<sup>162</sup>

Courts utilizing the *Chevron* deference approach acknowledge that the Fifth Circuit has read these provisions as the whistleblower definition defining who is protected and subsections (i)-(iii) of the anti-retaliation provision’s protected activities as identifying what a whistleblower is protected from doing.<sup>163</sup> However, while “this reading of the two statutory provisions is permissible . . . it is by no means mandatory.”<sup>164</sup> These courts have determined that subsection (iii) can also be viewed as an exception to the whistleblower definition.<sup>165</sup> The existence of these “competing, plausible interpretations . . . compels the conclusion that the statutory text is ambiguous in conveying Congress’s intent.”<sup>166</sup> Thus, when the whistleblower definition is read alongside subsection (iii) of the anti-retaliation provision’s protected activities, there is ambiguity regarding who subsection (iii) protects.<sup>167</sup>

The second step of the *Chevron* deference test is to apply the *Chevron* deference two-step analysis. First, a court must consider whether Congress has spoken directly on the issue, and if so, must give effect to Congress’ expressed intent.<sup>168</sup> However, if Congress is silent on the specific issue, then a court must determine if the agency’s interpretation is a “permissible construction of the statute”.<sup>169</sup> If the agency’s interpretation is reasonable, a court

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160. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2014). One provision of SOX requires companies to establish policies and procedures for an employee to anonymously disclose instances of misconduct to the board of directors. See also 15 U.S.C. § 78j-1(m)(4)(B) (2014); Baynes, *supra* note 44, at 877–880.

161. 15 U.S.C. § 78u-6(a)(6) (2014).

162. Murray v. UBS Sec., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*1,\*4 (S.D.N.Y. May 21, 2013).

163. *Id.*

164. *Id.* at \*5.

165. *Id.*

166. *Id.* (citation omitted).

167. Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519, 531 (S.D.N.Y. 2014).

168. Somers v. Dig. Realty Tr., Inc., No. C-14-5180 EMC, 2015 WL 4483955, at \*1, \*5 (N.D. Cal. July 22, 2015); Rosenblum v. Thomson Reuters (Mkts.) LLC, 984 F. Supp. 2d 141, 147 (S.D.N.Y. 2013).

169. Somers, 2015 WL 4483955, at \*5 (citation omitted); Rosenblum, 984 F.

must defer to it and cannot substitute its own interpretation of the statute, even if the court believes a different reading is necessary.<sup>170</sup>

In applying the first step of the *Chevron* deference two-step analysis, a review of the legislative history indicates that subsection (iii) of the anti-retaliation provision was only added to the last version of the Dodd-Frank Act that was passed and there is no record that Congress even discussed subsection (iii) during its sessions.<sup>171</sup> Therefore, since Congress has not spoken on the issue and its intent cannot be discerned, step two of the *Chevron* deference two-step analysis requires a court to defer to the SEC's Rule as long as it is a reasonable construction.

The SEC's Rule is in line with two cardinal rules of statutory construction.<sup>172</sup> First, the SEC's Rule is consistent with the superfluous canon that a statute ought to be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant."<sup>173</sup> Second, the Rule is consistent with the harmonious-reading canon that a court should "interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole."<sup>174</sup> While a statutory definition is a strong indicator of a term's defined meaning, the definition can be contradicted by other indications.<sup>175</sup> In fact, a recent Supreme Court case reasoned that, in determining the fair reading of a statute, a general definition does not necessarily constitute a clear statement of what Congress meant and other factors can be considered in order to harmonize the meaning of a statute.<sup>176</sup>

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Supp. 2d at 147 (citation omitted).

170. *Somers*, 2015 WL 4483955, at \*5; *Rosenblum*, 984 F. Supp. 2d at 147.

171. *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*1, \*7 (2d Cir. Sept. 10, 2015); *Somers*, 2015 WL 4483955, at \*11.

172. *Somers*, 2015 WL 4483955, at \*6.

173. *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*1, \*5 (S.D.N.Y. May 21, 2014) (citation omitted); *Somers*, 2015 WL 4483955, at \*6.

174. *Somers*, 2015 WL 4483955, at \*6 (citation omitted).

175. *Berman*, 2015 WL 5254916, at \*8; *Somers*, 2015 WL 4483955, at \*7.

176. *Bond v. United States*, 134 S. Ct. 2077, 2090–91 (2014). Bond discovered that her best friend was pregnant with her husband's child. *Id.* at 2085. Bond, seeking revenge on her friend, ordered two toxic chemicals on Amazon.com. *Id.* On over 20 different occasions, Bond spread the chemicals on her friend's car door, mailbox, and doorknob. *Id.* On one occasion, her friend came in contact with the chemicals, which resulted in a minor burn on her friend's thumb that was easily treated by rinsing it with water. *Id.* Bond was charged with two counts of possessing and using a chemical weapon under the Chemical Weapons Convention Implementation Act of 1998 (the "Act"). *Id.* at 2083, 2085. She entered a conditional guilty plea and was sentenced to six years in federal prison, five years of supervised released, and ordered to pay a

