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# HIDING BEHIND THE VEIL OF AMBIGUITY: WHY COURTS SHOULD APPLY THE PLAIN MEANING OF THE DODD-FRANK WHISTLEBLOWER PROVISIONS

DANIEL GILPIN<sup>†</sup>

## INTRODUCTION

Whistleblowing is a high-stakes business. Although a whistleblower may receive huge rewards for uncovering a securities law violation,<sup>1</sup> he or she may also live in fear of facing retaliation by his or her employer.<sup>2</sup> In 2014, the Securities and Exchange Commission (“SEC”) paid out more awards to whistleblowers than in all previous years combined.<sup>3</sup>

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system.”<sup>4</sup> To improve accountability and transparency, Congress created a bounty program to incentivize whistleblowers with awards for

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<sup>1</sup> Christina Rexrode & Timothy W. Martin, *Whistleblowers Score a Big Payday: Three Individuals, One Firm To Receive \$170 Million in Bank of America Probe*, WALL ST. J. (Dec. 19, 2014), <http://www.wsj.com/articles/third-whistleblower-to-collect-reward-related-to-bank-of-america-settlement-1419014474>.

<sup>2</sup> See Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program’s Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 754 (2014) (stating that whistleblowers may fear poor performance reviews, disqualifications from bonuses, thwarted career development, termination, difficulty in obtaining new employment without employer recommendations, social ostracism, office harassment, and even threats).

<sup>3</sup> SEC, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 10 (2014), <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf> [hereinafter 2014 ANNUAL REPORT].

<sup>4</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

helpful tips given to the SEC.<sup>5</sup> However, it is currently unclear who qualifies as a Dodd-Frank whistleblower.<sup>6</sup> Courts are split on whether an individual must report violations to the SEC or if it is sufficient to report to internal management to qualify as a whistleblower.<sup>7</sup> This threshold question is of utmost importance because only whistleblowers qualify for protection under Dodd-Frank's antiretaliation provision.<sup>8</sup>

In September 2015, the United States Court of Appeals for the Second Circuit created a split of authority with the Fifth Circuit on the statutory definition of a Dodd-Frank whistleblower.<sup>9</sup> In *Berman v. Neo@Ogilvy LLC*,<sup>10</sup> the Second Circuit determined that the definition provision and antiretaliation provision conflicted with one another, finding that the statute was ambiguous.<sup>11</sup> In light of this ambiguity, the Second Circuit deferred to the SEC's interpretation of the statute and held that an individual qualifies as a whistleblower, and is therefore protected under the antiretaliation provision, whether he or she reports to the SEC or reports internally.<sup>12</sup> On the other hand, in *Asadi v. G.E. Energy*,<sup>13</sup> the Fifth Circuit followed the narrow statutory definition of whistleblower found in the text of Dodd-Frank and held that an employee must report to the SEC in order to qualify as a whistleblower and thus, to qualify for antiretaliation protection.<sup>14</sup>

This Note argues that a plain reading of the statute—as championed by the Fifth Circuit—is correct in that an individual qualifies as a whistleblower only when she reports a violation to the SEC. Part I provides a history and background of modern antiretaliation whistleblower legislation. Part I also discusses the circumstances surrounding the passage of Dodd-Frank, the

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<sup>5</sup> See 15 U.S.C. § 78u-6(b) (2012).

<sup>6</sup> Compare *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013), with *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

<sup>7</sup> Compare *Asadi*, 720 F.3d at 629 (holding that only those individuals who report to the SEC qualify as whistleblowers), with *Berman*, 801 F.3d at 155 (holding that those individuals who report internally, as well as those who report to the SEC, qualify as whistleblowers).

<sup>8</sup> See 15 U.S.C. § 78u-6(h)(1)(A) (2012).

<sup>9</sup> Compare *Asadi*, 720 F.3d at 629, with *Berman*, 801 F.3d at 155.

<sup>10</sup> 801 F.3d 145.

<sup>11</sup> *Berman*, 801 F.3d at 155.

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

<sup>13</sup> 720 F.3d 620.

