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INSIDE OR OUT? THE DODD-FRANK WHISTLEBLOWER PROGRAM'S ANTIRETALIATION PROTECTIONS FOR INTERNAL REPORTING

*Jennifer M. Pacella**

ABSTRACT

*On July 17, 2013, the first federal court of appeals to have addressed the antiretaliation protections available to whistleblowers under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) strayed from a string of judicial victories that had been mounting for employee-whistleblowers. In *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit deviated from the holdings of several federal district courts that have interpreted the scope of Dodd-Frank's antiretaliation provisions to broadly protect whistleblowers. Ever since Dodd-Frank's enactment in 2010, courts have struggled to interpret whether the statute's antiretaliation protections are available for internal whistleblowers, or those who internally report violations of the securities laws to their employers, rather than directly to the Securities and Exchange Commission (SEC or the Commission). Confusion as to the scope of Dodd-Frank's protections has arisen due to an inconsistency in the language of the statute with respect to how the term, "whistleblower," is defined, which, on its face, appears to exclude internal whistleblowers. The various district courts to have*

* Assistant Professor of Law, City University of New York, Baruch College, Zicklin School of Business. I am grateful to James Fanto, Joel D. Hesch, Richard E. Moberly, Geoffrey C. Rapp, and Jorge G. Tenreiro for their helpful comments on earlier drafts. I would also like to thank the participants of the City University of New York, Baruch College, Department of Law Faculty Scholarship Series, and the Southeastern Academy of Legal Studies in Business for their input during presentations of this Article.

addressed this issue prior to Asadi have each sided with the whistleblower, often granting Chevron deference to a 2011 SEC rule that reconciles the statute's inconsistency by clarifying that Dodd-Frank's antiretaliation protections are available to internal and external whistleblowers alike. The decision in Asadi stands in stark contrast to these decisions and the SEC's interpretation of the statute. This Article explores the Fifth Circuit's decision in Asadi, as well as the district court opinions that have interpreted this issue, and argues that Asadi sets a disappointing precedent. Not only will the Fifth Circuit's decision potentially affect how other circuit courts will address this issue in the future, it also compromises the importance of internal compliance programs, which offer employees an outlet for reporting possible securities violations within their organizations so that companies can respond to problems in a timely manner. Weakened protection against retaliation for internal whistleblowers will likely have the effect of creating disincentives for employees to report internally. This Article examines the importance of internal compliance programs as a preventative measure against major securities violations and considers the effect that strong antiretaliation protections have on the promotion of internal reporting. As Dodd-Frank is still in its relatively early stages, it is probable that the Fifth Circuit's decision in Asadi will either give rise to a circuit split or prompt the Supreme Court to address this important issue.

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I. INTRODUCTION

On July 17, 2013, the Fifth Circuit's surprising decision in *Asadi v. G.E. Energy (USA), LLC*¹ chipped away the increasing protections that had been building for internal whistleblowers, those who internally report violations of the securities laws directly to their employers, rather than to the SEC. Refusing to follow the lead of several district courts that have interpreted the scope of the antiretaliation protections of

1. 720 F.3d 620 (5th Cir. 2013).

the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)² as available to internal whistleblowers, *Asadi* held that employees who report internally to their supervisors, rather than to the SEC, are not eligible for protection from retaliation under the statute.³ Prior to *Asadi*, a string of federal district court decisions had been gaining momentum in developing a trend of increased protections for internal whistleblowers by interpreting Dodd-Frank to broadly protect both internal and external whistleblowers.⁴ Far from continuing that trend, *Asadi* stands in stark contrast to the pro-whistleblower decisions that have swept across federal courts ever since the statute's enactment.

The decision in *Asadi* touches upon the conflict between two particular subsections of Dodd-Frank that have created ambiguity as to the reach of the statute's protections. Subsection (h) of § 78u-6 of Dodd-Frank, which provides protections from retaliation to whistleblowers, prohibits employers from taking any retaliatory action against "a whistleblower" for (i) providing information to the SEC; (ii) "initiating, testifying in, or assisting in any investigation or judicial or administrative action" of the SEC based on this information; or (iii) "in making disclosures that are required or protected" under specified federal laws, including those under the SEC's jurisdiction.⁵ The definition of "whistleblower" that is referenced in subsection (h) is found in subsection (a)(6) of § 78u-6, which is defined as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."⁶ As becomes apparent when reading these two subsections in tandem, an isolated and narrow reading of particular provisions may lead to an improper construction that excludes internal whistleblowers reporting only to their supervisors from antiretaliation protection, as the statutory definition of "whistleblower" speaks to those who make a report "to the Commission."⁷ It is precisely this tension that has caused defendant-employers subject to antiretaliation litigation to argue that plaintiff-employees who have reported only internally are statutorily excluded from invoking the antiretaliation protections of Dodd-Frank.⁸ The Fifth Circuit in *Asadi* sides with such defendant-employers.

Plaintiff-Appellant, Khaled Asadi, brought a claim against his former employer, Defendant-Appellee, G.E. Energy (USA), LLC (G.E. Energy), under § 78u-6(h) of

2. 15 U.S.C. § 78u-6 (2012).

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

4. *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914 (JMF), 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1105–07 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at *4–5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 997 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *6 (S.D.N.Y. May 4, 2011).

5. 15 U.S.C. § 78u-6(h)(1)(A). Individuals who allege discharge or other discrimination in violation of the antiretaliation provisions may bring a private right of action in federal district court. *Id.* § 78u-6(h)(1)(B)(i).

6. *Id.* § 78u-6(a)(6) (emphasis added).

7. *Id.*

8. *E.g.*, *Murray*, 2013 WL 2190084, at *3.

Dodd-Frank,⁹ alleging that G.E. Energy terminated him after he made an internal report of a possible securities law violation.¹⁰ Asadi, as G.E. Energy's Iraq Country Executive, was working in Amman, Jordan, when he became concerned that G.E. Energy was taking actions that violated the Foreign Corrupt Practices Act (FCPA).¹¹ After reporting this issue to his supervisor and to a regional executive of the company, Asadi began to receive "surprisingly negative" performance reviews, which led to pressure to step down from his position and his eventual termination from employment.¹² Asadi brought suit in the U.S. District Court for the Southern District of Texas,¹³ and G.E. Energy moved to dismiss for failure to state a claim.¹⁴

Deciding that it was not necessary to reach the issue of whether Asadi fit the definition of "whistleblower" under Dodd-Frank as to be eligible for relief, the district court granted G.E. Energy's motion to dismiss after finding that Dodd-Frank's antiretaliation provisions do not apply extraterritorially.¹⁵ Because the "majority of events giving rise to the suit occurred in a foreign country [Jordan]," the district court held that Asadi could not invoke Dodd-Frank's protections, which were meant to apply only domestically.¹⁶ When Asadi appealed to the Fifth Circuit, one might have expected that this circuit court would address the novel issue of whether Dodd-Frank applies extraterritorially.¹⁷ Instead, the court bypassed this issue and affirmed the

9. This section reads:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h).

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

11. *Id.* Specifically, Asadi learned from Iraqi officials that G.E. Energy had hired a woman who was "closely associated with a senior Iraqi official to curry favor with that official in negotiating a lucrative joint venture agreement." *Id.*

12. *Id.* Asadi was fired after failing to comply with G.E. Energy's request that he step down from his role as Iraq Country Executive to accept a role with minimal responsibility. *Id.*

13. *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (allowing individuals claiming violations of the antiretaliation provisions to bring a private right of action in the appropriate federal district court).

14. *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, *1 (S.D. Tex. June 28, 2012).

15. *Id.* at *4-7.

16. *See id.* at *5 (noting that Asadi's termination email "was sent to [him] in Jordan, was related to his employment in Jordan, and says that a letter would be sent to Asadi's home in Jordan"). The district court relied heavily on the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, holding that the Securities Exchange Act does not apply extraterritorially, thus reaffirming the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted); *Asadi*, 2012 WL 2522599, at *4.

17. The Second Circuit later decided that the protections of Dodd-Frank do not apply extraterritorially in *Liu v. Siemens AG*, 763 F.3d 175, 180 (2d Cir. 2014). *See infra* notes 135 and 152 for a discussion of the court's holding in *Siemens*.

district court's decision on what it deemed was a more "straightforward" ground—that Asadi was not a "whistleblower" under Dodd-Frank because he had not reported to the SEC.¹⁸

The Fifth Circuit's decision is alarming for several reasons. First, it ignores the correct rationale in the decisions of the several district courts that have already addressed the very same issue. Although not binding on a circuit court, these prior decisions have carefully analyzed Dodd-Frank's definition of whistleblower and its interplay with the statute's antiretaliation provisions, offering persuasive authority.¹⁹ Second, the *Asadi* decision rejects the SEC's expansive interpretation of the term "whistleblower" for purposes of Dodd-Frank's antiretaliation provisions as inclusive of those who make internal reports, which the SEC expressed in promulgating its final rules interpreting the statute in 2011.²⁰ Third, the decision in *Asadi* has the effect of undermining companies' internal compliance programs by creating a disincentive for employees to make the very difficult decision of blowing the whistle from within, as such individuals are now without any assurance of avenues for redress against retaliation in the judicial system. By excluding such persons from the generous antiretaliation provisions of Dodd-Frank, the precedent in *Asadi* leaves those who are critical in bringing to light possible securities violations without the robust protections that Dodd-Frank offers. Such a narrow view of the intended statutory protections is bound to have many implications, including controversy among federal courts, an overall decrease in the number of internal whistleblowers who report misconduct, and potentially an increased reliance on the Sarbanes Oxley Act of 2002 (SOX) as the only means to providing antiretaliation protections to internal whistleblowers.

This Article analyzes the implications of *Asadi* and proposes that such a decision runs contrary to the intended reach of Dodd-Frank to broadly incentivize and protect whistleblowers. Section II addresses the Dodd-Frank whistleblower program that was enacted in 2010, as well as the SEC rulemaking process that established final rules setting forth a "foundation for a framework that will support [the] entirely new regulatory regime" put into place by Dodd-Frank.²¹ This Section also discusses the decisions of the several district courts that have addressed the apparent conflict between subsections (a)(6) and (h) in § 78u-6 of Dodd-Frank. Section III then analyzes the decision in *Asadi* and considers its implications, especially with respect to the expected effect of the decision on the viability of internal compliance programs, which took on heightened importance after the enactment of SOX.

Section IV considers *Asadi*'s likely effect on the motivation for internal

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

19. *See, e.g., Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) ("Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." (quoting *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996))); *Liebisch v. Sec'y of Health & Human Servs.*, No. 93-3122, 1994 WL 108957, at *2 (6th Cir. Mar. 30, 1994) (refusing to accept a district court opinion as binding precedent but acknowledging its persuasive value).

20. *See Asadi*, 720 F.3d at 629–30 (finding that the SEC regulation contradicts Congress's unambiguous definition of "whistleblower" and therefore must be rejected); 17 C.F.R. § 240.21F-2(b) (2011) (providing an expansive definition of "whistleblower").

21. *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/dodd-frank.shtml> (last visited Aug. 21, 2014).

whistleblowers to move forward, especially in light of the serious repercussions they face for blowing the whistle on their employers. This Section also considers the essentiality of internal compliance programs as a preventative measure in avoiding potential securities violations and the significant benefits that accompany the existence of effective internal compliance programs, including mitigation in determining the sentence to be imposed on organizations that are convicted of criminal activity.²² This Article concludes by acknowledging the essential role that internal whistleblowers play in bringing to light potential securities violations and suggests that the decision in *Asadi* stifles the significant progress that has been made for whistleblowers, both statutorily and judicially, in recent years. Given the timeliness and importance of this issue, it is likely that *Asadi* will lead to a circuit split or to Supreme Court review of the intended reach of Dodd-Frank's antiretaliation provisions.

II. DODD-FRANK'S WHISTLEBLOWER PROGRAM AND ANTIRETALIATION PROVISIONS

A. *The Whistleblower Program and SEC Rules*

One of the purposes of Dodd-Frank's enactment was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system."²³ Dodd-Frank became effective in July 2010 in the aftermath of the economic crisis from 2008 to 2009, a time justifiably described as "one of political urgency and economic anxiety."²⁴ In an effort to address the failures that contributed to the economic crisis, Dodd-Frank established an independent executive agency known as the Bureau of Consumer Financial Protection to regulate consumer financial products and services²⁵ and a new government department, the Financial Stability Oversight Council, tasked with the duty of overseeing Wall Street and monitoring the nation's financial stability by recognizing emerging risks.²⁶ Dodd-Frank also instituted mortgage reform by placing various requirements on lenders to ensure a borrower's ability to repay home loans²⁷ and established various efforts to protect taxpayers by ending "too big to fail" bailouts.²⁸ These are just a few of the extensive provisions of

22. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1) (2012) (noting that if the criminal offense of the organization occurred at a time when the organization had in effect "an effective compliance and ethics program," then culpability is reduced for purposes of determining sentencing).

23. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010); see also Henry Klehm III et al., *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis with a Call for Greater International Cooperation, but Where Will that Lead?*, 13 U. PA. J. BUS. L. 927, 936 (2011) (noting that the recent financial crisis "triggered ambitious legislative reform by the United States Congress, culminating in the historic [Dodd-Frank Act]"); Scott L. Silver & Janine D. Garlitz, *SEC Whistleblower Incentives Under the Dodd-Frank Wall Street Reform Act*, 18 PIABA B.J. 169, 169-70 (2011) (noting the purposes of the Dodd-Frank legislation, "which is arguably the most significant financial securities-related legislation in modern history.").

24. Eugene A. Ludwig, *Assessment of Dodd-Frank Financial Regulatory Reform: Strengths, Challenges, and Opportunities for a Stronger Regulatory System*, 29 YALE J. ON REG. 181, 183 (2012).

25. 12 U.S.C. § 5491 (2012).

26. *Id.* § 5321.

27. 15 U.S.C. § 1639c (2012).