Tension arises since the whistleblower definition requires an individual to provide information to the SEC<sup>177</sup> and subsection (iii) of the anti-retaliation provision's protected activities provides protection to an individual who makes a SOX disclosure that is not required to be reported to the SEC.<sup>178</sup> In its comments to its Rule, the SEC explained that the anti-retaliation provision protects "three different categories of whistleblowers, and the third category . . . includes individuals who report to persons and governmental authorities other than the [SEC]."<sup>179</sup> Accordingly, the SEC recognizes subsection (iii) of the anti-retaliation provision's protected activities as an exception to the whistleblower definition and affords retaliation protection to employee-whistleblowers who make internal disclosures to their employers.<sup>180</sup> In promulgating its Rule, the "SEC considered the policy issues involved and exercised judgment in formulating its final rule" the purpose of which was to "better achieve the goals of the [Whistleblower Program] and advance effective enforcement of the Federal securities laws."<sup>181</sup> The SEC's Rule clarifies an ambiguity in a statute in which the SEC was charged with promulgating rules in order to interpret and enforce the statute.<sup>182</sup> Further, the SEC has experience and expertise, acquired over time, in interpreting and enforcing securities laws.<sup>183</sup> Therefore, a court should defer to the SEC's reasonable interpretation of the Whistleblower

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\$2,000 fine and almost \$10,000 in restitution. *Id.* at 2086. The Tenth Circuit affirmed and the Supreme Court granted certiorari. *Id.* The Supreme Court reserved Bond's conviction and remanded in part because the defined term "chemical weapon" was being too broadly interpreted and intruded on the States' police power. *Id.* at 2090, 2094. The Supreme Court gave the example that, if placed in the city's water supply, the chemicals Bond used may be considered chemical weapons; however, Bond's actions were much less severe and allowing a conviction under the Act would give the statute a reach that exceeded the ordinary meaning of the words Congress used. *Id.* at 2091.

177. *Somers*, 2015 WL 4483955, at \*7; 15 U.S.C. § 78u-6(a)(6) (2014).

178. *Somers*, 2015 WL 2354807, at \*7; *see supra* note 159 and accompanying text.

179. *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 532 (S.D.N.Y. 2014).

180. *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*1, \*5 (S.D.N.Y. May 21, 2013).

181. *Id.* at \*6 (citation omitted).

182. *Id.* at \*7. In fact, "the SEC is clearly the agency to resolve the ambiguity we face." *Berman v. Neo@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*1, \*9 (2d Cir. Sept. 10, 2015).

183. *Murray*, 2013 WL 2190084, at \*7. The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Program.<sup>184</sup>

b. *Second approach: on its face, the anti-retaliation provision protects employee-whistleblowers*

District courts in Colorado, Nebraska, New York, and Tennessee utilize the second approach and have determined that, by their own terms, subsections (i) and (ii) of the anti-retaliation provision's protected activities provide protection to an individual who makes a report to the SEC or who works with the SEC concerning potential securities law violations.<sup>185</sup> On the other hand, subsection (iii) does not require interaction directly with the SEC and provides protection for an employee-whistleblower who makes disclosures required under SOX or pursuant to another rule or regulation subject to the SEC's jurisdiction.<sup>186</sup>

Simply put, if an employee was required to report a potential securities law violation through his employer's internal whistleblowing procedures or an employee's disclosure was protected by another federal agency or by federal law enforcement, then subsection (iii) of the anti-retaliation provision's protected activities would prohibit retaliation against that employee-whistleblower by his employer.<sup>187</sup> In this respect, subsection (iii) is seen as a catch-all provision to extend retaliation protection to an employee-whistleblower who makes a disclosure under any law, rule, or regulation that is subject to the SEC's jurisdiction.<sup>188</sup>

Further, under traditional statutory construction principles, a court must give reasonable meaning to the words of a statute without rendering any language superfluous.<sup>189</sup> By reading the whistleblower definition, which requires reporting to the SEC, verbatim, it "would effectively invalidate [subsection] (iii)'s protection of whistleblower disclosures that do not require reporting to the SEC."<sup>190</sup> Therefore, a court must read subsection (iii) together with the whistleblower definition to protect an employee-whistleblower who reports a possible securities law violation internally to his employer or externally to non-SEC

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184. *Murray*, 2013 WL 2190084, at \*5, \*7.

185. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993 (M.D. Tenn. 2012).

186. *Id.*; 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2014).

187. *Nollner*, 852 F. Supp. 2d at 994.

188. *Id.*

189. *Id.* (citation omitted).

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

persons.<sup>191</sup>

c. *SEC's Amicus Curiae Briefs*

The SEC has submitted amicus curiae briefs in Second Circuit and Third Circuit cases to support its interpretation of the anti-retaliation provision.<sup>192</sup> In its briefs, the SEC recognized that there is ambiguity between subsection (iii) of the anti-retaliation provision's protected activities, which lists protected whistleblowing activities that do not require reporting to the SEC (by referring to SOX and other non-SEC originated rules that are also subject to the SEC's jurisdiction), and the whistleblower definition.<sup>193</sup> A whistleblower is an "individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]."<sup>194</sup> The SEC noted that subsections (i) and (ii) of the anti-retaliation provision's protected activities protect whistleblowers who report information directly to the SEC or participate with the SEC in an investigation, whereas subsection (iii) goes beyond disclosures involving securities law violations and disclosure made to the SEC.<sup>195</sup>

The SEC acknowledged that if the whistleblower definition was read narrowly as a limitation on the application of subsection (iii), then two preconditions would need to be met in order for a whistleblower to be protected under subsection (iii): first, the whistleblower made a concurrent disclosure to the SEC, and second, the information involved a violation of the securities laws.<sup>196</sup> The SEC questioned this reading because "[i]f Congress had actually intended to protect only these 'required or protected'

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191. *Nollner*, 852 F. Supp. 2d at 994.

192. *Safarian Brief*, *supra* note 30, at 1; *Meng-Lin Brief*, *supra* note 31, at 1; *see supra* notes 30–32 and accompanying text for background on the Second Circuit and Third Circuit cases.