<sup>14</sup> *Id.* at 629.

text of the whistleblower provisions, and the relevant SEC regulations. Part II outlines the recent case law on the issue of who qualifies as a Dodd-Frank whistleblower. Part III argues that only individuals who report to the SEC qualify as Dodd-Frank whistleblowers and addresses criticism of that reasoning.

## I. A HISTORY OF MODERN ANTIRETALIATION WHISTLEBLOWER LEGISLATION

### A. *The Sarbanes-Oxley Act of 2002*

Congress passed the Sarbanes-Oxley Act of 2002 (“SOX”) in the wake of the Enron scandal.<sup>15</sup> In October 2001, Enron shocked the financial world when it announced a \$618 million loss for the third quarter, which led to a \$1.2 billion drop in shareholder value.<sup>16</sup> Federal investigations—and eventually indictments—followed.<sup>17</sup> Sherron Watkins, a vice president at Enron, came forward and testified before Congress regarding the complex accounting scheme used by Enron to inflate its public value.<sup>18</sup> Watkins had reported the accounting scheme anonymously to both the CFO and the chairman of the board of directors.<sup>19</sup> She hoped her reports would result in reform, but Enron immediately sought legal advice about whether Watkins could be terminated without repercussions.<sup>20</sup> Watkins was eventually relegated from her executive suite to a meager office and given menial tasks.<sup>21</sup>

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<sup>15</sup> S. REP. NO. 107-146, at 2 (2002).

<sup>16</sup> *Id.*; see also Josh Emshwiller & Rebecca Smith, *Enron Posts Surprise 3rd-Quarter Loss After Investment, Asset Write-Downs*, WALL ST. J. (Oct. 17, 2001), <http://www.wsj.com/articles/SB1003237924744857040>.

<sup>17</sup> See generally *Indictment, United States v. Arthur Andersen LLP*, Cr. No. CRH-02-121, 2002 WL 33949318 (S.D. Tex. Mar. 7, 2002); *Indictment, United States v. Fastow*, Cr. No. CRH-02-0665, 2003 WL 22331357 (S.D. Tex. Apr. 30, 2003).

<sup>18</sup> See generally *The Financial Collapse of Enron—Part 3: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 107th Cong. 15–16 (2003) (statement of Sherron Watkins, Vice President of Corporate Development, Enron Corp.).

<sup>19</sup> Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 360–61 (2003).

<sup>20</sup> *Id.* at 362–63.

<sup>21</sup> *Id.* at 363.

Senators reacted with fury when they learned that Enron sought to fire Watkins for disclosing her findings instead of correcting the accounting fraud.<sup>22</sup> As a result, Congress included whistleblower protections in SOX in an effort to make potential whistleblowers comfortable with reporting potential violations.<sup>23</sup>

SOX protects whistleblowers by outlawing retaliation by publicly traded companies against employees who provide information about securities law violations.<sup>24</sup> Employees are protected in providing information to (1) a federal regulatory or law enforcement agency; (2) Congress; or (3) a supervisor with authority to investigate.<sup>25</sup> An aggrieved employee has an enforcement procedure if he or she has been a victim of employer retaliation.<sup>26</sup> First, the employee must file an administrative complaint with the Secretary of Labor.<sup>27</sup> Second, and only if that administrative complaint does not result in a final decision within 180 days, the employee has a private cause of action before a federal district court for wrongful retaliation.<sup>28</sup> This administrative filing requirement is a type of administrative exhaustion requirement.<sup>29</sup> The administrative exhaustion requirement presents difficult procedural hurdles to whistleblowers.<sup>30</sup> A successful SOX whistleblower's relief is reinstatement with the same seniority status, back pay with interest, special damages, costs, and reasonable attorney fees.<sup>31</sup> The statute of limitations for a SOX cause of action is 180 days after the violation occurs or 180 days after the employee became aware of the violation.<sup>32</sup>

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<sup>22</sup> S. REP. NO. 107-146, at 5 (2002). Other potential whistleblowers came forward, claiming that they were silenced when they questioned Enron's stock valuations or financial practices. See, e.g., *Man Says Advice To Sell Enron Led to Firing*, N. Y. TIMES (Mar. 5, 2002), <http://www.nytimes.com/2002/03/05/business/man-says-advice-to-sell-enron-led-to-firing.html>.