28. Silver & Garlitz, *supra* note 23, at 170; see also 12 U.S.C. § 1851 (prohibiting proprietary trading);

the statute, which spans 2,300 pages and imposes over 400 new rules and mandates.²⁹

In addition to reforms aimed at financial regulation, Dodd-Frank created vast developments to incentivize and protect whistleblowers to come forward with information regarding possible securities law violations. Such provisions include the ability of whistleblowers to be awarded cash bounties in exchange for their information and the enactment of heightened antiretaliation protections.³⁰ Section 922 of Dodd-Frank amends the Securities Exchange Act of 1934 (Exchange Act) by adding § 21F, “Securities Whistleblower Incentives and Protection,”³¹ which establishes a comprehensive whistleblower program prohibiting retaliation by employers against whistleblowers and requires the SEC to pay bounties to eligible whistleblowers who provide the SEC with “[o]riginal information”³² regarding a violation of the federal securities laws that leads to a successful enforcement action.³³

Dodd-Frank’s bounty scheme makes cash awards available to whistleblowers of between ten and thirty percent of the monetary sanctions exceeding \$1 million that result from a judicial, administrative, or related action brought by the SEC on the basis of the whistleblower’s information.³⁴ As one whistleblower scholar has expressed, the availability of bounties “correct[s] the resulting imbalance” between the potential whistleblower’s ethical desire to report fraud and the economic disadvantages of doing so, such as legal costs and loss of employment, by providing financial rewards that offset the whistleblower’s career risk.³⁵ Because whistleblowers need not first utilize internal reporting channels within their companies to be eligible for bounties and may provide information directly to the SEC instead,³⁶ concern has arisen among

id. § 1852 (establishing concentration limits on large financial firms); *id.* § 1842 (regulating the acquisition of bank shares and assets).

29. *Oversight of Dodd-Frank Act Implementation*, COMM. ON FIN. SERVS., <http://financialservices.house.gov/dodd-frank/> (last visited Aug. 21, 2014).

30. 15 U.S.C. § 78u-6; 17 C.F.R. § 240.21F-1 (2014).

31. Dodd-Frank Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. 78u-6).

32. To qualify as “[o]riginal information,” the information must be the following:

- (i) Derived from your independent knowledge or independent analysis;
- (ii) Not already known to the [SEC] from any other source, unless you are the original source of the information;
- (iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless you are a source of the information; and
- (iv) Provided to the [SEC] for the first time after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

17 C.F.R. § 240.21F-4(b).

33. *Id.* §§ 240.21F-1, 240.21F-2. In its report recommending the passage of the Dodd-Frank bill, the Senate Committee on Banking, Housing, and Urban Affairs noted that the new whistleblower program “aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.” S. REP. NO. 111-176, at 110 (2010).

34. 15 U.S.C. § 78u-6(a)–(b).

35. Geoffrey Christopher Rapp, *States of Pay: Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 59 (2012).

36. Joel Androphy et al., *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act*:

commentators, scholars, and legislators³⁷ that such a structure might diminish the importance of internal compliance programs by allowing employees to bypass internal reporting just to obtain bounties.³⁸ As will be examined, these concerns are amplified by the repercussions of *Asadi*.

In addition to allowing for bounties, Dodd-Frank enacted robust antiretaliation provisions for those who report information,³⁹ which provide that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower[:]

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under [specified federal laws], and any other law, rule, or regulation subject to the jurisdiction of the Commission.⁴⁰

What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know, 59 THE ADVOC. (TEXAS) 19, 24 (2012).

37. In July 2011, House of Representatives Member Michael Grimm introduced a bill, entitled the Whistleblower Improvement Act of 2011, to amend Dodd-Frank to require whistleblowers to first report internally in order to be eligible for a bounty in order to ensure that internal compliance channels remained strong. This bill died in committee. H.R. 2483, 112th Cong. (2011).

38. See, e.g., Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,496 (proposed Nov. 17, 2010) (to be codified at 17 C.F.R. pts. 240, 249) (requesting public comment and acknowledging the concern emerging that the bounty program could have the effect of bypassing internal compliance programs); Gregory A. Brower & Brett W. Johnson, *When Enough Is Not Enough: Two Court Rulings Complicate Corporate Compliance Efforts*, LEGAL BACKGROUNDER, Oct. 2013, at 3, available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/10-11-13BrowerJohnson_LB.pdf (noting that many large companies were concerned during the SEC rulemaking process that the program would incentivize employees to bypass internal reporting channels); Joshua Ernst, Comment, *The Dodd-Frank Whistleblower Provision: Throwing Fuel on the Fire for Foreign Corrupt Practices Act Compliance*, 43 ARIZ. ST. L.J. 1313, 1315 (2012) (stating that whistleblower statutes with monetary awards hinder the attempts of companies trying to “maintain a culture of compliance”); Jenny Lee, Note, *Corporate Corruption & The New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 BROOK. L. REV. 303, 331–32 (2011) (discussing the negative consequences to employers of Dodd-Frank’s whistleblower provisions); Michael Neal, Note, *Securities Whistleblowing Under Dodd-Frank: Neglecting the Power of “Enterprising Privateers” in Favor of the “Slow-Going Public Vessel,”* 15 LEWIS & CLARK L. REV. 1107, 1108–09 (2011) (suggesting that offering monetary awards for whistleblowing undermines the effectiveness of internal compliance programs); Ted Uliassi, Comment, *Addressing the Unintended Consequences of an Enhanced SEC Whistleblower Bounty Program*, 63 ADMIN. L. REV. 351, 361–65 (2011) (discussing how the existence of a reward system for whistleblowers may hinder the effectiveness of the program); Jonathan L. Awner & Denise Dickins, *Will There Be Whistleblowers?* REGULATION, Summer 2011, at 36–37 (noting the public concerns that arose during the SEC rulemaking process over the potential for individuals to make unsubstantiated whistleblowing accusations in order to gain monetary awards).

39. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

40. *Id.*; see also *Regulatory Developments 2010*, 66 BUS. LAW. 665, 704 (2011) (“In addition to the incentive provisions, the Dodd-Frank Act significantly enhances whistleblower [antiretaliation] protections.”).

The enforcement provisions of Dodd-Frank's antiretaliation protections significantly expand upon those that were previously established under SOX.⁴¹ Employees alleging violations of SOX's antiretaliation provisions are first required to exhaust their administrative remedies by filing a complaint with the Occupational Health and Safety Administration (OSHA) before bringing an action against an employer in federal court.⁴² In contrast, Dodd-Frank provides for a direct private right of action in federal district court for whistleblowers who allege "discharge or other discrimination" in violation of the antiretaliation provisions, allowing aggrieved whistleblowers to seek redress in the courts without first undergoing any administrative channels.⁴³

The statute of limitations for enforcement actions is also significantly longer than that of SOX, as whistleblowers under Dodd-Frank have six years from the date of the violation to file suit against their employers, or three years after the date "when facts material to the right of action are known or reasonably should have been known by the employee."⁴⁴ Under SOX, whistleblowers alleging retaliation have only 180 days after the date on which either the violation occurred or the employee became aware of the violation to invoke their administrative remedies.⁴⁵ Relief for retaliation is also noticeably broader. While both statutes provide for reinstatement of employment and compensation for litigation costs, their allowances for back pay differ—back pay is available under SOX, but Dodd-Frank provides for double back pay.⁴⁶

Given these enhanced protections, one would expect whistleblower antiretaliation claims under Dodd-Frank to be more successful than those under SOX, as the latter has proven ineffective in protecting whistleblowers from retaliation.⁴⁷ In 2007, whistleblower scholar Richard Moberly published an extensive empirical study of the outcome of SOX retaliation cases filed with OSHA by whistleblowers since the statute's enactment, revealing only 13 victories for claimants out of a total of 361

41. See Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces To Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 105–06 (2011) (noting that although Dodd-Frank significantly expands protection beyond what was available under SOX, "there is one glaring difference and inconsistency between the two acts" in that Dodd-Frank appears to protect only external reporting while SOX protects both internal and external reporting).

42. 18 U.S.C. § 1514A(b) (2012).

43. 15 U.S.C. § 78u-6(h)(1)(B)(i).

44. *Id.* § 78u-6(h)(1)(B)(iii)(I).

45. 18 U.S.C. § 1514A(b)(2)(D).

46. Compare *id.* § 1514A(c)(2)(B) (entitling an employee prevailing under a SOX whistleblower protection action to all back pay with interest), with 15 U.S.C. § 78u-6(h)(1)(C)(ii) (providing, under Dodd-Frank, twice the back pay with interest to an individual who is discharged for whistleblowing).

47. See Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 4 (2012) (noting that "government administrators and adjudicatory decision makers undermined [SOX's] protections"); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764–65 (2007) (discussing the inadequacies of SOX in protecting whistleblowers); Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 833 (2007) (finding that rulings on Sarbanes-Oxley whistleblower claims and the implementation of regulations adopted by the Department of Labor reveal that whistleblower protections under SOX are not strong enough to protect employee-whistleblowers and to adhere to Congress's intent).

OSHA decisions—a 3.6% success rate.⁴⁸ In Moberly's study of SOX's whistleblower provisions ten years after the statute's enactment, he notes that these numbers "have been even worse for whistleblowers," as only 10 more claimants had been successful in their OSHA cases between 2007 and December 31, 2011—"in total, from [SOX's] effective date until the end of 2011, employees won 1.8% of the 1,260 cases OSHA decided."⁴⁹ Moberly's studies have pinpointed "administrative recalcitrance and adjudicative hamstringing"⁵⁰ as the main causes of such low success rates for whistleblowers, which include, in brief, an improper application by OSHA of SOX's favorable burden of proof to the claimant's detriment, lack of increased OSHA personnel to handle the massive influx of retaliation cases post-SOX, OSHA's lack of expertise to investigate complex financial fraud cases, and rulings by administrative law judges that narrowly interpret SOX's protections.⁵¹

Additional studies examining the success rate of SOX's protection of whistleblowers have revealed that most antiretaliation cases brought before OSHA have either been delayed beyond the required 180 days of the employee-whistleblower's initial complaint or have been dismissed before a hearing, as whistleblowers face steep burdens in overcoming the preliminary stages of a claim, including facing what appears to be a bias against the employee at the investigative and hearing stages.⁵²

Several years after the passage of SOX, Congress enacted Dodd-Frank, which established a more extensive whistleblower program. On November 17, 2010, the SEC proposed rules to implement Dodd-Frank's whistleblower program, which outlined the procedures for receiving bounties and for obtaining protection from retaliation, clarified ambiguities in the statute, and solicited public comment.⁵³ The SEC received over 240 comment letters and approximately 1,300 form letters from groups such as whistleblower advocacy groups, public companies, lawyers and law firms, academics, professional associations, and corporate compliance personnel, each of whom provided views on significant issues related to improving the whistleblower program.⁵⁴

On May 25, 2011, the SEC adopted final rules to implement Dodd-Frank's whistleblower program.⁵⁵ The SEC made changes to its proposals by further

48. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67, 91-95 (2007).

49. Moberly, *supra* note 47, at 28-29. Moberly also notes that, surprisingly, "for three straight years between fiscal years 2006 and 2008, OSHA did not decide a single case in favor of a Sarbanes-Oxley claimant. During that time, OSHA found for employers in 488 straight decisions." *Id.* at 29 (footnote omitted).

50. *Id.*

51. *Id.* at 29-35.

52. See Watnick, *supra* note 47, at 840-41, 861-63 (noting that, as of June 2005, OSHA dismissed almost eighty-two percent of the cases that it had decided under SOX). SOX whistleblowers also face practical disadvantages, such as an inequity in resources compared to large employers and difficulty in obtaining witnesses due to the whistleblower's position of an "outsider." *Id.* at 871-72.

53. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488 (proposed Nov. 17, 2010) (to be codified at 17 C.F.R. pts. 240, 249).

54. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,300 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249).

55. Amy Goodman et al., *SEC Adopts Final Rules Implementing Whistleblower Provisions of Dodd-*

incentivizing whistleblowers to utilize their companies' internal compliance programs and reporting channels.⁵⁶ These incentives include measures such as increasing the amount of a whistleblower's bounty award for voluntarily participating in an entity's internal compliance or reporting program, attributing information as original to a whistleblower who reports misconduct internally, and extending the time that a whistleblower who reports information internally may also report to the SEC to be treated as if he or she had reported to the SEC at an earlier date.⁵⁷ These changes were made in response to the backlash from commentators, including compliance personnel, that the rules as proposed encouraged employees to bypass internal compliance channels out of fear of retaliation and desire for a bounty by going directly to the SEC with information.⁵⁸ The goal behind the SEC rule of attributing information as original to a whistleblower who reports internally is to ensure that employees who first report law violations through their internal compliance programs are eligible for a bounty if the company later self-reports the violation to the SEC based on the original whistleblower's information.⁵⁹ The SEC rule that equates the whistleblower's report to the SEC with the date that he or she internally reported to supervisors is intended to support the effective processes of internal compliance systems and to encourage whistleblowers who later report to the SEC to let their employers know about misconduct as soon as possible.⁶⁰

Many commentators made suggestions relating to the scope of Dodd-Frank's antiretaliation provisions.⁶¹ With respect to the enforceability of the antiretaliation protections, several commentators expressed that the SEC rules should provide that such protections may not be waived by any agreement, policy, or condition of

Frank Act, WALL STREET LAWYER, July 2011, at 1.

56. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,301; *see also* Justin Blount & Spencer Markel, *The End of the Internal Compliance World As We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1055 (2012) (describing how the SEC rules interpreting Dodd-Frank seek to "strike the appropriate balance between internal and external reporting by incentivizing, but not requiring, reporting through internal compliance channels").

57. 17 C.F.R. §§ 240.21F-4(b)(5), (7), 240.21F-6(a) (2014); Blount & Markel, *supra* note 56, at 1055; *see also* Press Release, SEC, SEC Adopts Rules To Establish Whistleblower Program (May 25, 2011), available at <http://www.sec.gov/news/press/2011/2011-116.htm> (discussing that although the final rules do not require employee whistleblowers to first report violations internally to obtain an award, they strengthen incentives to encourage employees to utilize their employer's internal compliance program).

58. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,300-01.

59. *Id.* at 34,321-22.

60. *Id.* at 34,322-23.