193. *Safarian Brief*, *supra* note 30, at 18; *Meng-Lin Brief*, *supra* note 30, at 18–20. As written, subsection (iii) also provides protection to an employee who makes a disclosure to a public company audit committee regarding questionable accounting practices, which includes practices that may not rise to the level of a securities law violation, and an in-house attorney's duty under SOX to disclose a breach of the Chief Executive Officer's fiduciary duty. *Safarian Brief*, *supra* note 30, at 19.

194. *Safarian Brief*, *supra* note 30, at 18; *Meng-Lin Brief*, *supra* note 30, at 18–20; 15 U.S.C. § 78u-6(a)(6) (2014).

195. *Safarian Brief*, *supra* note 30, at 19; *Meng-Lin Brief*, *supra* note 30, at 18–20; *see* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2014); *see also supra* note 193 and accompanying text.

196. *Safarian Brief*, *supra* note 30, at 20.

disclosures that satisfy these two conditions, why would Congress craft [subsection] (iii) to unnecessarily suggest that it protects a much broader class of disclosures than it actually does?”<sup>197</sup> If Congress truly intended this outcome, it could have been more explicit that subsection (iii) only intended to protect disclosures of securities law violations and only if the whistleblower made a concurrent disclosure to the SEC.<sup>198</sup> Furthermore, subsection (iii) would be redundant in instances where the employer knows the whistleblower also made a concurrent disclosure to the SEC as subsections (i) and (ii) would already provide retaliation protection for the whistleblower who reports securities law violations to the SEC.<sup>199</sup>

The only other instance in which this construction of subsection (iii) may function is under the hypothetical posed by the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*<sup>200</sup> While the Fifth Circuit reasoned that this hypothetical prevents subsection (iii) from being superfluous, that is far from true.<sup>201</sup> The SEC stated that the anti-retaliation provision is intended to prevent retaliation by putting an employer on notice that it cannot retaliate against its employees.<sup>202</sup> By following the Fifth Circuit’s approach, subsection (iii) would be ineffective to prevent retaliation and would lose its deterrent effect on employers because an employer would not know that the employee-whistleblower made an external report to the SEC.<sup>203</sup>

The interplay between the statutory provisions demonstrates that Congress did not unambiguously express its intent to limit the protections contained in the anti-retaliation provision to only whistleblowers who report securities law violations to the SEC.<sup>204</sup> By reaching the contrary conclusion, the Fifth Circuit failed to consider the role the Whistleblower Program “occupies within the broader securities-law framework, particularly the internal reporting processes that Congress has previously established,”<sup>205</sup>

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197. *Id.*

198. *Id.* at 20–21.

199. *Id.* at 21; *Meng-Lin Brief*, *supra* note 30, at 20–21.

200. *Safarian Brief*, *supra* note 30, at 22; *Meng-Lin Brief*, *supra* note 30, at 22; *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627–28 (5th Cir. 2013). *See supra* p. 21–22 for the text of the hypothetical posed by the Fifth Circuit in *Asadi*.

201. *Safarian Brief*, *supra* note 30, at 22.

202. *Id.*; *Meng-Lin Brief*, *supra* note 30, at 22.

203. *Safarian Brief*, *supra* note 30, at 22; *Meng-Lin Brief*, *supra* note 30, at 22–23.

204. *Safarian Brief*, *supra* note 30, at 23.

205. *Id.* at 24.

whereas the SEC acknowledges and interprets the Whistleblower Program against the broader securities-law framework.<sup>206</sup>

Further, the SEC acknowledged the Fifth Circuit's erroneous belief that its interpretation was necessary in order to avoid abolishing SOX whistleblower protection because it was unlikely a whistleblower would raise a SOX anti-retaliation claim if the whistleblower could raise a Dodd-Frank Act anti-retaliation claim.<sup>207</sup> However, this ignores two advantages of a SOX anti-retaliation claim.<sup>208</sup> First, an individual could avoid the burdens of pursuing his claim in court, which would likely result in high litigation costs, having his claim heard in an administrative forum, and having the DoL assume responsibility for the investigation.<sup>209</sup> Second, an individual with nominal back pay damages but significant emotional injuries may receive an even greater recovery, because a SOX claim allows recovery for emotional distress and reputational harm.<sup>210</sup> These advantages demonstrate that SOX anti-retaliation protection is not effectively abolished by the SEC's interpretation of the Dodd-Frank Act's anti-retaliation provision.

Since there is ambiguity between the whistleblower definition and subsection (iii) of the anti-retaliation provision, the SEC's reasonable interpretation that the anti-retaliation provision protects three different types of protected activities and that subsection (iii) protects an employee-whistleblower who reports to someone other than to the SEC warrants deference.<sup>211</sup> The SEC stated that its interpretation is reasonable since "[a] contrary result . . . would significantly weaken the deterrence effect on employers who might otherwise consider taking an adverse employment action."<sup>212</sup> Further, its interpretation is reasonable because it resolves the statutory ambiguity in a way that provides broad retaliation protection in the manner the anti-retaliation provision contemplated; ensures an employee-whistleblower who reports internally first will not be disadvantaged by losing employment retaliation protection; and better supports the overall objective of

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206. *Id.*

207. *Id.*; *Meng-Lin Brief*, *supra* note 30, at 20. A Dodd-Frank Act anti-retaliation claim allows for recovery of two times back pay rather than only back pay under a SOX anti-retaliation claim and has a substantially longer statute of limitations. *Safarian Brief*, *supra* note 30, at 24.

208. *Safarian Brief*, *supra* note 30, at 25.