<sup>23</sup> S. REP. NO. 107-146, at 10 (2002); see generally 18 U.S.C. § 1514A (2012).

<sup>24</sup> See 18 U.S.C. § 1514A(a).

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

<sup>26</sup> See *id.* § 1514A(b).

<sup>27</sup> *Id.* § 1514A(b)(1)(A).

<sup>28</sup> *Id.* § 1514A(b)(1)(B).

<sup>29</sup> See, e.g., *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 417 (S.D.N.Y. 2012).

<sup>30</sup> Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 100–01 (2007).

<sup>31</sup> 18 U.S.C. § 1514A(c).

<sup>32</sup> *Id.* § 1514A(b)(2)(D).

B. *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*

1. Legislation in Reponse to the Financial Crisis

Congress's most recent antiretaliation whistleblower legislation was a part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Dodd-Frank was passed in the wake of the financial collapse in the late 2000s.<sup>33</sup> In 2008, Lehman Brothers, a financial titan, filed for bankruptcy in the wake of nationwide escalating foreclosures.<sup>34</sup> As a result, institutions stopped issuing commercial paper<sup>35</sup> and the financial world came to a screeching halt.<sup>36</sup> The financial crisis deepened, affecting all consumer borrowers.<sup>37</sup> Commentary after the financial crisis generally called for more stringent government regulation.<sup>38</sup>

2. The Whistleblower Provisions

This Note focuses on the whistleblower provisions of Dodd-Frank, particularly the definition and antiretaliation sections located in 15 U.S.C. § 78u-6 (the "Dodd-Frank Whistleblower Provisions"). In the wake of the 2008 financial collapse, Congress

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<sup>33</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

<sup>34</sup> Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES (Sept. 14, 2008), <http://www.nytimes.com/2008/09/15/business/15lehman.html>.

<sup>35</sup> Commercial paper is a source of short-term financing, usually with repayment due one day to ninety days later. It is used by banking institutions to finance their daily operations when they loan more than they have on hand. See Shah Gilani, *Credit Crisis Update: An Inside Look at the Commercial Paper Debacle*, MONEY MORNING (Oct. 9, 2008), <http://moneymorning.com/2008/10/09/credit-crisis-update>.

<sup>36</sup> *Id.* ("[T]he immediate problem is the commercial paper market. It's dead. . . [It is an] inevitable contagion spreading like nuclear winter across the globe.")

<sup>37</sup> See Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Past Subprime Loans*, N.Y. TIMES (Feb. 12, 2008), <http://www.nytimes.com/2008/02/12/business/12credit.html> (discussing how prime borrowers, in addition to subprime borrowers, became unable to get any credit because the financial industry's knee-jerk reaction to tighten lending standards); see also S. REP. NO. 111-176, at 9 (2010) ("[M]illions of Americans have lost jobs; millions of American families have lost trillions of dollars in net worth; millions of Americans have lost their homes; and millions of Americans have lost their retirement, college, and other savings.").

<sup>38</sup> See Gary S. Becker, *The Great Recession and Government Failure*, WALL ST. J. (Sept. 2, 2011), <http://www.wsj.com/articles/SB10001424053111904199404576536930606933332>.

passed Dodd-Frank “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system.”<sup>39</sup> Among other things, Dodd-Frank established a whistleblower reward program<sup>40</sup> and provides whistleblowers with a cause of action for wrongful retaliation by an employer.<sup>41</sup>

Under Dodd-Frank, a whistleblower is defined as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”<sup>42</sup> The second part of the statute at issue is the antiretaliation provision under 15 U.S.C. § 78u-6(h)(1)(A). Specifically, an employer may not:

[D]ischarge, 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 Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including [§] 78j-1(m) of this title, [§] 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>43</sup>

For the sake of brevity, this Note refers to each of the respective subsections of the antiretaliation provision as subsection (i), subsection (ii), and subsection (iii).

Courts have had to interpret whether, under subsection (iii), individuals who report internally to management qualify as Dodd-Frank whistleblowers. A plain reading of the statute seems to indicate they do not because the statutory definition is incorporated in the antiretaliation provision; a person who

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<sup>39</sup> Pub. L. No. 111-203, pmbll., 124 Stat 1376, 1376 (2010).