61. *Id.* at 34,302 (citing various comments received during the rulemaking process). Some commentators urged the SEC to explicitly state in the rules that the antiretaliation provisions do not apply to those who file a fraudulent or false submission, lack good faith or a reasonable belief of a violation, or whose submission fails to establish a reasonable likelihood of a securities law violation. *Id.* Other comments expressed that the antiretaliation provisions should apply only to those who qualify for a bounty and should "categorically exempt a company's adverse action against an employee based on factors other than whistleblower status, such as engaging in culpable conduct, failing to comply with the reporting requirements of a company's internal compliance program, or violating a professional obligation to hold information in confidence." *Id.* (footnotes omitted).

employment.⁶² Others suggested the exclusion from protection of those who submit information that is based on publicly disseminated information or that which an employee “should reasonably know” is already known to a company’s board of directors, officers, the SEC, or another governmental entity.⁶³ After considering the various comments, the SEC established the following rules governing the statute’s prohibition against retaliation:

For purposes of the anti-retaliation protections afforded by [the Dodd-Frank whistleblower program, amending the Exchange Act], you are a whistleblower if:

- (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation [of provisions of federal law relating to fraud against shareholders]) that has occurred, is ongoing, or is about to occur, and;
- (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).
- (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.⁶⁴

The SEC’s rules reconcile the conflict between Dodd-Frank’s definition of a whistleblower, as one who reports to the SEC, with the broader antiretaliation provisions that imply that protections are available for external and internal whistleblowers alike. As the third prong of § 78u-6(h)(1)(A) of Dodd-Frank protects from retaliation “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 [and other federal laws],”⁶⁵ and § 806 of SOX clearly protects both internal and external whistleblowers,⁶⁶ the SEC’s rules clarify that Dodd-Frank is also intended to protect internal whistleblowers from retaliation. In noting the express incorporation of SOX into Dodd-Frank, the SEC referenced three separate categories of whistleblowers that SOX protects, consisting of employees who “report to (i) A Federal regulatory or law enforcement agency, (ii) any member of Congress or committee of Congress, or (iii) a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct.”⁶⁷ To remove any further doubt, the SEC’s rules also clearly

62. *Id.*

63. *Id.*

64. 17 C.F.R. § 240.21F-2(b) (2014).

65. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

66. The Sarbanes-Oxley Act states that retaliation is unlawful against an employee who

(1) . . . provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [federal securities laws] . . . when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A(a)(1)(A)–(C) (2012) (emphasis added).

67. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011)

indicate that the third category of § 78u-6(h)(1)(A) “includes individuals who report to persons or governmental authorities *other than the Commission*.”⁶⁸ Several federal courts have considered the interplay of the SEC’s rules with Dodd-Frank’s antiretaliation provisions for internal whistleblowers.

B. Decisions of District Courts Addressing Dodd-Frank’s Ambiguity

In the years following Dodd-Frank’s enactment, whistleblowers began to take advantage of the statute’s enforcement provisions allowing them to bring actions directly in federal court against their employers, a right that is unavailable under SOX.⁶⁹ As aggrieved employees who had reported possible violations internally began to bring suit, employers came to rely on Dodd-Frank’s definition of “whistleblower” to claim that employees reporting internally were precluded from bringing claims under Dodd-Frank against them. The first district courts to address the issue have sided with internal whistleblowers, establishing what was expected to be a trend of expansive judicial interpretations of the antiretaliation provisions.⁷⁰ These district courts have found that internal whistleblowers are entitled to antiretaliation protections either by finding that the language of Dodd-Frank unambiguously protects such persons or, when deemed ambiguous, by granting *Chevron* deference⁷¹ to the SEC’s broad interpretation of the statute.

The very first court to examine the conflict between Dodd-Frank’s narrow definition of whistleblower and the broader categories of activity protected by the

(codified at 17 C.F.R. pts. 240, 249) (citing 18 U.S.C. § 1514A(a)(1)(C)). The SEC also noted that the retaliation protections for internal reporting afforded by this provision do not apply to employees of entities other than public companies. *Id.*

68. *Id.*

69. See *supra* notes 41–43 and accompanying text for an explanation of greater whistleblower accessibility to federal court under Dodd-Frank. Under SOX, aggrieved whistleblower employees were required to exhaust their administrative remedies by filing a complaint with the Secretary of Labor before accessing the courts. 18 U.S.C. § 1514A(b)(1)(A).

70. See Stephen W. Aronson & Ian T. Clarke-Fisher, *Preventive Measures in Response to Recent Expansions of the Whistle-Blower Retaliation Protections Under Dodd-Frank*, WESTLAW J. EMP., Jan. 2013, at 1–4 (describing this string of pro-whistleblower cases); Barbara Hoey & Jeanne Barber, *Keeping Current: Two Federal Courts Issue Expansive Interpretations of the Dodd-Frank Act’s Whistleblower Definition*, BUS. L. TODAY, Oct. 2012, at 1 (noting that these decisions have “expanded the universe of employees who can potentially bring Dodd-Frank retaliation claims, and are likely to embolden the plaintiffs’ bar and spawn more lawsuits.”); Nicolle L. Jacoby & Kristina A. Moon, *Expanded Protection for Whistleblowers: Emerging Trend Stems from Dodd-Frank Anti-Retaliation Provisions*, N.Y. L.J., Mar. 25, 2013, at 9, 12 (recognizing a potential trend of extending protections).

71. When determining whether to grant *Chevron* deference to an agency’s construction of a statute in questions of statutory interpretation, a court asks

whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (footnotes omitted).

antiretaliation provisions was the U.S. District Court for the Southern District of New York. In *Egan v. Tradingscreen, Inc.*,⁷² plaintiff, Patrick Egan, brought an action against his former employer, Tradingscreen, Inc., a financial software business, claiming retaliation in violation of Dodd-Frank.⁷³ In early 2009, after learning that TradingScreen's CEO was diverting the company's corporate assets to another competing company that the CEO solely owned, Egan reported this activity internally to the president, who then passed the information to the company's independent board of directors.⁷⁴ An internal investigation ensued, and, after the independent directors informed the CEO that he needed to resign, the CEO gained control of the board, preventing his forced resignation and instead firing Egan.⁷⁵ Egan sued the company and CEO, asserting, among other allegations, entitlement to relief under the antiretaliation provisions of Dodd-Frank.⁷⁶ The defendants moved to dismiss on the basis that Egan had not reported the conduct directly to the SEC, thereby disqualifying him from relief under the statute.⁷⁷

The court recognized the contradiction between the statute's definition of whistleblower in 15 U.S.C. § 78u-6(a)(6) as one who reports "to the Commission" and § 78u-6(h)(1)(A)(iii)'s antiretaliation protection of a whistleblower who makes "disclosures that are required or protected under [SOX, the Exchange Act, 18 U.S.C. § 1513(e) (retaliating against a witness, victim, or informant)] and any other law, rule, or regulation subject to the jurisdiction of the Commission."⁷⁸ The court resolved this conflict through a literal reading of § 78u-6(h)(1)(A)(iii)'s antiretaliation protections, which it interpreted as not requiring direct reporting to the SEC by viewing this subsection as a "narrow exception" to the definition of whistleblower in § 78u-6(a)(6).⁷⁹ Therefore, if Egan could allege that his disclosures fell under one of the four types of protected activity enumerated in § 78u-6(h)(1)(A)(iii) that do not require reporting to the SEC, such as those under SOX, the Exchange Act, 18 U.S.C. § 1513(e), or any other law or regulation subject to the SEC's jurisdiction, he would be eligible for protection as a whistleblower.⁸⁰

The court in *Egan* came to this conclusion by undergoing a statutory construction analysis and by examining the legislative history of Dodd-Frank. Noting that the legislative history of the statute does not indicate whether reporting to the SEC is required to invoke the statute's antiretaliation provisions,⁸¹ the court looked to other

72. No. 10 Civ. 8202 (LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

73. *Egan*, 2011 WL 1672066, at *1–2.

74. *Id.* at *2.

75. *Id.* Egan was informed that he would not receive the company's customary severance package or the chance to cash out his stock options. *Id.*

76. *Id.* at *3.

77. *Id.*

78. *Id.* at *4 (emphasis omitted) (citing 15 U.S.C. § 78u-6(a)(6), (h) (2012)). The court also acknowledged Egan's argument that limiting the antiretaliation protections only to those who report directly to the SEC would produce an irrational result, as whistleblowers who reported violations to other federal agencies like the Department of Justice or Internal Revenue Service would not be eligible for protection. *Id.*

79. *Id.* at *5.

80. *Id.*

81. *See id.* at *4 (citing S. REP. NO. 111-176, at 38, 110–12, 217–18 (2010); H.R. REP. NO. 111-517, at

provisions of the statute evidencing Congress's desire to extend "whistleblower protection to persons other than those reporting to a particular federal agency."⁸²

Despite the court's broad interpretation of the statute, it nevertheless found that Egan had not adequately pleaded that his disclosures were "required or protected" under a law, rule, or regulation subject to the SEC's jurisdiction.⁸³ As such, the court found that he was not subject to protection under the third prong of § 78u-6(h)(1)(A), which was largely due to the fact that TradingScreen, Inc. is a privately held company not subject to SOX.⁸⁴ Therefore, Egan was not ultimately able to proceed with his claims, and TradingScreen's motion to dismiss was granted.⁸⁵ However, the court's analysis with respect to reconciling the contradictory provisions of Dodd-Frank provided guidance for the next case that would shortly follow.

About a year after the decision in *Egan*, the U.S. District Court for the Middle District of Tennessee addressed the same issue. In *Nollner v. Southern Baptist Convention, Inc.*,⁸⁶ Ron Nollner and his wife, Beverly, brought claims under Dodd-Frank's antiretaliation provisions against entities that organized and facilitated the Nollners' relocation from Tennessee to India to perform missionary-related work on behalf of the Southern Baptist community.⁸⁷ After their relocation, the Nollners found the job situation in India to be far from what they were promised and discovered that their employers were violating the FCPA.⁸⁸ Although Mr. Nollner reported this suspicious activity to his supervisor multiple times, he was ignored and eventually asked to resign from his position in India.⁸⁹ The Nollners brought suit under Dodd-Frank, and the defendants moved to dismiss, claiming that the statute's antiretaliation protections precluded the Nollners from suing.⁹⁰

In its analysis, the court cited *Egan* and the SEC rules interpreting Dodd-Frank for support, holding that while the first two prongs of § 78u-6(a)(h)(1)(A) prohibit retaliation against a whistleblower who provides information to the SEC or works with the SEC directly on an investigation, the "third category does not require that the whistleblower have interacted directly with the SEC—only that the disclosure, to

870 (2010)) (noting that the various committee reports and debates in Congress focused instead on Dodd-Frank's new bounty provisions "contain[ing] very few substantive discussions of its anti-retaliation provisions").

82. *See id.* (noting the statute's separate whistleblower antiretaliation provisions "under the purview of the newly-created Bureau of Consumer Financial Protection, protecting persons providing disclosures 'to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency' of violations of law or regulations under the Bureau's jurisdiction." (quoting 12 U.S.C. § 5567(a)(1) (2012))).

83. *Id.* at *6 (emphasis omitted).

84. *See id.* (noting that "[m]erely alleging the violation of a law or rule under the SEC's purview is not enough; a plaintiff must allege that a law or rule in the SEC's jurisdiction explicitly requires or protects disclosure of that violation").

85. *Id.*

86. 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

87. *Nollner*, 852 F. Supp. 2d at 988–90.

88. *Id.* at 989–90. The Nollners alleged that the defendant entities would not allow Mr. Nollner to meet with the architect or contractor for the job at issue and were, among other things, paying bribes to local Indian officials, procuring illegal permits, and maintaining incomplete records. *Id.*

89. *Id.* at 990.

90. *Id.* at 990–91.

whomever made, was ‘required or protected’ by certain laws within the SEC’s jurisdiction.”⁹¹ Referring to the third prong as a “catch-all” provision since it specifically includes disclosures pertaining to any “law, rule, or regulation subject to the jurisdiction of the Commission,” the court explained that Dodd-Frank protects employees from retaliation if they report a violation of federal law falling within the SEC’s jurisdiction.⁹²

Despite finding that an employee need not report directly to the SEC to qualify for protection from retaliation, the court nevertheless found that the Nollners had not made a disclosure of a law violation that was within the Commission’s jurisdiction.⁹³ In doing so, the court noted that the FCPA, violations of which the Nollners had reported, applies only to “issuers” of securities, defined as companies registered under the Exchange Act or required to file reports with the SEC thereunder, and “domestic concerns,” defined as citizens, nationals, or residents of the United States.⁹⁴ The court reasoned that the SEC has jurisdiction only over FCPA violations by issuers, while the Department of Justice has jurisdiction over domestic concerns and other non-issuers who commit FCPA violations.⁹⁵ Because the defendants in this case were domestic concerns and not issuers, the court found that the Department of Justice, rather than the SEC, had jurisdiction over them, which would preclude the Nollners from bringing a claim under the third prong of § 78u-6(a)(h)(1)(A).⁹⁶ Therefore, as in *Egan*, the Nollners were not able to proceed with their claims for reasons not related to the antiretaliation provisions.

In September 2012, the U.S. District Court for the District of Connecticut became the first court to find that an internal whistleblower could survive the motion to dismiss stage in *Kramer v. Trans-Lux Corp.*⁹⁷ In *Kramer*, the court denied the motion to dismiss of an employer, Trans-Lux Corporation, after it allegedly terminated plaintiff, Richard Kramer, for internally reporting concerns regarding conflicts of interest of the company and failures to adhere to its pension plan requirements.⁹⁸ Trans-Lux argued that the antiretaliation provisions of Dodd-Frank apply only to those who fit the definition of “whistleblower” under § 78u-6(a)(6) and have engaged in one of the activities that are enumerated under § 78u-6(h)(1)(A), thereby disqualifying Kramer to bring suit since he had not provided the SEC with information “in the manner required by the SEC” and could not be deemed a “whistleblower.”⁹⁹

The district court found that while the language of Dodd-Frank is ambiguous as to whether its antiretaliation provisions apply only to those who have provided information to the SEC in a manner established by the SEC, Trans-Lux’s interpretation

91. *Id.* at 993 (citing *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300–01, 34,304 (June 13, 2011) (codified at 17 C.F.R. pts. 240–249)).

92. *Id.* at 994 (emphasis omitted) (quoting 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012)).

93. *Id.* at 996–97.

94. *Id.* at 996 (citing 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2012)).

95. *Id.*

96. *Id.*

97. No. 3:11CV1424 (SRU), 2012 WL 4444820, at *1, 7 (D. Conn. Sept. 25, 2012).

98. *Kramer*, 2012 WL 4444820, at *2–3, 7.