209. *Id.*

210. *Id.*

211. *Id.* at 26; *Meng-Lin Brief*, *supra* note 30, at 27–28.

212. *Safarian Brief*, *supra* note 30, at 29; *Meng-Lin Brief*, *supra* note 30, at 29.



the Whistleblower Program and the SEC's rulemaking—mainly, not to dis-incentivize a potential employee-whistleblower from first making an internal report.<sup>213</sup>

### III. CONFIDENTIALITY AND ETHICAL CONSIDERATIONS, COMPANY SELF-REPORTING, EMPLOYEE LOYALTY, AND PUBLIC POLICY: CONSIDERATIONS AND BENEFITS

#### A. *Confidentiality and Ethical Considerations of Corporate Officers and Employees Holding Professional Designations*

Corporate officers and corporate accounting and finance employees, such as certified public accountants (“CPAs”) and chartered financial analysts (“CFAs”), have an advantage over regulators in monitoring a company's compliance with the securities laws as these employees have access to confidential and proprietary company information and have the requisite knowledge of the company and its methods of conducting business.<sup>214</sup> These employees have the technical skills necessary to understand the complex financial transactions and a unique ability to recognize when corporate actions violate the securities laws.<sup>215</sup> In addition, such employees are agents for the companies in which they work and owe certain fiduciary duties to the company.<sup>216</sup>

Corporate officers and corporate accounting and finance employees owe a fiduciary duty of loyalty to their respective employers, must act in good faith, must act in the best interests of their employer, and must protect company information.<sup>217</sup> Additionally, CPAs and CFAs are part of professional organizations that require their members to adhere to certain confidentiality and ethical obligations, including the obligation to act in the best interests of their employer and/or client.<sup>218</sup> Such confidentiality and ethical obligations can, by their very nature,

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213. *Safarian Brief*, *supra* note 30, at 28; *Meng-Lin Brief*, *supra* note 30, at 28–29.

214. Moberly, *supra* note 45, at 1116–17; Baynes, *supra* note 44, at 884.

215. Moberly, *supra* note 45, at 1116–17; Rapp, *supra* note 46, at 109.

216. Baynes, *supra* note 44. Officers and senior executives owe a duty of loyalty and a duty of care to their employer. *Id.* at 883–86. The duty of loyalty involves acting in good faith and in a manner reasonably believed to be in the best interests of the company, which includes protecting company information. *Id.* at 883. The duty of care involves performing duties with the care that a person in a similar “position would reasonably exercise under similar circumstances.” *Id.* at 886.

217. *Id.* at 883.

218. See *Code of Ethics & Standards of Professional Conduct*, *supra* note 44; *AICPA Code of Professional Conduct*, *supra* note 44.

conflict with internal whistleblowing policies and procedures and external whistleblowing programs.<sup>219</sup>

These employees may be found to have converted company information by sharing such information with external authorities.<sup>220</sup> At worst, these external disclosures could lead to civil or criminal liability for the company, senior officers, and the board of directors, and may make it impossible for them to receive reduced sanctions and fines.<sup>221</sup> At the very least, these external disclosures could lead to embarrassment or reputational loss for the company and the corporate officers.<sup>222</sup>

CFAs have similar difficulties. If a CFA discovers that his company or another employee has committed a securities law violation, the CFA has a duty not to participate or assist in the misconduct and to act in the best interest of his client/employer, which may include disclosing the misconduct in order to prevent further harm.<sup>223</sup> The CFA may have an inherent conflict with his ethical obligations if he fears retaliation by his employer for reporting the possible violation internally through his employer's whistleblowing procedures and chooses to report the possible violation externally to the SEC.<sup>224</sup>

The CFA Institute has enumerated certain steps a CFA should take in order to avoid ethical violations and stop misconduct from occurring or continuing to occur.<sup>225</sup> These steps include discussing concerns with the individual committing the misconduct to allow the individual time to correct the situation; notifying the employer through the employer's internal procedures; asking to be removed from the situation where the misconduct is occurring; reporting the misconduct to the appropriate outside regulator; and resigning from the company if continued employment might be construed as participation in the misconduct.<sup>226</sup> While these steps may assist a CFA in avoiding disciplinary actions initiated by the CFA Institute, they do nothing to protect a CFA from retaliation by his employer for reporting a violation internally. In fact, the CFA Institute

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219. See Baynes, *supra* note 44, at 885.

220. See *id.*

221. See *id.*

222. See *id.* at 886.

223. See *Code of Ethics & Standards of Professional Conduct*, *supra* note 44; *What Makes a True CFA Charterholder*, CFA MAG. 34 (Jan.-Feb. 2011), <http://www.cfapubs.org/doi/pdf/10.2469/cfm.v22.n1.full>.

224. *What Makes a True CFA Charterholder*, *supra* note 223.

225. *Id.*

226. *Id.*

encourages a CFA to take actions (e.g., making an internal report) that potentially may not be protected under the Fifth Circuit's reading of the Dodd-Frank Act's anti-retaliation provision.

Under the Fifth Circuit's reading, if a CFA made an internal report of a possible securities law violation to his employer and his employer retaliated against him for that internal report, the CFA would not be protected under subsection (iii) of the anti-retaliation provision.<sup>227</sup> According to the Fifth Circuit, the CFA would not be considered a whistleblower under the whistleblower definition because he did not make his report to the SEC.<sup>228</sup> Thus, any retaliation faced by the CFA by virtue of his internal disclosure would go unpunished, even if the CFA subsequently made a report to the SEC.<sup>229</sup> At the time of future disclosure to the SEC, retaliation against the CFA would have already occurred. Since that retaliation did not occur as a result of the CFA's disclosure to the SEC, the CFA would not be protected under the Fifth Circuit's interpretation of the anti-retaliation provision. If the employer retaliated against the CFA for a second time, as a result of the CFA's external report to the SEC, only then would the CFA have any protection from retaliation under the Fifth Circuit's interpretation and that protection would be limited to the retaliation directly resulting from the CFA's disclosure to the SEC.