<sup>40</sup> 15 U.S.C. § 78u-6(b)(1) (2012) (entitling a whistleblower to anywhere between ten percent and thirty percent of sanctions that are imposed in the action).

<sup>41</sup> *Id.* § 78u-6(h)(1)(B)(i) (“An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States . . .”).

<sup>42</sup> *Id.* § 78u-6(a)(6).

<sup>43</sup> *Id.* § 78u-6(h)(1)(A).

reports to the SEC is protected from retaliation for making three different types of disclosures under the statute.<sup>44</sup> The Fifth Circuit and some district courts have ruled that this plain reading of the statute is correct.<sup>45</sup> However, several district courts, and most recently the Second Circuit, either read the statute in a contorted fashion to find ambiguity or read subsection (iii) as an implied exception to the definition of a whistleblower.<sup>46</sup>

Unfortunately, because Congress passed Dodd-Frank in quick fashion, there is little legislative history from which to discern if Congress intended anything other than the plain meaning of the statute to control.<sup>47</sup> However, what little exists is very telling. In its report, the House of Representatives was pleased that Dodd-Frank “enhances incentives and protections for whistleblower providing information leading to successful SEC enforcement actions.”<sup>48</sup> The Senate, in its report, was impressed that the new whistleblower program was “designed to motivate people who know of securities violations to tell the SEC.”<sup>49</sup>

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<sup>44</sup> *Berman v. Neo@Ogilvy LLC*, 801 F.2d 145, 157 (2d Cir. 2015) (Jacobs, J., dissenting) (stating “[this] is the more natural reading of the statute.”)

<sup>45</sup> See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013); *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 644 (E.D. Wis. 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, Civil Action No. 12-cv-00381-RBJ, 2013 WL 3786643, at\*5 (D. Colo. July 19, 2013), *aff’d on different grounds*, 571 F. App’x. 698 (10th Cir. 2014).

<sup>46</sup> See e.g. *Berman*, 801 F.3d at 155 (“[A]t a minimum, the tension between the definition . . . subsection . . . and the limited protection provided by [subsection] (iii) . . . if it is subject to that definition section renders [the Whistleblower Provisions] sufficiently ambiguous.”); see also *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1104–05 (N.D. Cal. 2015) (leave granted to appeal to the 9th Cir.); *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); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*4 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at \*5 (D. Conn. Sept. 25, 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. May 4, 2011).

<sup>47</sup> Only one House report and one Senate report speak to the whistleblower issue.

<sup>48</sup> H.R. REP. NO. 111-517, at 727 (2010) (Conf. Rep.). It would be bizarre for Congress to think that internal disclosures would lead to “successful SEC enforcement actions.”

<sup>49</sup> S. REP. NO. 111-176, at 38 (2010) (Conf. Rep.).



In Dodd-Frank, relief for a successful plaintiff is defined as (1) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (2) two times back pay with interest; and (3) litigation costs and reasonable attorney fees.<sup>50</sup> The statute of limitation for a Dodd-Frank cause of action is between six to ten years, depending on when the whistleblower learned of the violation.<sup>51</sup>

There are three important differences between the SOX antiretaliation cause of action and the Dodd-Frank antiretaliation cause of action. First, the Dodd-Frank cause of action provides greater monetary damages than the SOX cause of action because Dodd-Frank allows for double back pay, whereas SOX only allows for actual back pay.<sup>52</sup> Second, the Dodd-Frank cause of action does not have an administrative exhaustion requirement, whereas the SOX cause of action does.<sup>53</sup> Third, the Dodd-Frank cause of action has a statute of limitations that is at least ten times as long as the statute of limitations for the SOX cause of action.<sup>54</sup> As a result, plaintiffs usually prefer to proceed under a Dodd-Frank cause of action.

### 3. SEC Regulations

The SEC promulgated rules and regulations regarding the Dodd-Frank Whistleblower Provisions pursuant to authority delegated by Congress.<sup>55</sup> In November 2010, the SEC issued its proposed rule, Regulation 21F, and sought comments from the public.<sup>56</sup> The proposed rule prompted vigorous discussion; the SEC received more than 240 comment letters and 1,300 form

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<sup>50</sup> 15 U.S.C. § 78u-6(h)(1)(C) (2012).