99. *See id.* at *3 (citing the narrow definition of “whistleblower” in 15 U.S.C. § 78u-6(a)(6)).

would significantly reduce the protections that are available to whistleblowers.¹⁰⁰ Such an interpretation would effectively render section (iii) of the antiretaliation provision moot “because individuals who have engaged in the activity [therein] are not, by definition, whistleblowers.”¹⁰¹ The district court decided that the language of the statute was ambiguous, as it was not “unambiguously clear” that the antiretaliation provisions apply only to those who provide information to the SEC, in a manner established by the SEC.¹⁰² The court reasoned that in order to have provided information in a “manner established, by rule or regulation, by the Commission,”¹⁰³ as the definition of “whistleblower” indicates, an individual would have to either submit the information online through the SEC’s website or mail or fax a complaint form.¹⁰⁴ The court found that such a reading would run contrary to the goal of Dodd-Frank, which was to “improve the accountability and transparency of the financial system” and “create ‘new incentives and protections for whistleblowers.’”¹⁰⁵

Having determined that the language of the statute was ambiguous given that it appears to contradict the goal of Dodd-Frank, the court granted *Chevron* deference to the final SEC rules clarifying the interplay between the two sections by stating that a whistleblower is one who provides information in a manner described in the more expansive § 78u-6(h)(1)(A).¹⁰⁶ In determining that the SEC had set forth a permissible construction of the statute to include internal whistleblowers in the category of those who are protected from antiretaliation through the third prong of § 78u-6(h)(1)(A), the court cited the decisions in *Egan* and *Nollner* for the premise that the SEC’s rule is a permissible construction of the statute.¹⁰⁷

The court also rejected the defendant’s argument that Kramer’s disclosures were not required by SOX and therefore would not fall into the third prong of § 78u-6(h)(1)(A), which protects “disclosures that are required or *protected* under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934,” and any other law, rule, or regulation subject to the jurisdiction of the Commission.¹⁰⁸ “The language of this section indicates that disclosures that are protected under Sarbanes-Oxley’s whistleblower provision are also protected under the Dodd-Frank Act’s whistleblower provision.”¹⁰⁹ As SOX protects individuals who “*reasonably believe*” that a violation

100. *Id.* at *4.

101. *See id.* (noting also that a narrow reading of the statute “seems inconsistent” with its goal of “improv[ing] the accountability and transparency of the financial system and creat[ing] new incentives and protections for whistleblowers.” (internal quotation marks omitted) (quoting *Asadi v. G.E. Energy (USA), LLC*, No. 4:12–345, 2012 WL 2522599, at *3 (S.D. Tex. June 28, 2012))).

102. *Id.*

103. *Id.* at *3 (citing 15 U.S.C. § 78u-6(a)(6)).

104. *Id.* at *4 (citing 17 C.F.R. § 240.21F-9(a)).

105. *Id.* (quoting *Asadi*, 2012 WL 2522599, at *3).

106. *Id.* at *5. Under *Chevron*, a court reviewing an agency interpretation must determine “whether the agency’s answer is based on a permissible construction of the statute.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

107. *See Kramer*, 2012 WL 4444820, at *5 (noting that “before the SEC’s rule was published, one court had resolved the discrepancies between sections 78u-6(h)(1)(A) and 78u-6(a)(6) in an identical fashion”).

108. *Id.* at *6 (citing 15 U.S.C. § 78u-6(h)(1)(A)(iii)).

109. *Id.*

of SEC rules or regulations has occurred and report this information to, among others, “a person with supervisory authority over the employer (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct),” the court reasoned that Kramer’s disclosures would be protected.¹¹⁰ Stating that the language of the emails and letter in which Kramer reported his concerns to supervisors demonstrate that he “reasonably believed” Trans-Lux was committing violations of SEC rules and regulations, the court found that Kramer had alleged sufficient facts to support a retaliation claim under Dodd-Frank.¹¹¹ Accordingly, the court denied the defendant’s motion to dismiss and allowed Kramer to proceed with his lawsuit—marking this decision as the first to allow a whistleblower under Dodd-Frank to proceed beyond the pleading stage.¹¹²

The U.S. District Court for the District of Colorado was next to analyze the same issue. In *Genberg v. Porter*,¹¹³ Carl Genberg, a former employee of Ceragenix Corporation and Ceragenix Pharmaceuticals, Inc. (collectively, Ceragenix), made internal reports to Ceragenix’s management that the corporation was allegedly violating Delaware corporate law and SEC proxy rules.¹¹⁴ Management did not take action, and, soon thereafter, Genberg was fired.¹¹⁵ Genberg brought various claims against Ceragenix, including alleged violations of Dodd-Frank’s antiretaliation provisions, and the company moved to dismiss, arguing that Genberg failed to state a claim for relief because he did not qualify as a “whistleblower” under the statute.¹¹⁶ In its examination of the issue, the court agreed with the elements of a Dodd-Frank retaliation claim set forth in *Nollner*, holding that, to prevail on such a claim, a plaintiff is required to show that:

- (1) he reported an alleged violation to the SEC or another entity, or *internally to management*;
- (2) he was retaliated against for reporting the alleged violation;
- (3) the disclosure of the alleged violation was made pursuant to a rule, law, or regulation subject to the SEC’s jurisdiction; and,
- (4) the disclosure was required or protected by that rule, law, or regulation within the SEC’s jurisdiction.¹¹⁷

In coming to this conclusion, the court found that § 78u-6(h)(1)(A)(iii), which covers disclosures that are required or protected under SOX and the SEC’s jurisdiction, directly conflicted with the definition of “whistleblower” found elsewhere in the statute because it protects those who have not disclosed information to the SEC.¹¹⁸ Agreeing with the holdings in *Egan*, *Nollner*, and *Kramer*, the court in *Genberg* found that Ceragenix’s interpretation of Dodd-Frank “would render § 78u-6(h)(1)(A)(iii) inoperable and moot.”¹¹⁹ Citing precedent indicating that a “cardinal principle of

110. *Id.* (quoting 18 U.S.C. § 1514A(a)(1)(C)).

111. *Id.* at *7.

112. *Id.*

113. 935 F. Supp. 2d 1094 (D. Colo. 2013).

114. *Genberg*, 935 F. Supp. 2d at 1097–98.

115. *Id.* at 1098–99.

116. *Id.* at 1104.

117. *Id.* at 1105 (emphasis added).

118. *Id.* at 1106.

119. *Id.* (citing *Kramer v. Trans-lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at *5 (D. Conn.

statutory construction” is to construe a statute in such a way that, “if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant,” the court agreed with the decisions before it to find that § 78u-6(h)(1)(A)(iii) is best interpreted as an exception to the narrow definition of “whistleblower” in § 78u-6(a)(6).¹²⁰ Because Genberg disclosed alleged securities violations to upper-level management at Ceragenix, the court found that he qualified as a whistleblower and could proceed with his retaliation claim under Dodd-Frank.¹²¹ Despite this finding, the court found that Genberg’s claim failed on a substantive level, in that the alleged retaliatory act that Genberg suffered, the non-authorization of post-termination payments, was the result of Ceragenix’s bankruptcy proceedings rather than retaliation for whistleblowing.¹²²

On May 21, 2013, the U.S. District Court for the Southern District of New York denied a motion to dismiss by a defendant who claimed that an internal whistleblower was barred from bringing a claim under Dodd-Frank in *Murray v. UBS Securities, LLC*.¹²³ The plaintiff, Trevor Murray, sued his former employer, UBS, pursuant to the antiretaliation provisions of Dodd-Frank, for allegedly firing him for reporting to his managers that he was being pressured to produce objective research reports about security products that were false or misleading, in violation of the federal securities laws.¹²⁴ UBS moved to dismiss on the basis that Murray, who reported internally, was statutorily excluded from invoking Dodd-Frank’s antiretaliation protections due to § 78u-6(a)(6)’s definition of “whistleblower” as one who reports to the SEC.¹²⁵

In response, Murray contended that the third prong of § 78u-6(h)(1)(A) creates an exception to the definition of whistleblower as defined in § 78u-6(a)(6), thereby protecting employees who make any disclosures “that are ‘required or protected’” under the federal securities laws.¹²⁶ The court agreed with Murray, reasoning that “in assessing who is right, the Court does not write on a blank slate. . . . [F]our other district court judges have confronted this exact issue, and each one has endorsed [Murray’s] reading of the statute.”¹²⁷ The court also referenced the SEC rules implementing Dodd-Frank and the comments thereto, which state that there are three categories of whistleblowers under the statute.¹²⁸ The SEC rules express that “the third

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 *5 (S.D.N.Y. May 4, 2011)).

120. *Id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

121. *Id.* at 1106–07.

122. *Id.* at 1108.

123. No. 12 Civ. 5914 (JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013).

124. *Murray*, 2013 WL 2190084, at *1–2. Mr. Murray worked for UBS as a Senior Commercial Mortgage-Backed Security Strategist, performing research and creating reports about UBS’s products for distribution to clients. *Id.* at *1. He alleged that he repeatedly told his superiors at UBS of the attempts of his supervisors to influence his research and urge him “not to publish anything negative.” *Id.*

125. *Id.* at *1.

126. *Id.* at *2.

127. *Id.* (citing *Genberg*, 935 F. Supp. 2d at 1106; *Kramer v. Trans-lux Corp.*, No. 11 Civ. 1424(SRU), 2012 WL 4444820, at *3–5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993–95 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011)).

128. *Id.* at *3 (citing 17 C.F.R. § 240.21F-2(b)(1)).

category [of whistleblowers] includes individuals who report to persons or governmental authorities other than the Commission” by way of the incorporation of the antiretaliation protection provisions of SOX, which clearly provide antiretaliation protection for employees who report to their supervisors or someone working for the employer.¹²⁹

Acknowledging that the SEC’s view of Dodd-Frank is that the antiretaliation protections extend to individuals who made disclosures that are required or protected under SOX regardless of whether the disclosures were made to the SEC itself, the court decided to grant *Chevron* deference to this interpretation.¹³⁰ Finding that the language of Dodd-Frank creates a “tension” between § 78u-6(a)(6) and § 78u-6(h)(1)(A), the court acknowledged that the defendants’ reading of subsection (a)(6) as identifying “*who*” is protected while subsection (h)(1)(A) identifies “*what*” is protected may be permissible, but “is by no means mandatory.”¹³¹ Because, as Murray argued and as the court in *Egan* first noted, subsection (h)(1)(A)(iii) may be viewed “as a narrow exception to [§] 78u-6(a)(6)’s definition of a whistleblower as one who reports to the SEC,” the court found that the statutory text of Dodd-Frank was ambiguous.¹³²

In examining step two of the *Chevron* analysis, the court found that the SEC had reasonably construed the statute, which was supported by the interpretations set forth by the courts in *Egan*, *Nollner*, *Kramer*, and *Genberg*.¹³³ The court in *Murray* found it reasonable to defer to the SEC’s interpretation, which “reflects the considerable experience and expertise that the agency has acquired over time with respect to interpretation and enforcement of the securities laws.”¹³⁴ Therefore, the court denied UBS’s motion to dismiss, marking yet another victory in the district courts for internal whistleblowers to proceed with their antiretaliation claims. These victories, however, would soon be undermined by the Fifth Circuit’s decision in *Asadi v. G.E. Energy*.¹³⁵

129. *Id.* (emphasis omitted) (quoting Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249)).

130. *Id.* at *4–5.

131. *Id.*

132. *Id.* at *5 (quoting *Egan*, 2011 WL 1672066, at *5).

133. *Id.* at *6–7.

134. *Id.* at *7.

135. 720 F.3d 620, 630 (5th Cir. 2013). In the months before this Article went to print, several other district courts addressed the issue of whether internal whistleblowers are protected from retaliation under Dodd-Frank. Four disagreed with *Asadi*’s holding, finding that the language of the statute presents ambiguity and granting *Chevron* deference to the SEC’s broader interpretation of the statute. *Yang v. Navigators Group, Inc.*, No. 13–cv–2073 (NSR), 2014 WL 1870802, at *12–13 (S.D.N.Y. May 8, 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13–4149 (SDW) (MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 147–48 (S.D.N.Y. 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013). On May 21, 2014, a Nebraska district court offered a comprehensive analysis of Dodd-Frank’s statutory conflict. *Bussing v. COR Clearing, LLC*, No. 8:12–CV–238, 2014 WL 2111207, at *7–12 (D. Neb. May 21, 2014). The court concluded that the construction of the statute in *Asadi* is not reconcilable with the broad disclosures that are protected in § 78u-6(h)(1)(A)(iii) and fails to protect those most vulnerable to retaliation, internal whistleblowers. *Id.* at *11. In so concluding, the court reached the same result as the SEC’s regulation but did so through a plain reading of the statute, rather than by determining that the statute is unambiguous and then granting deference to the SEC’s interpretation. *Id.* at *12. Three other district court decisions followed *Asadi*, finding that the language of the statute is not ambiguous and that no *Chevron* deference to the SEC’s interpretation is warranted. *Englehart v. Career Educ.*

III. THE IMPLICATIONS OF *ASADI* AND NARROW INTERPRETATIONS OF THE ANTIRETALIATION PROTECTIONS

A. *The Asadi Opinion*

On July 17, 2013, the Fifth Circuit issued its decision in *Asadi v. G.E. Energy*, which turned a sharp corner from the progress that had been made for internal whistleblowers in the years since Dodd-Frank's enactment. As the first federal court of appeals to address the issue of whether internal whistleblowers are eligible for Dodd-Frank's antiretaliation protections, the Fifth Circuit has set a disappointing precedent.