Such an outcome has a chilling effect on those employees who are charged with independently confirming their employer's compliance with the securities laws. The Fifth Circuit's interpretation provides timid anti-retaliation protection that may come too late in many instances. It may even encourage retaliation against employee-whistleblowers who only make internal reports in the first instance, because any retaliation by the employer against these employee-whistleblowers would not be subject to the anti-retaliation provision's protection.

#### B. *Company Incentives to Self-Report Violations*

As regulators' primary focus has shifted away from punishment of a company towards the cessation of wrongdoing,

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227. See *supra* Part II.C.1.

228. See *supra* Part II.C.1.

229. The CFA's delay in reporting the potential securities law violation to the SEC is a direct consequence of the CFA Institute's enumerated steps to avoid ethical violations and disciplinary actions initiated by the CFA Institute. See *What Makes a True CFA Charterholder*, *supra* note 223.

public support of internal whistleblowing has grown.<sup>230</sup> Whistleblowing has been embraced as a “tool to reduce, deter and stop corporate wrongdoing.”<sup>231</sup> Regulators often “enlist private corporations to self-regulate actively by self-identifying problems and risks.”<sup>232</sup> New regulations rely on individual companies to monitor their compliance with the securities laws and to continuously learn about industry best practices.<sup>233</sup>

These new regulations and “judicial decisions . . . encourage employers to establish internal whistleblowing procedures in order to reap the benefits that these reports can deliver to organizations and the government. Direct incentives for creating internal [whistleblowing] procedures are included in congressional mandates such as the federal Corporate Sentencing Guidelines.”<sup>234</sup> The Corporate Sentencing Guidelines specifically recommend internal whistleblowing as a way to deter misconduct by providing for increased monetary fines and sanctions for companies that make little to no effort to prevent wrongdoing.<sup>235</sup> Companies that, in good faith, attempt to stop and detect misconduct often receive reduced fines and sanctions.<sup>236</sup> Meaningful internal reporting systems and protecting whistleblowers are some of the characteristics of an acceptable detection program.<sup>237</sup> These internal reporting systems allow for early detection of issues and give the company time to respond before misconduct can fester and expose the company to substantial liabilities.<sup>238</sup>

Internal reporting saves public funds by reducing the costs associated with investigations and enforcement actions initiated by the SEC, other regulatory agencies, and law enforcement; is in line with most employees’ preference to internally report possible violations; is less harmful to the company; and is seen as more ethical as external reporting is often perceived as disloyal.<sup>239</sup>

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230. Dworkin, *supra* note 42.

231. Callahan et al., *supra* note 41, at 215.

232. Lobel, *supra* note 43, at 1247.

233. *Id.* at 1248.

234. Callahan et al., *supra* note 41, at 190.

235. *Id.* at 191.

236. *Id.*

237. *Id.*

238. Letter from Susan Hackett, Senior Vice President and Gen. Couns., Ass’n of Corp. Couns., to Elizabeth M. Murphy, Sec’y, SEC (Dec. 15, 2010), <http://www.sec.gov/comments/s7-33-10/s73310-126.pdf> [<http://perma.cc/TLK9-XFWQ>].

239. Dworkin, *supra* note 42; Bishara, et al., *supra* note 40, at 39. “Governments, strapped for resources, facing shrinking budgets, global competitive pressures to liberalize trade, and corporate regulatory resistance, are increasingly experimenting

Internal whistleblowing procedures provide an efficient and inexpensive source of information on possible corporate misconduct; assist in communicating information to those who have the power to act; and assist in correcting “misunderstandings and wrongdoing without the financial and reputational risks associated with external” whistleblowing.<sup>240</sup>

The Fifth Circuit’s interpretation of the anti-retaliation provision<sup>241</sup> would frustrate these company incentives and conflict with other statutes and regulations, such as SOX, which encourages internal reporting because employee-whistleblowers would be forced to simultaneously report possible misconduct to the SEC to preserve protection under the Dodd-Frank Act’s anti-retaliation provision. If this were to happen, company whistleblowing procedures would be meaningless and most likely go unused. Additionally, companies would not receive the benefits associated with early detection of potential misconduct, resulting in more harm to the company, its clients, and investors.

### C. *Employee Whistleblowing and Loyalty*

Whistleblowers are rarely seen in a positive light. In fact, “[t]he history of whistleblowers[] . . . [is that most] have been fired, blackballed from their industry or profession, and have suffered personal problems.”<sup>242</sup> Fellow employees generally view whistleblowers as disloyal and treat them as outcasts.<sup>243</sup> Nevertheless, “a deep sense of institutional loyalty (as well as fear of retribution for blowing the whistle) lies within the heart of most employees . . . .”<sup>244</sup>

The regulatory environment is based on the assumption that regulators will detect instances of misconduct.<sup>245</sup> However, a study of corporate scandals found that the SEC detected only seven

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with approaches that rely on organizations themselves to complement standard-setting and enforcement activities.” Lobel, *supra* note 43, at 1267.

240. Bishara, et al., *supra* note 40. “External whistleblowers can disclose confidential information or inaccurate information that hurts the company’s business.” Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of the Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL’Y J. 1, 22 (2007).