<sup>51</sup> The statute of limitation is (1) six years from the date of the violation, or (2) three years after the date when a Plaintiff discovers or reasonably should have discovered facts that indicate she has a cause of action—to a maximum of ten years after the date of the violation. *See id.* § 78u-6(h)(1)(B)(iii).

<sup>52</sup> Compare *id.* § 78u-6(h)(1)(C)(ii), with 18 U.S.C. § 1514A(c)(2)(B).

<sup>53</sup> Compare 15 U.S.C. § 78u-6(h)(1) (2012), with 18 U.S.C. § 1514(b)(1).

<sup>54</sup> Compare 15 U.S.C. § 78u-6(h)(1)(B)(iii) (providing for a statute of limitations between six to ten years after the violation), with 18 U.S.C. § 1514A(b)(2)(D) (providing for a statute of limitations of 180 days after the violation occurs or 180 days after the employee becomes aware of the violation).

<sup>55</sup> *See* 15 U.S.C. § 78u-6(j) (2012) (“The [SEC] shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.”).

<sup>56</sup> *See generally* Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488-01 (proposed Nov. 17, 2010) (to be codified at 17 C.F.R. pt. 240, 249).

letters.<sup>57</sup> Many comments from large corporations and corporate interest groups suggested amendments that required whistleblowers to report internally before reporting to the SEC,<sup>58</sup> similar to the SOX requirement of internal reporting before external reporting.<sup>59</sup> Some commenters strongly disagreed with those suggested amendments.<sup>60</sup> One commenter stated, “Dodd-Frank was a knowing Congressional repudiation of the Sarbanes-Oxley school of preventative corporate compliance.”<sup>61</sup>

In the first part of its two part final rule, the SEC defines a whistleblower “as an individual who . . . provides information to the [SEC] relating to a potential violation of the securities laws.”<sup>62</sup> The second part of the final rule discusses the antiretaliation provision, and indicates that it creates “three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the [SEC].”<sup>63</sup> The SEC reasoned that this is a reasonable interpretation because it supports a core objective of the SEC’s whistleblower rulemaking—to avoid disincentivizing individuals from reporting internally in appropriate

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<sup>57</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300 (June 13, 2011) (to be codified at 17 C.F.R. pt. 240, 249). A list of the submitted comments is available at <https://www.sec.gov/comments/s7-33-10/s73310.shtml>.

<sup>58</sup> See Comment Letter on Proposed Whistleblower Rules from Steven Fagell, Esq., Covington and Burling, LLP, to Sarit Klein & Stephen L. Cohen (Feb. 18, 2011) (on file with the SEC), <https://www.sec.gov/comments/s7-33-10/s73310-273.pdf>; Comment Letter on Proposed Whistleblower Rules from David Baris, Exec. Dir., American Ass’n of Bank Dirs., to Elizabeth M. Murphy, Sec’y, Sec. Exch. Comm’n (Dec. 17, 2010) [hereinafter Ass’n of Bank Dirs. Comment Letter] (on file with the SEC), <https://www.sec.gov/comments/s7-33-10/s73310-213.pdf>; *Hearing on Legis. Proposals To Address the Negative Consequences of the Dodd Frank Whistleblower Provisions Before the Subcomm. on Capital Mkts. & Gov’t Sponsored Enters.*, 112th Cong. (2011) (statement of Ken Daly, President and CEO, NACD), <https://www.sec.gov/comments/s7-33-10/s73310-312.pdf>.

<sup>59</sup> See 15 U.S.C. § 78j-1(b)(1) (2012); see also discussion *supra* Section I.A.

<sup>60</sup> See Comment Letter on Proposed Whistleblower Rules from Kurt S. Schulzke, Esq. to Elizabeth M. Murphy, SEC (Dec. 17, 2010) [hereinafter Schulzke] (on file with the SEC), <https://www.sec.gov/comments/s7-33-10/s73310-201.pdf>; *Hearing on Legis. Proposals To Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions Before the Subcomm. on Capital Mkts. & Gov’t Sponsored Enters.*, 112th Cong. (2011) (statement of Geoffrey Christopher Rapp, Professor of Law, Univ. of Toledo Coll. of Law).