In his complaint before the U.S. District Court for the Southern District of Texas, plaintiff, Khaled Asadi, a dual citizen of both the United States and Iraq, alleged that his former employer, G.E. Energy, terminated his employment after he informed his supervisors that the company had violated the FCPA.¹³⁶ Asadi alleged that while he was working for G.E. Energy in Jordan to secure and manage service contracts with the Iraqi government, an Iraqi official informed Asadi of corruption by G.E. Energy, specifically that the company had hired a woman "closely associated" with the Senior Deputy Minister of Electricity to "curry favor with the Minister while negotiating a lucrative [agreement]."¹³⁷ Concerned that this action would trigger possible violations of the FCPA, Asadi reported this information to his supervisor and to a colleague in G.E. Energy's Oil and Gas Division.¹³⁸ Shortly thereafter, Asadi, whose previous ten performance reviews with G.E. Energy were positive, suddenly received "surprisingly negative" performance reviews that did not specify any problems.¹³⁹ Asadi alleges that he then experienced pressure to step down from his position and that G.E. Energy

Corp., No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *7-9 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.*, No. CV 13-02977 RS, 2013 WL 7394596, at *3-6 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4 (D. Colo. July 19, 2013). One other district court decision, which did not directly address the issue discussed herein, noted in a footnote that it found persuasive the analyses of *Murray* and *Egan*, deeming the language of Dodd-Frank ambiguous and deferring to the SEC's broader interpretation. *Ahmad v. Morgan Stanley & Co.*, No. 13 Civ. 6394(PAE), 2014 WL 700339, at *4 n.5 (S.D.N.Y. Feb. 21, 2014). No other circuit court besides the Fifth has yet addressed this issue and Asadi did not file a petition for writ of certiorari to the Supreme Court subsequent to the Fifth Circuit's decision. See Richard Marmaro, *Recent Trends in Government Enforcement in White Collar Defense Cases*, ASPATORE (Jan. 2014), WL 10493, at *5 (noting that the decisions to have examined this issue could lead to a potential circuit split). Although the question of whether internal whistleblowers are protected from retaliation under Dodd-Frank was presented to the Second Circuit in *Liu v. Siemens AG*, that court resolved the question before it on other grounds—that the antiretaliation protection provisions of Dodd-Frank do not apply extraterritorially. 763 F.3d 175, 180 (2d Cir. 2014). In *Siemens*, the SEC filed an amicus brief in support of Liu, the appellant, arguing that the ambiguity of the language of Dodd-Frank warrants deference to the agency's reasonable interpretation protecting internal whistleblowers. See Brief for U.S. Sec. & Exch. Comm'n as Amici Curiae Supporting Appellant, *Liu v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014) (No. 13-4385-cv); Mystica M. Alexander, *Defining the Whistleblower Under Dodd-Frank: Who Decides?* 5 CAL. L. REV. CIRCUIT 278, 283-84 (2014). Because the Second Circuit decided the case on the issue of extraterritorial application, it expressed no views as to whether internal whistleblowers are protected under Dodd-Frank. *Siemens*, 763 F.3d at 182-83.

136. *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at *1 (S.D. Tex. June 28, 2012).

137. *Id.*

138. *Id.*

139. *Id.* at *2.

began “constant and aggressive severance negotiations with him, which continued until [G.E. Energy] abruptly ended all discussions and terminated [Asadi’s] employment on June 24, 2011.”¹⁴⁰ Asadi learned of his termination by an email from G.E. Energy’s Human Resources Department, which stated that G.E. Energy was terminating Asadi’s employment “as an at-will employee, as allowed under U.S. law” and informed him that “[a]s a U.S.-based employee you will be terminated in the U.S.”¹⁴¹

Asadi sued G.E. Energy under Dodd-Frank, alleging that his termination constituted retaliation for reporting G.E. Energy’s questionable activity, and G.E. Energy moved to dismiss for failure to state a claim.¹⁴² Noting that Asadi “does not fit within Dodd-Frank’s definition of a whistleblower” because he did not report directly to the SEC,¹⁴³ the district court instead acknowledged Asadi’s argument that he fits within the broader language of § 78u-6(h)(1)(A) by making disclosures that are “required or protected” under the SOX and the FCPA.¹⁴⁴ Sidestepping further analysis on this issue, however, the court decided that it “need not reach the issue of whether [Asadi] qualifies as a whistleblower under the Anti-Retaliation Provision [§ 78u-6(h)(1)(A)]. . . . [because] each of [Asadi’s] claims fails on other grounds.”¹⁴⁵

The district court instead focused its attention on the extraterritoriality of Dodd-Frank’s antiretaliation provisions, as Asadi claimed that the statute extends to activity that had occurred abroad.¹⁴⁶ Citing the Supreme Court’s decision in *Morrison v. National Australia Bank, Ltd.*¹⁴⁷ for support, the district court applied the presumption that Congress’s legislation “does not apply outside the United States unless a contrary intent appears.”¹⁴⁸ In *Morrison*, the Supreme Court had considered the extraterritoriality of § 10(b) of the Exchange Act after plaintiffs, who were foreign investors, sued foreign and U.S. defendants for alleged misconduct in trading on foreign stock exchanges.¹⁴⁹ Relying on the plain language of the statute, the Supreme Court held that because there is no “affirmative indication” in the Exchange Act that § 10(b) has extraterritorial application, the Court must presume that the statute is concerned only with domestic conditions.¹⁵⁰ Relying on *Morrison*, the district court in *Asadi* found that the Dodd-Frank’s antiretaliation provisions do not protect Asadi’s extraterritorial whistleblowing activity.¹⁵¹ Because Asadi blew the whistle while he was stationed in Jordan, received his termination letter while there, and the “majority of

140. *Id.* (internal quotation marks omitted).

141. *Id.* (alteration in original).

142. *Id.* at *1.

143. *Id.* at *3.

144. *Id.* (emphasis omitted) (citing *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993–95 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011)).

145. *Id.*

146. *Id.* at *4.

147. 561 U.S. 247 (2010).

148. *Asadi*, 2012 WL 2522599, at *4 (internal quotation mark omitted) (quoting *Morrison*, 561 U.S. at 255).

149. *Morrison*, 561 U.S. at 250–51.

150. *Id.* at 248, 265.

151. *Asadi*, 2012 WL 2522599, at *4–5.

events giving rise to the suit occurred in a foreign country,” the district court found that he could not invoke Dodd-Frank’s protections and thus granted G.E. Energy’s motion to dismiss.¹⁵²

Asadi’s appeal to the Fifth Circuit resulted in a perplexing decision. Although the district court had found Asadi ineligible for Dodd-Frank’s protections due to its non-extraterritorial reach, the Fifth Circuit, applying de novo review, found that Asadi was statutorily excluded from relief on entirely different grounds—because he was not a “whistleblower.”¹⁵³ The Fifth Circuit conducted a statutory construction analysis of the language of Dodd-Frank, requiring it to first determine whether the text of the statute is plain and unambiguous as to clearly express the intention of Congress.¹⁵⁴ The court defined the question before it as “relatively straightforward,” that is, “whether an individual who is not a ‘whistleblower’ under the statutory definition of that term in § 78u-6(a)(6) may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision.”¹⁵⁵ The Fifth Circuit considered the text of the statute and the “interplay” between the two subsections in question—(a) and (h)—noting that subsection (a) provides definitions, such as “whistleblower” that are used throughout the rest of the statute.¹⁵⁶ Citing the definition of “whistleblower” as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission,” the Fifth Circuit held that “[t]his definition, standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a ‘whistleblower’ for purposes of § 78u-6.”¹⁵⁷

The Fifth Circuit rejected Asadi’s argument that the antiretaliation provisions in § 78u-6(h)(1)(A) should be construed to protect those who take actions falling within the third prong of the subsection for those who make “disclosures that are required or protected under [the federal securities laws and other specified laws], and any other law, rule, or regulation subject to the jurisdiction of the Commission,” even if they do not provide information to the SEC.¹⁵⁸ The Fifth Circuit noted that Asadi’s contention was based on a “perceived conflict” between § 78u-6(a)(6) and § 78u-6(h)(1)(A), and, significantly, recognized that “Asadi has some case law, as well as the SEC regulation on this issue, in his corner,” citing *Kramer, Egan, and Nollner*.¹⁵⁹

152. *Id.* at *4–6. The question of whether Dodd-Frank applies extraterritorially was examined recently by the Second Circuit in *Liu v. Siemens AG*, which held that the antiretaliation protections of Dodd-Frank do not apply beyond the United States. 763 F.3d 175, 180–81 (2d Cir. 2014).

153. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013). The Fifth Circuit applies de novo review to a district court order that grants a Rule 12(b)(6) motion to dismiss for failure to state a claim “and may affirm on any basis supported by the record.” *Id.* at 622 (citing *Torch Liquidating Trust ex rel. Bridge Assocs. v. Stockstill*, 561 F.3d 377, 384 (5th Cir. 2009)).

154. *Id.* (citing *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

155. *Id.* at 623.

156. *Id.* (citing 15 U.S.C. § 78u-6 (2012) and the definition of “whistleblower” in subsection (a) therein).

157. *Id.* (emphasis omitted) (quoting 15 U.S.C. § 78u-6(a)(6)).

158. *Id.* at 624 (citing 15 U.S.C. § 78u-6(h)(1)(A)(iii)).

159. *Id.* at 624–25 (footnote omitted). In a footnote recognizing that Asadi has legal authority on which to base his claims, the Fifth Circuit notes the following:

District courts that have considered this question have concluded that the whistleblower-protection

Despite the existence of these persuasive and correctly decided district court decisions and the SEC rules broadly interpreting the statute for purposes of who qualifies as a whistleblower, the Fifth Circuit rejected Asadi's arguments, finding that the language of the statute is unambiguous as it stands, thereby eliminating the need to consider the SEC's construction of the statute.¹⁶⁰ The Fifth Circuit interpreted the interplay of § 78u-6(a)(6) and § 78u-6(h)(1)(A) as covering the "who" and the "what" of the statute, respectively, specifically "(1) who is protected [under § 78u-6(a)(6)]; and (2) what actions by protected individuals constitute protected activity [under § 78u-6(h)(1)(A)]."¹⁶¹ As the language of § 78u-6(h)(1)(A) states that "[n]o employer may discharge . . . or in any other manner discriminate against, a whistleblower . . . because of any lawful act done by the whistleblower in taking any of the three categories of protected actions,"¹⁶² the Fifth Circuit held that the answer to the first question of "who is protected" is "a whistleblower," and the answer to the second question of "what merits protection is" "any lawful act done by the whistleblower."¹⁶³ Against this backdrop, the court reasoned that the three prongs of § 78u-6(h)(1)(A) describe what types of actions are protected by a "whistleblower" who, as a preliminary matter, has already met the definition of "whistleblower" under § 78u-6(a)(6) as one who reports directly to the SEC.¹⁶⁴

The Fifth Circuit continued to reason that the definition of "whistleblower" and the third category of protected activity under § 78u-6(h)(1)(A) do not conflict, as

provision, as enacted, is either conflicting or ambiguous. See, e.g., *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at *4 (D.Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 994 n. 9 (M.D.Tenn.2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4-5 (S.D.N.Y. May 4, 2011). For instance, in *Egan*, the court explained that "a literal reading of the definition of the term 'whistleblower' in 15 U.S.C. § 78u-6(a)(6), requiring reporting to the SEC, would effectively invalidate § 78u-6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC." *Egan*, 2011 WL 1672066, at *4; see also *Nollner*, 852 F.Supp.2d at 994 n. 9 (approvingly citing *Egan* and explaining that "the plain terms of anti-retaliation category (iii), which do not require reporting to the SEC, appear to conflict with the [Dodd-Frank Act's] definition of 'whistleblower' at § 78u-6(h)(1)(A)(iii), which defines a whistleblower as anyone who reports securities violations 'to the Commission'" (emphasis in original)). In *Kramer*, the district court focused on the same interplay between § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii) and concluded that it was not "unambiguously clear that the Dodd-Frank Act's retaliation provision only applies to those individuals who have provided information relating to a securities violation to the Commission." *Kramer*, 2012 WL 4444820, at *4. Each district court, after concluding that the statute was conflicting or ambiguous, concluded that the Dodd-Frank whistleblower-protection provision extends to protect certain individuals who do not make disclosures to the SEC. See *Nollner*, 852 F.Supp.2d at 994 n. 9; *Kramer*, 2012 WL 4444820, at *4-5; *Egan*, 2011 WL 1672066, at *4-5.

Id. at 624 n.6.

160. See *id.* at 630 (noting that the language of Dodd-Frank already "clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank. Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision.>").

161. *Id.* at 625.

162. *Id.* (alterations in original) (emphasis added) (quoting 15 U.S.C. § 78u-6(h)(1)(A) (2012)) (internal quotation mark omitted).

163. *Id.*

164. *Id.*

Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers. Under that reading—which . . . the plain text of the statute does not support—individuals could take actions falling within the third category of protected activity yet fail to qualify under the more narrow definition of whistleblower.¹⁶⁵

Noting that the language and structure of the whistleblower-protection provision does not support this interpretation, the court gave the following example of the type of scenario that it believed § 78u-6(h)(1)(A)(iii) addressing “required or protected disclosures” was intended to cover:

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 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes–Oxley Act of 2002 (“the SOX anti-retaliation provision”). 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 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.¹⁶⁶

Through this example, the Fifth Circuit attempted to give meaning to the third prong of § 78u-6(h)(1)(A) to cover instances in which employees report securities violations to their supervisors and simultaneously to the SEC and are retaliated against for their internal disclosure because their employer is not aware of the SEC disclosure. Not only does this example seem to be an attempt to grasp at straws to give meaning to § 78u-6(h)(1)(A)(iii), it disregards the statute’s express incorporation of the SOX antiretaliation provision into Dodd–Frank, which does not require external disclosures for antiretaliation protection. In addition, it is likely to be a very rare instance in which a whistleblower has reported simultaneously to both his or her supervisors and to the SEC, as an employee-whistleblower is likely to choose one method over another. For example, an employee may be motivated to report only internally because of a sense of loyalty to the company and a desire to correct any instances of misconduct before the information goes public.¹⁶⁷ Alternatively, a whistleblower who decides to report only

165. *Id.* at 626.

166. *Id.* at 627–28 (footnote omitted).

167. See Richard E. Moberly, *Sarbanes-Oxley’s Structural Model To Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1151 (2006) (noting that internal whistleblowers may be less

externally has a higher likelihood of avoiding the multiple disincentives to reporting internally altogether, such as loss of employment, disqualification from bonuses, ostracism, and loss of workplace friendships.¹⁶⁸

The Fifth Circuit also found Asadi's construction of the statute problematic because it would render the SOX antiretaliation provision moot.¹⁶⁹ Because an individual who makes a disclosure that is protected by the antiretaliation provision of SOX could also bring a claim under Dodd-Frank "on the basis that the disclosure was protected by SOX," the court found that it would be unlikely for that individual to bring a SOX claim because the protections afforded by Dodd-Frank are so much more extensive.¹⁷⁰ Under Dodd-Frank, a whistleblower can receive double back pay as a remedy, need not exhaust administrative remedies before filing suit, and can benefit from a significantly longer statute of limitations.¹⁷¹ However, the Fifth Circuit's concern for the viability of SOX is questionable. Dodd-Frank expands SOX's antiretaliation provisions to address weaknesses that have been revealed in the years since SOX's enactment,¹⁷² thereby granting whistleblowers better protections than what had previously been available under the law.