241. See *supra* Part III.C.1.

242. David Culp, *Whistleblowers: Corporate Anarchists or Heros? Towards a Judicial Perspective*, 13 HOFSTRA LAB. L.J. 109, 113 (1995) (all but first alteration in original) (citation omitted).

243. *Id.* at 114.

244. *Id.* at 115.

245. Rapp, *supra* note 46, at 109.

percent of the corporate fraud.<sup>246</sup> This suggests that “[w]histleblowing is the single most effective way to detect fraud” and “[e]mployee disclosures are the most common source of fraud detection.”<sup>247</sup> In fact, whistleblower tips account for more than forty percent of fraud detection.<sup>248</sup> Without employee-whistleblowers, future incidents of large-scale corporate wrongdoing, as large as Enron<sup>249</sup> or Bernie Madoff,<sup>250</sup> might be revealed too late by regulators or might never be revealed.<sup>251</sup>

Other studies suggest that companies with internal whistleblowing procedures receive an increased number of whistleblower reports.<sup>252</sup> One reason for this increase is that employees feel loyal to their employers and choose to report possible violations internally through their employers’ internal procedures in the first instance.<sup>253</sup> Internal whistleblowers tend to be long-term employees with the requisite institutional knowledge who are disappointed by corporate misconduct and believe their employers’ best interests are served by reporting corporate misconduct internally.<sup>254</sup> It is only when these loyal employee-whistleblowers receive no response from their employers, fear retaliation, or suffer from retaliation that they choose to disclose misconduct externally,<sup>255</sup> at which point it may already be too late

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246. *Id.* The study was conducted by Alexander Dyck, an economist at the University of Toronto, and looked at 216 instances of corporate fraud occurring between 1996 and 2004 in United States companies with over \$750 million in assets. *Id.* at 107 n.254.

247. *Id.* at 108.

248. *Id.*

249. See *supra* note 67 and accompanying text.

250. Bernie Madoff, a former hedge fund manager, perpetrated what is thought to be the largest Ponzi scheme in history by taking nearly \$50 billion from investors. Robert Lenzer, *Bernie Madoff's \$50 Billion Ponzi Scheme*, FORBES (Dec. 12, 2008, 6:45 PM), [http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in\\_rl\\_1212croesus\\_inl.html](http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html) [<http://perma.cc/Q8KU-WBYQ?type=live>]. He perpetrated his fraud by promising investors steady double-digit returns. *Id.* If Madoff’s investors had not requested \$7 billion in redemptions, his scheme may never have been discovered. *Id.* In fact, the SEC failed to discover Madoff’s fraud, even after receiving several detailed and credible complaints and failing to properly examine his activities. Jennifer Liberto, *SEC investigation: We missed Madoff*, CNNMONEY (Sept. 2, 2009, 8:52 PM), [http://money.cnn.com/2009/09/02/news/economy/Madoff\\_SEC\\_investigation/](http://money.cnn.com/2009/09/02/news/economy/Madoff_SEC_investigation/) [<http://perma.cc/353R-H6BL>].

251. Rapp, *supra* note 46, at 109.

252. Moberly, *supra* note 45, at 1141.

253. *Id.*

254. *Id.* at 1142.

255. Callahan et al., *supra* note 41, at 195; Rapp, *supra* note 46, at 115–19. In 2014, the SEC made two whistleblower awards to employee-whistleblowers when their

for these employee-whistleblowers to receive retaliation protection under the Fifth Circuit's interpretation of the anti-retaliation provision.<sup>256</sup>

When a company is engaged in wrongdoing, the failure to protect employee-whistleblowers is synonymous with the law encouraging other employees to engage in wrongdoing and behave immorally.<sup>257</sup> Responsible employers should encourage their employees to report misconduct by implementing and supporting internal whistleblowing procedures and providing retaliation protection.<sup>258</sup> Such actions demonstrate the employers' commitment to ethical behavior, and can improve employee morale when employees know they can put a stop to corporate misconduct.<sup>259</sup>

Yet, in most instances, rather than being viewed as a hero or respected by their peers, whistleblowers tend to be "treated with scorn and disdain and are often rewarded with labels such as 'snitch,' 'rat,' and 'tattle-tale.'"<sup>260</sup> Recent studies have found that eighty-two percent of employee-whistleblowers reported being "fired, quit under duress, or had significantly altered [job] responsibilities," and up to sixty-four percent have "reported being blacklisted from other jobs in their field."<sup>261</sup> When employee-whistleblowers are adequately protected, they will internally report

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employers failed to act upon credible allegations of corporate misconduct. 2014 *Annual Report*, *supra* note 60, at 1. In both instances, the employee-whistleblowers worked through their employers' internal whistleblower procedures for reporting potential violations. *Id.* It was only when the employers failed to timely respond and take appropriate corrective action that the employee-whistleblowers made external reports to the SEC. *Id.*

256. *See supra* Part II.C.1.

257. Culp, *supra* note 242, at 131.

258. *Id.* at 132; *see also* Callahan, et al., *supra* note 41, at 196. Organizational emphasis on internal procedures and procedural justice will likely enhance an employee's willingness to follow corporate policies. Lobel, *supra* note 43, at 1250. When internal reporting systems are communicated effectively to employees and proper training is received, the employer can assist in creating a culture of shared values where all employees feel responsible for making sure the company operates within the law and ethics. Letter from Susan Hackett, Senior Vice President and Gen. Couns., Ass'n of Corp. Couns., to Elizabeth M. Murphy, Sec'y, SEC 2-3 (Dec. 15, 2010), <http://www.sec.gov/comments/s7-33-10/s73310-126.pdf> [<http://perma.cc/TLK9-XFWQ>]. However, these internal systems will not work if employees do not feel protected in reporting wrongdoing. *Id.*

259. Callahan et al., *supra* note 41, at 196.

260. Culp, *supra* note 242, at 115.

261. Rapp, *supra* note 46, at 113-14. One whistleblower, a nuclear physicist, stated he was moved into a broom closet, his computer was taken, and he was eventually moved into the mailroom. *Id.*

instances of misconduct before such misconduct can be detected externally.<sup>262</sup> It is precisely for these reasons that employee-whistleblowers are in the most need of retaliation protection.