<sup>61</sup> Schulzke, *supra* note 60.

<sup>62</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34301 (June 13, 2011) (to be codified at 17 CFR pt. 240).

<sup>63</sup> *Id.* at 34304.

circumstances.<sup>64</sup> The SEC sought to avoid creating a two-tiered system of antiretaliation provisions favoring those who report to the SEC, which the SEC stated would disincentivize internal reporting.<sup>65</sup>

The SEC was also concerned with reports made to law enforcement agencies, because those reports would not qualify under a narrow reading of "to the Commission" under the whistleblower definition.<sup>66</sup> In its amicus brief to the Second Circuit, the SEC provided a hypothetical to illustrate the consequences of reading the Dodd-Frank Whistleblower Provisions narrowly. The hypothetical stated that if an individual reported securities fraud to the FBI and the employer terminated the individual before any report was made to the SEC, then the individual would not qualify as a whistleblower and therefore, would not be protected under the antiretaliation provision.<sup>67</sup> In that situation, the terminated individual would only have recourse under SOX.<sup>68</sup>

Currently, there is a split of authority among the circuit courts on whether this SEC regulation is an unreasonable interpretation of a clear Congressional mandate or a reasonable clarification of an ambiguous statute.<sup>69</sup>

## II. RECENT CASE LAW

### A. *Court of Appeals Rulings*

#### 1. *Asadi*

In *Asadi v. G.E. Energy (USA), L.L.C.*,<sup>70</sup> the United States Court of Appeals for the Fifth Circuit held that the text of the Dodd-Frank Whistleblower Provisions was unambiguous and only those individuals who report violations to the SEC qualify as

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<sup>64</sup> Brief for SEC as Amicus Curiae Supporting Appellant at 29, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) (No.14-4626), 2015 WL 636112 [hereinafter SEC 2d Cir. Amicus Brief].

<sup>65</sup> *Id.* at 29.

<sup>66</sup> *Id.* at 34.

<sup>67</sup> *Id.* at 34–35.

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

<sup>69</sup> Compare *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013), with *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

<sup>70</sup> 720 F.3d 620.

Dodd-Frank whistleblowers.<sup>71</sup> In *Asadi*, Plaintiff was defendant-employer's Iraq Country Executive.<sup>72</sup> Iraqi officials informed Plaintiff that Defendant hired a woman closely associated with a senior Iraqi official in order to curry favor with that official in negotiating a lucrative agreement.<sup>73</sup> Plaintiff reported this issue to his supervisor, fearing that this was a violation of the Foreign Corrupt Practices Act ("FCPA").<sup>74</sup> Plaintiff was given a "surprisingly negative review" after that internal report and was fired one year later.<sup>75</sup>

Plaintiff filed a complaint alleging a violation of the Dodd-Frank antiretaliation provision because he was terminated for his internal reports to management regarding possible FCPA violations.<sup>76</sup> Defendant moved to dismiss on the premise that Plaintiff failed to state a claim for relief, arguing that since Plaintiff did not report a violation to the SEC, Plaintiff did not qualify as a Dodd-Frank whistleblower.<sup>77</sup> The district court dismissed the complaint on other grounds.<sup>78</sup> On appeal, the Fifth Circuit "start[ed] and end[ed] [its] analysis with the text of the relevant statute—15 U.S.C. § 78u-6."<sup>79</sup> The court first examined the structure of the section, noting that subsection (a) provided a list of definitions, including the term whistleblower and that subsection (h) defined what actions could not be taken against defined whistleblowers.<sup>80</sup>

The court determined that the statutory definition of whistleblower and the antiretaliation provision do not conflict for two reasons.<sup>81</sup> First, the court reasoned that the antiretaliation provision uses the term "whistleblower" rather than "employee" or "individual," which are used in other sections. This suggests that Congress intended the prohibited activity section to only apply to whistleblowers as statutorily defined.<sup>82</sup> Second, the court addressed a critique of this reasoning—that it renders

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<sup>71</sup> *Id.* at 629.

<sup>72</sup> *Id.* at 621.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

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

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

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

<sup>79</sup> *Id.* at 623.