Finally, the Fifth Circuit rejected Asadi's contention that the SEC's regulation construing Dodd-Frank's whistleblower protection provisions, which defines whistleblowers as those who "provide . . . information in a manner described in [§ 78u-6](h)(1)(A)," should be granted deference.¹⁷³ The court found that the plain language of the statute does not support the SEC's regulation, which redefines "whistleblower" more broadly than the statute's definition of "whistleblower."¹⁷⁴ Finding that Congress has already unambiguously defined "whistleblower" as one who reports information to the SEC, the Fifth Circuit held that because Congress has already addressed this issue, it must reject the SEC's interpretation of the term "whistleblower" for purposes of the antiretaliation provisions of the statute.¹⁷⁵ As such, the Fifth Circuit held that because Asadi did not provide any information to the SEC, he does not qualify as a whistleblower, thereby affirming the decision of the district court.

The Fifth Circuit's decision mirrors many of the points raised by G.E. Energy's counsel during oral argument of this case before the panel of Judge Elrod, Judge

likely to experience retaliation); Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting,"* 45 CONN. L. REV. 483, 533 (2012) (stating that leading business ethics treatises have indicated that the use of internal channels before external channels is a moral choice for a whistleblower).

168. FREDERICK D. LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 57–60 (2012).

169. See *Asadi*, 720 F.3d at 628 ("[C]onstruing the Dodd-Frank whistleblower-protection provision to extend beyond the statutory definition of 'whistleblowers' renders the SOX anti-retaliation provision, for practical purposes, moot.").

170. *Id.* at 628–29.

171. *Id.* at 629. See also *supra* Part II.A for a discussion of the more expansive protections available under Dodd-Frank compared to SOX.

172. See *supra* notes 47–52 and accompanying text for a discussion of the successes and failures of SOX since its enactment.

173. *Asadi*, 720 F.3d at 630 (citing 17 C.F.R. § 240.21F-2(b)(1) (2014)).

174. *Id.*

175. *Id.*

Higginson, and Judge Jackson (sitting by designation).¹⁷⁶ G.E. Energy's counsel suggested that rather than focusing on the question of whether Dodd-Frank's antiretaliation provision applies extraterritorially, the definition of "whistleblower" would be a "more straightforward way of affirming."¹⁷⁷ Counsel for G.E. Energy also discussed the same example of the mid-level manager as an instance for which Congress intended § 78u-6(h)(1)(A)(iii) to apply¹⁷⁸ and argued that the SEC's broader interpretation of the definition of "whistleblower" should apply only if there is ambiguity in the statute.¹⁷⁹

Judge Elrod acknowledged that a holding requiring a whistleblower to report to the SEC to avail itself of Dodd-Frank's antiretaliation provision would be the first of its kind in the entire nation, asking G.E. Energy's counsel, "You're asking for a lot, aren't you? For us to be the first court in America, at the circuit level, to hold [in this way]."¹⁸⁰ Despite this acknowledgement, the panel of judges in *Asadi* decided to do just that, standing out as the very first circuit court to provide a narrow reading of the extent to which Dodd-Frank protects internal whistleblowers.

The decision in *Asadi* is flawed because it fails to acknowledge that the language of the statute is ambiguous on its face, thereby bypassing the need to grant *Chevron* deference to the SEC's reasonable construction of the statute, which protects internal whistleblowers. The court in *Asadi* argues that the plain language of §§ 78u-6(a)(6) and 78u-6(h)(1)(A)(iii) do not conflict, as the former defines a whistleblower as one who reports to the SEC, and the latter provides the three types of activities for which a "whistleblower," which is defined in subsection (a)(6), is protected.¹⁸¹ Although this may be a plausible interpretation, it disregards the fact that the third prong of § 78u-6(h)(1)(A) explicitly protects "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002[, the Exchange Act,] . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission."¹⁸² Therefore, a reference is made to other federal statutes, the protections under which are incorporated by reference into Dodd-Frank. Ambiguity emerges because of the reference to SOX specifically, the language of which clearly states that employee-whistleblowers are protected from retaliation when they provide information that "the employee reasonably believes constitutes a violation" of the securities laws or SEC rule or regulation, "when the information or assistance is provided to . . . a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."¹⁸³ Since the plain language of the third prong of Dodd-Frank's § 78u-6(h)(1)(A) expressly incorporates disclosures that are protected under SOX, which includes internal

176. Oral Argument, *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013) (No. 12-20522), available at <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx>.

177. *Id.* at 15:56.

178. *Id.* at 24:16–24:50.

179. *Id.* at 34:53.

180. *Id.* at 34:56.

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

182. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

183. 18 U.S.C. § 1514A (2012).

reporting, ambiguity arises when this provision is read together with the more limiting definition of whistleblower in subsection (a)(6).

In questions of statutory interpretation, the law under *Chevron* has always been clear that the court's first step is to determine whether the language in dispute is plain and unambiguous.¹⁸⁴ This inquiry ceases if the intent of Congress is already unambiguous from the language of the statute and "the statutory scheme is coherent and consistent."¹⁸⁵ If a statute's language is deemed ambiguous, the court must grant deference to the administrative agency's permissible construction of the statute.¹⁸⁶ A determination of the ambiguity of a statute at step one involves an examination of "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."¹⁸⁷ As the Supreme Court has stated,

A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole[.]" *Similarly, the meaning of one statute may be affected by other Acts*, particularly where Congress has spoken subsequently and more specifically to the topic at hand.¹⁸⁸

The court in *Asadi* erred by rendering meaningless the specific reference to SOX in the third prong of subsection (h)(1)(A), providing no supportable explanation for why Congress decided to include this language in Dodd-Frank. Interpreting the third prong of subsection (h)(1)(A) as inclusive of internal whistleblowers is consistent with the overall scheme of the Dodd-Frank whistleblower program itself, which is to motivate as many whistleblowers as possible to come forward with information pertaining to law violations.¹⁸⁹

Besides a failure to acknowledge the ambiguity of the statute, the court in *Asadi* provides questionable support for its position. First, as discussed earlier, the court's attempt to provide meaning to the third prong of subsection (h)(1)(A) by way of the example of the mid-level manager is a straw man argument.¹⁹⁰ Second, the court makes a fairly abrupt conclusion that the language of the statute is not ambiguous, including a footnote citing precedent that the court will not rely on legislative history in analyzing the case.¹⁹¹ In *Exxon Mobil Corporation v. Allapattah Services, Inc.*,¹⁹² the Supreme Court reaffirmed that in questions of statutory interpretation, the statutory text itself and not the legislative history is determinative in deciding whether the statute's

184. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

185. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

186. *Chevron*, 467 U.S. at 844.

187. *Robinson*, 519 U.S. at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)).

188. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added) (internal citations omitted).

189. H.R. Res. 4173, 111th Cong. § 21F(h)(1)(A)(iii) (2010); S. REP. NO. 111-176, at 110–11 (2010).

190. See *supra* notes 166–68 and accompanying text for an assessment of the Fifth Circuit's weak attempt to provide meaning to subsection (h)(1)(A)(iii).

191. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627 n.9 (5th Cir. 2013) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

192. 545 U.S. 546 (2005).

language is ambiguous.¹⁹³

[L]egislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "looking over a crowd and picking out your friends." Second, judicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.¹⁹⁴

Despite the Fifth Circuit citing the *Exxon* case for the premise that it would not rely on legislative history in deciding whether the language was ambiguous, it did just that. Following an argument that was raised by G.E. Energy during oral argument,¹⁹⁵ the Fifth Circuit argued that the "language and structure" of the provisions in question do not support Asadi's construction because use of the term "whistleblower" was included in the statute rather than terms such as "individual" or "employee."¹⁹⁶ Here, the court notes that the legislative history of Dodd-Frank reveals that the bill initially passed by the House of Representatives did not use the word "whistleblower" when describing persons who would be protected from retaliation but instead used the phrase, "employee, contractor, or agent," which was subsequently replaced by the Senate's version of the bill, which used "whistleblower" instead.¹⁹⁷ Agreeing with G.E. Energy's argument, the Fifth Circuit noted:

If Congress had selected the terms "individual" or "employee," Asadi's construction of the whistleblower-protection statute would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee—not just those individuals or employees who qualify as a "whistleblower"—to be protected from retaliatory actions by their employers. Congress, however, used the term "whistleblower" throughout subsection (h) and, therefore, we must give that language effect.¹⁹⁸

In coming to this conclusion, the Fifth Circuit appears to have relied on these particular pieces of legislative history despite its indication that doing so would be inappropriate, providing a contradictory mode of reasoning to support its conclusion. While it remains unknown whether Congress really intended to exclude internal whistleblowers from antiretaliation protections due to the lack of any legislative history on this precise question,¹⁹⁹ it becomes increasingly clear that Congress enacted a statute

193. *Exxon*, 545 U.S. at 568.

194. *Id.* (internal citation omitted).

195. Oral Argument at 24:55–25:05, *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013) (No. 12-20522), available at <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx>.

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

197. *Id.* at 626 n.9 (citing H.R. Res. 4173, 111th Cong. § 7203 (g)(1)(A) (as passed by House, Dec. 11, 2009); *id.* § 922(h)(1)(A) (as passed by Senate, May 20, 2010)).

198. *Id.* at 626–27 (footnote omitted).

199. See *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4 (S.D.N.Y. May 4, 2011) (noting that "[t]he legislative history of [Dodd-Frank] provides little evidence of Congress's purpose [with respect to this question]. The various committee reports and debates in Congress focus on the bounty

that is indeed ambiguous and should be revised. Given the conflict between the language of subsections (a)(6) and (h)(1)(A)(iii), the *Asadi* court should have recognized in the first step of its *Chevron* analysis that the language was ambiguous and that, under *Chevron* step two, deference to the broader SEC interpretation of a “whistleblower” was fully warranted.

B. Asadi’s Implications for Internal Compliance Channels

The decision in *Asadi* marks the first interpretation by a federal appellate court of Dodd-Frank’s antiretaliation provisions, an important decision that will likely affect how other courts view the issue of how a whistleblower is defined under the statute. One practical repercussion of the *Asadi* decision is that it is likely to negatively affect the utilization of internal compliance programs, as internal whistleblowers are currently left without the assurance that they may take advantage of the robust protections from retaliation that have become available under Dodd-Frank when they make internal reports.²⁰⁰ As an alternative, whistleblowers are likely to be prompted to report directly to the SEC.²⁰¹ After Dodd-Frank’s enactment, concern regarding the viability of internal compliance programs arose in the bounty context, specifically that because whistleblowers need not first make internal reports to obtain bounties, they might bypass the difficult endeavor of reporting internally and report directly to the SEC.²⁰² Although the SEC attempted to address these concerns when it promulgated the rules interpreting Dodd-Frank, the sustainability of internal reporting channels has once again become threatened due to the precedent set by *Asadi*, which disincentivizes internal whistleblowers to take any action.²⁰³

provisions of the Act and contain very few substantive discussions of its anti-retaliation provisions. Of those few, none touch upon the issue of whether reporting to the SEC is required for whistleblowers to avail themselves of the Act’s anti-retaliation provisions.”). See also H.R. Res. 4173, 111th Cong. (2010) and S. REP. NO. 111-176, at 110–11 (2010), for the lack of any discussion of this issue.

200. See *supra* Part II.A for a discussion of the ways in which the protections of Dodd-Frank are more expansive than SOX, including a significantly longer statute of limitations, the availability of double back pay, and the absence of any need to exhaust administrative remedies before bringing suit in federal court.

201. Soon after the Fifth Circuit’s decision in *Asadi*, multiple sources, including corporate law firms and the media, issued client alerts suggesting that the decision may prompt whistleblowers to instead report directly to the SEC. *E.g.*, John J. Carney & Francesca M. Harker, *A Shift in Whistleblower Protections: New Incentives for Employees To Report to the SEC Directly*, BAKERHOSTETLER (July 30, 2013), <http://www.bakerlaw.com/alerts/A-Shift-in-Whistleblower-Protections-New-Incentives-for-Employees-to-Report-to-the-SEC-Directly-7-30-2013>; Rachel Louise Ensign & Christopher Matthews, *Whistleblower Debate Emerges in Court Cases: Companies Say Protections Apply Only When Tipsters Raise Concerns with SEC*, WALL ST. J. (Aug. 11, 2013, 7:56 PM), <http://online.wsj.com/news/articles/SB10001424127887323446404579006720755980840>.

202. See *supra* Part II.A for a discussion of the advantages and disadvantages of either reporting internally to the company or directly to the SEC.

203. See Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 73–74 (2013) (noting the irony between early concerns that Dodd-Frank would undermine internal compliance and the *Asadi* decision, which “underscores the importance of reporting to the SEC”); Nicole H. Sprinzen, *Asadi v. G.E. Energy (USA) L.L.C.: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 191–93 (2014) (discussing *Asadi*’s threat to compliance principles in the international corporate antibribery context).

Studies have revealed that internal whistleblowers are much less likely to blow the whistle if they believe that their colleagues or supervisors may retaliate against them.²⁰⁴ “Whistleblowers often experience retaliation by their supervisors and are shunned by their social circles. They also fear other effects associated with stepping forward to report fraud, which often entail[] psychological and societal costs, including fear, guilt, and mistreatment by peers and community.”²⁰⁵ The threat of retaliation without any recourse and related social and psychological factors can result in a “chilling effect” on whistleblowers.²⁰⁶ By stripping aggrieved employee-whistleblowers of the very protections that Dodd-Frank sought to provide, the decision in *Asadi* flies in the face of the purpose of the statute in minimizing the fear of retaliation and motivating whistleblowers to come forward with information pertaining to securities laws violations.²⁰⁷

The enactment of SOX in 2002 brought the importance of internal reporting and company compliance programs to the forefront. As part of SOX, public companies were required to establish internal reporting channels that would allow employees to blow the whistle on any instances of corporate misconduct to their supervisors.²⁰⁸ Section 301 of SOX requires the audit committee of boards of directors to establish procedures for receiving, retaining, and managing complaints regarding accounting, auditing, and internal accounting controls, and for allowing confidential, anonymous concerns regarding accounting or auditing issues.²⁰⁹ This internal reporting model is

204. See, e.g., David M. Mayer et al., *Encouraging Employees To Report Unethical Conduct Internally: It Takes a Village*, 121 *ORG. BEHAVIOR & HUMAN DECISION PROCESSES* 89, 100 (2013) (asserting that employees may be less likely to report internally due to fear of retribution from their employer and fellow employees); Moberly, *supra* note 47, at 44–45 (noting that various studies suggest that employees are encouraged to report when there is a strong ethical culture “and that people—not necessarily policies and codes—create and perpetuate that culture. . . . [I]ndividual players in the system, such as organizational supervisors, government administrators, and adjudicatory decision makers, impact whistleblowers as much as, if not more than, any formal legal provisions.”).

205. Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 *T.M. COOLEY L. REV.* 217, 226 (2012) (alteration in original) (footnote omitted) (internal quotation marks omitted). Hesch continues: “In short, ‘most employees will choose to “suffer in silence” in the face of wrongdoing for fear of retaliation in the form of termination and harassment.’” *Id.* at 227 (quoting Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 *TEX. L. REV.* 1151, 1158 (2010)).

206. Vega, *supra* note 167, at 513–14.

207. See S. REP. NO. 111-176, at 110–11 (2010) (discussing the congressional motivations behind the Dodd-Frank Act, which included encouraging whistleblowers to report corporate misconduct by offering them incentives to come forward).

208. See 15 U.S.C. § 78j-1(m)(4) (2012) (requiring corporations to establish procedures for employees to share confidential and anonymous information about accounting or auditing misconduct to the corporation’s audit committee); Blount & Markel, *supra* note 56, at 1032–33 (noting that SOX contains provisions aimed at encouraging whistleblowers by protecting them from internal retaliation such as firings, suspensions, threats, and other forms of harassment); Moberly, *supra* note 48, at 75 (stating that several provisions of SOX are aimed at encouraging internal whistleblowers to come forward); Shannon Kay Quigley, *Whistleblower Tug-of-War: Corporate Attempts To Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, Comment, 52 *SANTA CLARA L. REV.* 255, 262 (2012) (“[SOX] significantly altered internal reporting mechanisms by improving the legitimacy of internal disclosures . . .”).

209. 15 U.S.C. § 78j-1(m)(4); see also Moberly, *supra* note 167, at 1138 (discussing the new internal

focused on encouraging whistleblowers to report from the inside and is “based on the understanding that whistleblowing becomes easier and more acceptable when corporations provide an authorized and visible channel for employees to report misconduct.”²¹⁰ This structure allows employees to “become part of the corporate monitoring system . . . provid[ing for] a visible mechanism for employee reports to reach the ears of those who can remedy the misconduct.”²¹¹ Internal compliance programs are dependent on a “robust flow of information” to be effective.²¹² “[I]nformation is the lifeblood of such programs. Diverting a large portion of that flow of information to the government will impair companies’ ability to step in and interrupt violations at an early stage.”²¹³

SOX also created a mandate requiring public companies to disclose whether they have a code of ethics in place for their senior financial officers.²¹⁴ SEC regulations expanded upon what was required to be covered in such codes of ethics to include written standards promoting prompt internal reporting of any code violations to specified persons.²¹⁵ Public companies are required to provide their codes of ethics to the public as an exhibit to their public annual report, a posting on their website, or a free copy to anyone who requests it.²¹⁶ Companies face damaging consequences for failing to adhere to this model, as, pursuant to SOX, the SEC directs the national securities exchanges and national securities associations to prohibit the listing of a company’s securities that is not in compliance with this requirement.²¹⁷ As a result, companies have managed their risks through adherence to internal reporting and compliance models in an attempt to minimize and avoid significant penalties for violations of SEC rules.²¹⁸

It has been suggested that internal whistleblowing should be preferable to corporations over external whistleblowing because it allows wrongdoing to be detected at an earlier stage, which results in fewer costs for the company to remedy and a higher probability that the company can avoid a debilitating governmental investigation.²¹⁹ A

compliance procedures required by SOX).

210. Moberly, *supra* note 167, at 1131–32.

211. *Id.* at 1132; *see also* Kevin J. Lesinski, *Analyzing the Past Year’s Highlights in Securities Litigation*, ASPATORE (May 2012), 2012 WL 1197184, at *14 (noting that internal compliance programs make it possible for companies to promptly address corporate misconduct).

212. Kathleen L. Casey, SEC Comm’r, Statement by SEC Commissioner: Adoption of Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), *available at* <http://www.sec.gov/news/speech/2011/spch052511klc-item2.htm>.

213. *Id.* (noting that such a result “does not benefit investors, and it is at odds with the purposes of the securities laws”).

214. Moberly, *supra* note 47, at 18.

215. *Id.* at 19.

216. *Id.*

217. Moberly, *supra* note 167, at 1139 (citing 15 U.S.C. § 78j-1(m)(1)(A) (2012)).

218. Ashoke S. Talukdar, *The Voice of Reason: The Corporate Compliance Officer and the Regulated Corporate Environment*, 6 U.C. DAVIS BUS. L. J. 3, § 3(A)(1) (2005).

219. *See, e.g.*, John Ashcroft et al., *Whistleblowers Cash In, Unwary Corporations Pay*, 40 HOFSTRA L. REV. 367, 406 (2011) (noting SOX’s explicit requirement that public companies create a procedure to receive and manage reports from employee-whistleblowers); Blount & Markel, *supra* note 56, at 1060 (highlighting that a healthy dialogue between employers and employees before a violation is reported increases the

company's best line of defense against governmental investigations for misconduct is through internal whistleblowers, as such individuals present a great value to their employers by recognizing problems within the company and seeking to inform their supervisors who can timely address the issue.²²⁰ It has been suggested that the strongest motivating factor for whistleblowers is to "do the 'right' thing."²²¹ Exhibiting an "ethical dimension," whistleblowing is more likely to occur when the individual feels a sense of responsibility to their colleagues, employers, or profession or when reporting is in line with their personal values and sense of morality.²²² Rather than be viewed as threats to their employers, internal whistleblowers should be highly valued given that their incentive to report is motivated by concern for their places of employment. Internal reporting provides companies with a number of benefits, including investigating wrongdoing in the early stages, evaluating the merits of reported violations, correcting problems in a timely manner, and avoiding any negative publicity of problems that become known to the public.²²³

However, motivating internal whistleblowers to report possible violations is no easy task. The repercussions of doing so are often devastating to their livelihood. Internal whistleblowers face isolation, alienation, and have been commonly treated as snitches and disloyal employees, thereby resulting in a corporate culture that undermines their value as providers of essential information to warn their employers of possible misconduct.²²⁴ "Corporate cultures that embrace internal whistleblowers will gain the advantages of detecting wrongdoing in its earliest stages and reducing the likelihood of external whistleblowing. Ending the threat of retaliation is the first step toward changing the culture."²²⁵

likelihood that a potential violation can be remedied before it grows into a larger problem); Lucian E. Dervan, *Responding to Potential Employee Misconduct in the Age of the Whistleblower: Foreseeing and Avoiding Hidden Dangers*, 3 BLOOMBERG CORP. L.J. 670, 674 (2008) (stating that internal whistleblowing makes it more likely that corporations can avoid costly litigation and take quicker, more efficient corrective action).

220. Lauren J. Resnick et al., *Anyone Can Whistle*, 28 CORP. COUNSELOR 1, 1 (2013); see also DR. WILLIAM DE MARIA, CTR. FOR PUB. ADMIN., UNIV. OF QUEENSLAND, AUSTRALIA, COMMON LAW - COMMON MISTAKES: THE DISMAL FAILURE OF WHISTLEBLOWER LAWS IN AUSTRALIA, NEW ZEALAND, SOUTH AFRICA, IRELAND AND THE UNITED KINGDOM (Apr. 12-13, 2002) (paper presented to Int'l Whistleblowers Conference at Univ. of Indiana) (noting that "[w]histleblowers, when viewed positively, are usually seen as well-meaning, ethically consistent and organizationally-focused").

221. 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 (2012) (citing Gregory Liyanarchchi & Chris Newdick, *The Impact of Moral Reasoning and Retaliation on Whistle-Blowing: New Zealand Evidence*, 89 J. BUS. ETHICS 37, 41 (2009), who note that individuals with higher levels of moral reasoning and behavior are more likely to blow the whistle than those with lower levels of moral reasoning).

222. *Id.*

223. Recent Legislation, *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers To Report Suspected Violations to the SEC—Dodd-Frank Act*, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (to be codified at 15 U.S.C. § 78U-6), 124 HARV. L. REV. 1829, 1835 (2011).

224. See Ashcroft et al., *supra* note 219, at 407 (noting the necessity of a "cultural shift" within corporations as to how whistleblowers are treated); Hesch, *supra* note 205, at 226-27 (highlighting the various ways in which whistleblowers suffer retaliation, thereby acting as a deterrent to come forward).

225. Ashcroft et al., *supra* note 219, at 407.

IV. INTERNAL REPORTING AND FEAR OF RETALIATION

A. *Motivating Whistleblowers*

Internal whistleblowers are faced with notable disincentives that external whistleblowers, or those who do not report internally, are able to avoid.²²⁶ For these reasons, it is usually extremely difficult to incentive whistleblowers to come forward, as they face both potential mental and physical retaliation and intellectual and professional challenges in deciding to bring detrimental information about their employers and friends to light.²²⁷ Financial disincentives include poor performance reports by supervisors, disqualification from bonuses, thwarted career development, termination, and difficulty obtaining new employment due to lack of good recommendations from prior employers.²²⁸ Internal whistleblowers also experience nonfinancial disincentives, mainly psychological pressure, social ostracism, exclusion from social gatherings, emails, or carpools, silent treatment, transfers to other locations, and workplace harassment and threats.²²⁹ Whistleblowers may also experience heightened scrutiny, investigation of personal background, and detachment from colleagues, who are often friends, which creates devastating effects not only on the whistleblower but on his or her family.²³⁰ Whistleblowers are “often face[d with] the difficult choice between telling the truth and the risk of committing ‘career suicide.’”²³¹

Corporate and securities law scholar, James Fanto, suggests that negative reactions toward whistleblowers occur because the whistleblower threatens “groupthink,” a phenomenon in which members of a group become uniform in their perspectives, acknowledging only the seeming positive aspects of group behavior and disciplining any member who challenges such uniformity.²³² “[T]he whistleblower calls into question the totality of the decisions, and the worldview, of the group; the whistleblower becomes the embodiment of the truth about the organization that the group cannot accept without admitting the massive impropriety at the heart of its

226. LIPMAN, *supra* note 168, at 57.

227. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 118 (2007) (“It is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one’s employer, colleagues and friends.” (quoting Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 61 (2002))).

228. *See* LIPMAN, *supra* note 168, at 58–59 (observing that many whistleblowers suffer such severe reputational damage that they can never again work in their chosen profession).

229. *Id.* at 59–60. “The usual practice is to demoralize and humiliate the whistleblower, putting him or her under so much psychological stress that it becomes difficult to do a good job.” *Id.* at 60 (quoting C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* 31–32 (2002)).

230. *Id.* at 59–60.

231. *See* S. REP. NO. 111-176, at 111 (2010).

232. James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 443–44, 466–67 (2004) (discussing Irving Janis’s social psychological groupthink theory as it relates to whistleblowing); *see also generally* David B. Greenberger, Marcia P. Miceli & Debra J. Cohen, *Oppositionists and Group Norms: The Reciprocal Influence of Whistle-blowers and Co-workers*, 6 J. BUS. ETHICS 527 (1987). In this article, Greenberger, Miceli, and Cohen examine whistleblowing as an act of nonconformity, in which whistleblowers face rejection from conforming group members who “dislike those who deviate” and “see themselves as more similar to each other than to the deviant.” *Id.* at 536.

existence.”²³³ In this way, the whistleblower brings to light a truth that his or her superiors would prefer to avoid, resulting in a collective sense of resistance toward the whistleblower.

In 2009, the Ethics Resource Center (ERC) conducted a survey of whistleblower-employees who experienced retaliation for their actions, noting that past research “has identified fear of retaliation as the leading indicator of misconduct in the workplace.”²³⁴ The ERC survey studied employees who observed some form of misconduct, reported their observations to someone within the company, and felt that they were punished as a result of reporting.²³⁵ The survey reveals that, in 2009, fifteen percent of all those who observed and reported misconduct felt that they were retaliated against.²³⁶ This rate is higher for organizations with 100 to 499 employees and for union employees, each at twenty-one percent.²³⁷ One scholar notes that this figure is misleading, as the actual percentage of those who have experienced retaliation varies depending on the type of misconduct reported and the position of power of the person who reports, and that the risk of retaliation for reporting major misconduct is actually much higher.²³⁸ The ERC survey revealed that of the various types of retaliation, the majority of respondents experienced the following with the most frequency: exclusion by supervisors or management from work decisions and activities (sixty-two percent); the cold shoulder by coworkers (sixty percent); and verbal abuse by management or supervisors (fifty-five percent).²³⁹

Further research has revealed that the two most common explanations for why employees do not report internally are fear of retaliation and feelings of futility if they choose to report, with fear of retaliation supported by a very real risk that internal whistleblowers will be penalized for disclosing misconduct.²⁴⁰ The threat of reprisal itself is a major deterrent to blowing the whistle, causing potential whistleblowers to carefully weigh the possible costs and benefits of reporting wrongful acts.²⁴¹ A potential whistleblower’s disincentive to report often exists whether or not the actual reprisal is carried out—“[p]erceptions of the likelihood of retribution are just as important [in deciding whether to blow the whistle] as the reality, if not more so.”²⁴²

233. See Fanto, *supra* note 232, at 467 (referencing social psychological research supporting this theory).

234. ETHICS RES. CTR., RETALIATION: THE COST TO YOUR COMPANY AND ITS EMPLOYEES 1 (2010) [hereinafter ERC SURVEY]; see also LIPMAN, *supra* note 168, at 61–62 (discussing the survey).

235. ERC SURVEY, *supra* note 234, at 2.

236. *Id.* at 3. To determine who is more or less likely to experience retaliation, ERC examined rates by various factors, including employee age, gender, tenure, union membership, management level, and company size and ownership. *Id.*

237. *Id.* at 5.

238. See LIPMAN, *supra* note 168, at 61 (explaining that the fifteen percent “represents an average frequency of retaliation for both minor . . . and major misconduct” and that the more serious the wrongdoing, the higher the likelihood of retaliation, especially for women).

239. See ERC SURVEY, *supra* note 234, at 6 (finding that the least common form of retaliation was physical harm to a person or property, which was experienced by four percent of all retaliation victims).