The Second Circuit and majority of courts' interpretation of the anti-retaliation provision<sup>263</sup> would protect these loyal employee-whistleblowers from retaliation by their employers. It would allow employee-whistleblowers to do what they perceive as morally right (i.e., report potential misconduct internally) in order to help protect the company and its reputation in the marketplace. By not providing these employee-whistleblowers with retaliation protection, they will be forced to either make an external report to the SEC, in which case any company incentive for self-reporting misconduct would vanish,<sup>264</sup> or choose to say nothing at all regarding the misconduct, thereby allowing the misconduct to continue.

#### D. *Public Policy Considerations*

In issuing its Rule, the SEC was determined to ensure that the Dodd-Frank Act's Whistleblower Program would not undercut the willingness of an employee-whistleblower to report securities law violations through his employer's internal whistleblowing procedures.<sup>265</sup> The Whistleblower Program was designed to encourage internal whistleblower reports of potential misconduct rather than to weaken or replace internal compliance policies and procedures.<sup>266</sup> Furthermore, its success relies on the protection of whistleblowers.<sup>267</sup> While the Whistleblower Program provides

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262. Dworkin, *supra* note 42, at 462.

263. *See supra* Part II.C.2.

264. *See supra* Part III.B.

265. *Safarian Brief*, *supra* note 30, at 3; *Meng-Lin Brief*, *supra* note 30, at 2-3. "Recognizing the significant role that internal company reporting can play, Congress for nearly two decades has enacted a series of amendments to the securities laws to encourage, and in some instances to require, internal reporting of potential misconduct." *Meng-Lin Brief*, *supra* note 30, at 6. In fact, the OWB is examining confidentiality, separation, and employment agreements to determine whether any provisions in those agreements may discourage employees from becoming whistleblowers. Michael Sackheim, *Seminar: Ethical Issues Confronting Lawyers in the Financial Services Industry in 2014*, INT. SWAPS & DERIVATIVES ASS'N, INC. 22 (July 16, 2014) (on file with author) (citation omitted). "[I]f [the OWB] find[s] that kind of language, not only [is the OWB] going to go to the companies, [it is] going to go after the lawyers who drafted it." *Id.*

266. *2014 Annual Report*, *supra* note 60, at 2.

267. U.S. SEC. AND EXCH. COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 2 (2013), <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf> [<http://perma.cc/X5QX-N22N>]. The OWB is



incentives for whistleblowers to report possible misconduct (e.g., the possibility of a bounty), it also encourages employee-whistleblowers to work within their respective employers' own compliance policies and procedures.<sup>268</sup> Refusing to provide retaliation protection to employee-whistleblowers who make internal reports in the first instance could cause the unintended consequence of employee-whistleblowers completely foregoing their employers' internal compliance procedures and instead reporting directly to the SEC.<sup>269</sup>

Congress, clearly appreciating the significant role that internal reporting can play, has enacted a number of amendments to the securities laws in order to encourage, and in some instances require, the internal reporting of possible misconduct.<sup>270</sup> One challenge for the SEC during its rulemaking under the Dodd-Frank Act was to ensure employees were not dissuaded from reporting internally.<sup>271</sup> Such a result could lead to a reduction in the effectiveness of employers' existing compliance policies and procedures, and their ability to investigate and respond to possible misconduct.<sup>272</sup>

Like Congress, the SEC recognizes that employee-whistleblowing plays an important role in ensuring compliance with the federal securities laws and assists a company in identifying, correcting, and self-reporting violations, thereby critically enhancing its own enforcement objectives and its ability to bring enforcement actions against employers that retaliate against their employees for internal reporting.<sup>273</sup> Internal reporting systems are essential sources of information regarding misconduct.<sup>274</sup> If such internal reporting systems are not utilized, the system of securities regulation will be less effective.<sup>275</sup> With this in mind, the SEC

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actively working with the Enforcement Division of the SEC to identify employers who have taken retaliatory actions against employees for reporting potential misconduct or instances where confidentiality, severance, or other agreements have been used to prohibit an employee from making reports regarding potential misconduct. *Id.*

268. *Id.* at 4.

269. *Id.* at 2.

270. *Safarian Brief*, *supra* note 30, at 5.

271. *Id.* at 10.

272. *Id.*

273. *Id.*; *Meng-Lin Brief*, *supra* note 30, at 5.

274. *Incentives for Whistleblowers*, *supra* note 17, at 1836. Without internal employee-whistleblower reports, future incidents of corporate wrongdoing, as large as Enron or the Bernie Madoff Ponzi scheme, may never be revealed or revealed too late. Rapp, *supra* note 46, at 109.

275. *Incentives for Whistleblowers*, *supra* note 17, at 1836.

issued its Rule to provide strong incentives for employee-whistleblowers to report misconduct internally when appropriate.<sup>276</sup>

In May of 2014, the Nebraska District Court, part of the majority position, decided *Bussing v. COR Clearing, LLC*,<sup>277</sup> in which the court specifically addressed the hypothetical posed by the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*<sup>278</sup> The Nebraska District Court explained that “[i]n the whistleblower context, there are three major players: employee-whistleblowers, employers, and the SEC.”<sup>279</sup> From the employer’s point of view, the hypothetical posed in *Asadi* creates an odd standard of liability where liability for retaliation attaches only when certain preconditions, of which the employer is unaware, are satisfied.<sup>280</sup> The Nebraska District Court further explained that the hypothetical is also under-inclusive from the employee-whistleblower’s point of view and over-inclusive from the SEC’s point of view, because the hypothetical fails to account for the fact that most employees tend to report violations internally to their employers before disclosing violations externally to the SEC.<sup>281</sup> Employees tend to report internally first for a number of reasons: they are not motivated by financial gain and the prospect of a bounty is not a factor in their decision; employees feel a sense of loyalty to their employers and want to give their employers a chance to correct the violation; and employees may not know to report externally to the SEC to receive retaliation protection.<sup>282</sup>

The Nebraska District Court stated that “under *Asadi*, not only does the law fail to protect the majority of whistleblowers, it fails to protect those who are most vulnerable to retaliation.”<sup>283</sup> The court refused to attribute an intent to Congress that would offer broad retaliation protection only to take it away, leaving behind retaliation protection for only a small group of whistleblowers.<sup>284</sup> It also refused to conclude that Congress intended to depart from the “general practice of first making an

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276. *Meng-Lin Brief, supra* note 30, at 3.

277. 20 F. Supp. 3d 719 (D. Neb. 2014).

278. 720 F.3d 620, 627–28 (5th Cir. 2013). *See supra* p. 21–22 for the text of the hypothetical posed by the Fifth Circuit in *Asadi*.

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

280. *Id.*

281. *Id.*

282. *Id.* at 732–33.

283. *Id.* at 733.

284. *Id.*

internal report.”<sup>285</sup>

The Nebraska District Court explained that internal reporting serves many important interests, such as allowing a company to remediate misconduct at an early stage and helping the SEC to vet the tips it receives.<sup>286</sup> Failing to protect employee-whistleblowers who report internally will frustrate a company’s internal compliance procedures and might deter employees from participating in an internal investigation.<sup>287</sup> “[F]rom the SEC’s perspective, the *Asadi* interpretation is over-inclusive, as it encourages reports to the SEC that could be more efficiently handled internally, thus wasting government resources generally and diverting resources from cases that need the SEC’s full attention.”<sup>288</sup> While “Congress [may have] aimed to encourage whistleblowers to report to the SEC[,] . . . it does not follow that Congress intended to *discourage* internal reporting.”<sup>289</sup>

Additionally, in supporting the majority position in *Ellington v. Giacomakis*, the Massachusetts District Court stated:

[i]t is apparent from the wording and positioning of § 78u-6(h)(1)(B)(i)<sup>290</sup> that Congress intended that an employee terminated for reporting [SOX] violations to a supervisor . . . and ultimately to the SEC, [to] 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.<sup>291</sup>

Simply put, the Massachusetts District Court believed it unfair for an employee-whistleblower to lose retaliation protection under the Dodd-Frank Act after reporting a possible securities law violation internally first, if the employer is protected from its retaliation by firing the employee-whistleblower before the employee-whistleblower can make a subsequent report to the SEC, which is precisely the outcome that results from the Fifth Circuit’s interpretation.

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285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. “An individual who alleges discharge or other discrimination in violation of subparagraph (A) [the anti-retaliation provision] may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).” 15 U.S.C. § 78u-6(h)(1)(B)(i) (2014).

291. 977 F. Supp. 2d 42, 45 (D. Mass. 2013).

## CONCLUSION

Internal whistleblowing is a useful tool for both companies and the SEC to combat violations of the securities laws. Internal reporting procedures allow a company to detect corporate misconduct and self-report those violations to the SEC, which can result in reduced monetary fines and sanctions and can help to protect a company's reputation in the marketplace.<sup>292</sup> The SEC recognized the benefits of internal whistleblowing when it utilized its rulemaking authority under the Dodd-Frank Act.<sup>293</sup> The SEC interpreted subsection (iii) of the anti-retaliation provision's<sup>294</sup> protected activities as an exception to the whistleblower definition to provide retaliation protection to employee-whistleblowers who report possible securities law violations internally through their employers' whistleblowing procedures, rather than only providing protection when employee-whistleblowers make external reports to the SEC.<sup>295</sup>

Circuit courts of appeal and other district courts should reject the Fifth Circuit and minority of courts' interpretation and follow the Second Circuit and majority of district courts to find that subsection (iii) provides anti-retaliation protection to employee-whistleblowers who report possible securities law violations internally from the retaliatory actions of their employers. By not protecting employee-whistleblowers who report internally, future circuit courts of appeal and district courts will impair the very purpose of the Dodd-Frank Act, which is "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices . . . ."<sup>296</sup> Failure to protect employee-whistleblowers who make internal reports of misconduct will only encourage retaliation against the group of individuals who need this protection the most. Moreover, it is only fair and reasonable that these employee-whistleblowers receive adequate protection of the law when reporting its very violation.

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292. Bishara et al., *supra* note 40, at 39–40; Callahan et al., *supra* note 41.

293. *Meng-Lin Brief*, *supra* note 30, at 6.

294. 17 C.F.R. § 240.21F-2 (West 2015), *invalidated* by *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

295. *See supra* Part II.C.3.

296. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (codified in scattered sections of Titles 7, 12, 15, 18, 22, 31, and 42 of the United States Code).