240. Mayer et al., *supra* note 204, at 91, 100–01.

241. See Jamie Darin Prenekert et al., *Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action*, 91 N.C. L. REV. 889, 928–29 (2013) (noting that those who decide to report have concluded that the potential benefits of doing so outweigh the potential costs).

242. *Id.* at 929.

Such perceptions, which may include fears of being viewed as a troublemaker or liar, or punitive action such as threats, demotion, or termination from employment, have been found to depend on contextual factors that are largely based on the institution itself, making it less likely that an employee will report wrongdoing if the institution has a history of retaliating against past whistleblowers.²⁴³

These disincentives for internal whistleblowers are extremely detrimental to bringing potential violations of the securities laws to the forefront, as those from the inside are the most valuable source of information. As one whistleblower scholar has articulated, “[w]histleblowing is the single most effective way to detect fraud,”²⁴⁴ because the government relies heavily on private individuals to detect misconduct through reporting.²⁴⁵ Whistleblowers, as actual insiders, have “better and earlier access to information about the most serious instances of corporate fraud.”²⁴⁶ Over forty percent of fraud detection results from whistleblower tips.²⁴⁷ Tips from whistleblowers have been found to be thirteen times more effective than external audits in bringing possible violations to the forefront.²⁴⁸ A study in which statistics of employee-whistleblowers were examined revealed that, in eighty-two percent of cases, the whistleblower experienced retaliation, such as termination, quitting under duress, or had significantly altered responsibilities.²⁴⁹ This study also revealed that many employee-whistleblowers reported that they were forced to move to another industry or even another town to avoid harassment.²⁵⁰ In fact, given these repercussions, it is surprising that internal whistleblowers decide to report at all.²⁵¹

This data reveals not only that whistleblowers are essential to the fraud detection process but also that the most significant deterrent to internal reporting is the fear of retaliation, which may be manifested in various ways such as social ostracism, loss of identity, negative reputation, loss of employment, and destruction of career.²⁵² When

243. See *id.* at 929–30 (“[I]f an individual perceives that previous whistleblowers in her organization have experienced reprisal, then she will be less likely to blow the whistle. Conversely, employees will be more likely to report wrongdoing in organizations that have policies and procedures that create the impression that a whistleblower will be taken seriously and assisted.”).

244. Rapp, *supra* note 221, at 108; see also Umang Desai, Comment, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 428–29 (2012) (noting that the majority of whistleblowers are employees, auditors, and regulators).

245. Feldman & Lobel, *supra* note 205, at 1206; see also Ellen C. Brotman & Erin C. Dougherty, *Blue Collar Tactics in White Collar Cases*, 35 CHAMPION 16, 17 (2011).

246. Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS 55, 57 (2010) (noting that whistleblowers have far better access to inside information in comparison to plaintiffs’ securities lawyers who bring forth private securities litigation).

247. Rapp, *supra* note 221, at 108 (citing ASSOC. OF CERTIFIED FRAUD EXAM’RS, 2010 REPORT TO THE NATIONS (2010)).

248. S. REP. NO. 111-176, at 110–11 (2010).

249. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2216 (2010).

250. See *id.* at 2245 (noting that the lawyer for James Bingham, a whistleblower in the Xerox case, described Jim’s situation as follows: “Jim had a great career, but he’ll never get a job in Corporate America again.”).

251. *Id.*

252. See Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 97–98 (2013) (noting the various forms of retaliation that whistleblowers may suffer, which include “ostracism, isolation, blacklisting, defamation, job stagnation, and personal

employees perceive that they will be subject to retaliation for which they have no recourse in the courts, they are less likely to report to their supervisors any instances of wrongdoing. As such, judicial decisions like *Asadi* are likely to have the effect of further discouraging internal whistleblowers to report, as this ruling has made clear that whistleblowers who do not report externally to the SEC are simply excluded from Dodd-Frank's extensive antiretaliation protections.

B. Benefits of Internal Reporting and Compliance Programs

As discussed, as internal whistleblowers are likely to experience a decreased sense of motivation to utilize the internal reporting channels of their companies in light of *Asadi*, the viability of such programs is likely to be compromised. Such a possibility is significantly disadvantageous for companies. First, as of November 2010, the existence of an effective internal compliance program is a mitigating factor in determining the sentence to be imposed on organizations that are convicted of criminal activity under the Federal Sentencing Guidelines.²⁵³ Corporations are subject to criminal liability when an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted contrary to company policy.²⁵⁴ The entire organization can still be held liable for any of the illegal acts of its employees.²⁵⁵ The U.S. Sentencing Commission has attempted to alleviate "[these] harshest aspects of this institutional vulnerability by incorporating into the sentencing structure the preventive and deterrent aspects of systematic compliance programs."²⁵⁶ As such, the U.S. Sentencing Commission has the discretion to mitigate the range of fines, even up to ninety-five percent, if a corporation demonstrates that it had in place an effective compliance program when the underlying misconduct was committed.²⁵⁷

The Department of Justice's internal guidelines also indicate that there are nine factors to consider when determining whether to criminally indict a corporation if its employees engage in criminal conduct, including the existence and adequacy of a

consequences such as depression and family problems"); see LIPMAN, *supra* note 168, at 58–59; see also Fanto, *supra* note 232, at 441 (describing a group's "extreme negative reaction to the whistleblower" who "threatens the group's shared viewpoint and its very existence").

253. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1) (2012) (stating that culpability is reduced in imposing a sentence if the criminal offense of the organization occurred at a time when the organization had in effect "an effective compliance and ethics program"); *id.* § 8.B2.1 (proposing factors for an effective compliance and ethics program); Elletta Sangrey Callahan, Terry Morehead Dworkin, Timothy L. Fort & Cindy A. Schipani, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 190–91 (2002) (discussing the "carrot and stick" approach taken by the Federal Sentencing Guidelines, as the "stick" represents disincentives to misconduct in the form of monetary sanctions or penalties for organizations that make little or no effort to internally prevent wrongdoing, while the "carrot" consists of reduced fines and avoidance of sanctions for those who have attempted to thwart misconduct through internal compliance programs).

254. PAULA DESIO, U.S. SENTENCING COMMISSION, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES, (2012), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/ORGOVERVIEW.pdf.

255. *Id.*

256. *Id.*

257. *Id.*

corporate compliance program.²⁵⁸ The critical factors in evaluating the program consist of whether it is designed for maximum effectiveness to prevent and detect wrongdoing by employees and whether management is enforcing the program or encouraging employees to engage in misconduct.²⁵⁹ Additional questions in evaluating the effectiveness of such programs include whether the program is well designed, whether the corporation's directors exercise independent review over proposed corporate actions, and whether internal audit functions are conducted to ensure their independence and accuracy.²⁶⁰

Second, the size of bounty awards that are available for whistleblowers under Dodd-Frank may be increased if the whistleblower cooperated with an internal compliance program.²⁶¹ There is no requirement in the final SEC rules interpreting Dodd-Frank that whistleblowers first report internally to be eligible for a bounty.²⁶² To incentivize employees to blow the whistle internally and to use their companies' internal compliance and reporting systems, the SEC has included as criteria for increasing an award whether a whistleblower voluntarily participated in an entity's internal compliance program.²⁶³ If the internal whistleblower has participated in such a program, his or her reward will be higher.²⁶⁴ In turn, a whistleblower's interference or noncompliance with internal reporting is a factor that can decrease an award.²⁶⁵

Further, the SEC rules contain a provision whereby a whistleblower may receive a bounty for internally reporting original information to a company's internal compliance program if the entity then reports that information to the SEC, which leads to a successful enforcement action.²⁶⁶ Pursuant to this provision, all of the information that the entity provides to the SEC will be attributed to the whistleblower, meaning "that the whistleblower will get credit—and potentially a greater award—for any additional information generated by the entity in its investigation."²⁶⁷ Recognizing the significant

258. Memorandum from Mark R. Filip, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations 3–4 (Aug. 28, 2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>. According to the Filip memorandum,

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Id. at 2; see also Sprinzen, *supra* note 203, at 156 (discussing the U.S. Department of Justice's Principles of Federal Prosecution of Business Organizations).

259. See Filip, *supra* note 258, at 15.

260. *Id.*

261. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,300–01 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249).

262. *Id.* at 34,301.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

benefits to internal reporting, the SEC promulgated these rules as a means to incentivize whistleblowers to report internally.²⁶⁸ In doing so, the SEC expressed that it

believe[s] that this approach effectuates the general statutory purpose of [Dodd-Frank]—which is to enhance the enforcement of the Federal securities laws by encouraging whistleblowers to come forward to the Commission with quality tips regarding possible securities law violations—in a manner that is consistent with, and reflective of, cost-benefit considerations.²⁶⁹

The goals of the SEC in this respect appear to be working. A recent article indicated that incentives to report internally have been successful, as more than eighty percent of whistleblowers seeking bounties have first reported internally.²⁷⁰ The SEC has also commented on the “high quality” of tips that it has been receiving since Dodd-Frank’s enactment.²⁷¹ When the final SEC rules were released, former SEC Chairwoman Mary L. Schapiro commented that “[w]hile the SEC has a history of receiving a high volume of tips and complaints, the quality of the tips we have received has been better since Dodd-Frank became law.”²⁷²

During the SEC’s rulemaking process to implement Dodd-Frank’s whistleblower provisions, the corporate and financial community was strongly opposed to the fact that the SEC did not include a requirement that whistleblowers first report internally to receive a bounty.²⁷³ Many commentators from the corporate community argued that such a structure would encourage whistleblowers to bypass reporting to internal compliance channels and report directly to the SEC.²⁷⁴ These commentators argued that effective internal whistleblowing avoids significant litigation costs for companies, as problems raised by whistleblowers may be discovered and resolved early.²⁷⁵ As a result of these concerns, the SEC implemented changes specifically aimed at incentivizing whistleblowers to utilize internal compliance channels and internally report violations.²⁷⁶

If the corporate community accepts the decision in *Asadi* and continues to claim, as the defendants have in the cases that have addressed this issue, that internal whistleblowers are not eligible for antiretaliation protections under Dodd-Frank, a clear contradiction of their position exists. The need for effective internal compliance

268. *Id.* at 34,359.

269. *Id.* (footnote omitted). The SEC included such incentives to internal reporting also as a way of responding to the numerous public comments received that the availability of whistleblowers to receive bounties without first reporting internally would undermine the effectiveness of internal compliance programs. *Id.*

270. Ben Protesse & Nathaniel Popper, *Hazy Future for Thriving S.E.C. Whistle-Blower Effort*, N.Y. TIMES (Apr. 23, 2013, 9:04 PM), http://dealbook.nytimes.com/2013/04/23/hazy-future-for-s-e-c-s-whistle-blower-office/?_r=0.

271. *Id.*

272. SEC Adopts Rules To Establish Whistleblower Program, *supra* note 57.

273. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,331, 34,359. See also *supra* Part II.A for a discussion of the corporate and financial community’s concerns about the lack of an internal reporting requirement.

274. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,359.

275. *Id.*

276. *Id.*

channels is ever present, and the lack thereof poses significant risks to good corporate governance. Effective internal compliance programs and the existence of compliance officers within companies provide enormous benefits. As one scholar notes, some of these benefits include an assurance that companies are adhering to the numerous laws and regulations imposed upon them, an internalization of compliance policies by employees to ethically affect business decision making, the need for fewer regulatory burdens as legislators and regulators could be convinced that companies are not motivated solely by self-interest, and the identification of problems before they become larger and more problematic issues.²⁷⁷ The creation of a “culture of compliance” would result in compliance officers trusting supervisors to make legal and ethical business decisions, a strong model for employees in how to ethically think and act, and, ultimately, fewer instances of misconduct and avoidance of future financial crises.²⁷⁸ Given the invaluable role of internal compliance in today’s society and its potential to transform negative corporate mentalities, the role that internal whistleblowers play in the fraud detection process is critical, and such persons should be subject to the highest protection against retaliation possible.

V. CONCLUSION

In the years since Dodd-Frank’s enactment, federal courts have construed the language of the statute to expansively protect internal whistleblowers from retaliation. The Fifth Circuit’s decision in *Asadi* threatens that protection by setting a precedent that not only disregards the SEC’s interpretation of the workings of Dodd-Frank but leaves those who have access to the most critical information without any recourse for actions taken against them for internally reporting violations. The Fifth Circuit in *Asadi* erred in deciding that the language of the statute was unambiguous. As enacted, the statute presents a conflict, and Congress should amend the whistleblower provisions under Dodd-Frank to ensure that the language leaves no question as to whether internal whistleblowers are protected. The specific incorporation by reference of SOX into subsection (h)(1)(A) includes internal whistleblowers among those who are protected and presents a conflict with the more limiting definition of “whistleblower” of subsection (a)(6). Despite this ambiguity, the Fifth Circuit gave effect to what it deemed plain and unambiguous language of the statute, thereby avoiding the second step of the *Chevron* analysis in which the SEC’s interpretation clarifies the conflict and provides a reasonable construction of the statute, which merits deference. In addition, by disregarding the careful judicial analyses that have preceded it, the decision in *Asadi* sets out on a path that minimizes the statutory protections from retaliation that Congress made available to internal whistleblowers through Dodd-Frank by improving upon the protections that had previously been available under SOX.

This precedent is likely to have the effect of discouraging internal whistleblowers

277. James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Financial Firms*, 4–8, 41–42 (Brooklyn Law Sch. Legal Studies, Research Paper No. 358), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321317.

278. *Id.* at 44, 46, 52; see also Moberly, *supra* note 167, at 1132 (discussing SOX’s structural model as a means that “encourages employees to become part of the corporate monitoring system, allowing them to work in concert with the corporation rather than against it” and report their knowledge of misconduct).

to decide to report internally since such persons now face limited recourse in the courts for retaliation, especially in light of the devastating repercussions that they face when reporting information. Such a result is also detrimental to companies, which benefit from the existence of internal compliance programs and internal reporting as preventative measures in addressing possible securities law violations before a complex government investigation ensues or before their reputation is damaged by negative public attention.

As this issue is further unraveled by other courts of appeals that are sure to examine the statute, we are likely to see a circuit split, which may give rise to the Supreme Court deciding to address the scope of Dodd-Frank's antiretaliation protections. The protections from retaliation afforded to internal whistleblowers therefore hang in the balance, and, in light of the essential role such whistleblowers play in today's society, one would hope that the decision in *Asadi* will not be the last word on this important issue.