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

<sup>81</sup> *Id.* at 626–27.

<sup>82</sup> *Id.*

subsection (iii) superfluous—by reading subsection (iii) as antiretaliation protection for other required disclosures other than reporting to the SEC.<sup>83</sup> This would arise when an employee reports a securities law violation to its employer and simultaneously reports to the SEC without informing its employer.<sup>84</sup> If the employer terminates the employee for the internal report, subsection (iii) prevents the employer from arguing that, because it did not know about the SEC report, the employee is not entitled to antiretaliation protection, despite being a statutorily defined whistleblower.<sup>85</sup> The court reasoned that its narrow reading does not render subsection (iii) superfluous because this simultaneous reporting example is a conceivable one.<sup>86</sup>

The court also reasoned that allowing those who report internally to qualify as whistleblowers would render the SOX antiretaliation provision moot.<sup>87</sup> If internal reporting qualified one to be a Dodd-Frank whistleblower, every plaintiff would file her claim as a Dodd-Frank whistleblower and not a SOX whistleblower. This is because Dodd-Frank whistleblowers receive double the back pay<sup>88</sup> and have no administrative exhaustion requirement.<sup>89</sup> Plaintiff's final argument was that the court should give *Chevron* deference to the SEC's regulations because the SEC is the agency charged with enforcing the Dodd-Frank Act.<sup>90</sup> The court rejected that argument because *Chevron* deference is only given to an agency where the statute is ambiguous and the agency's interpretation is a reasonable one.<sup>91</sup> Here, the court explained that the statute is unambiguous and

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<sup>83</sup> *Id.* at 627. For example, attorneys are required to report internally evidence of a material violation of securities law to the chief legal counsel or chief executive officer. 15 U.S.C. § 7245(1) (2012).

<sup>84</sup> *Asadi*, 720 F.3d. at 627–28.

<sup>85</sup> *Id.* at 628.

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

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

<sup>88</sup> Compare 15 U.S.C. § 78u-6(h)(1)(C) (2012), with 18 U.S.C. § 1514A(c)(2) (2012).

<sup>89</sup> Compare 15 U.S.C. § 78u-6(h), with 18 U.S.C. § 1514A(b)(1).

<sup>90</sup> *Asadi*, 720 F.3d. at 629.

<sup>91</sup> *Id.* at 629–30.

the SEC's interpretation unreasonably expands the definition of whistleblower beyond a plain reading of the statute.<sup>92</sup> Accordingly, the court affirmed the dismissal.<sup>93</sup>

## 2. *Berman*

In *Berman v. Neo@Ogilvy LLC*,<sup>94</sup> the United States Court of Appeals for the Second Circuit held that the text of the Dodd-Frank Whistleblower Provisions was ambiguous and therefore, gave deference to the SEC's interpretation of the definition of a whistleblower, which includes those who report a violation to the SEC and those who report a violation internally.<sup>95</sup> Defendant was a media agency, owned by a parent company, which provided digital and direct media services.<sup>96</sup> Plaintiff was defendant-employer's finance director.<sup>97</sup> Plaintiff was responsible for the company's financial reporting, compliance with Generally Accepted Accounting Principles ("GAAP"), and the internal accounting procedures of Defendant and its parent company.<sup>98</sup> Plaintiff alleged in his complaint that he discovered fraudulent accounting procedures that violated GAAP, SOX, and Dodd-Frank.<sup>99</sup> Plaintiff reported these potential violations internally to a senior officer and defendant's Audit Committee.<sup>100</sup> The senior officer was upset with Plaintiff and fired him for his internal report of the potential violations.<sup>101</sup>

When Plaintiff filed suit, Defendant moved to dismiss, arguing that Plaintiff failed to state a claim for relief because he did not qualify as a Dodd-Frank whistleblower, as he did not report a violation to the SEC.<sup>102</sup> The district court agreed and dismissed the case.<sup>103</sup> On appeal, the Second Circuit stated that the question presented was whether reading the two sections of

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 630.

<sup>94</sup> 801 F.3d 145 (2d Cir. 2015).

<sup>95</sup> *Id.* at 155.

<sup>96</sup> *Id.* at 149.

<sup>97</sup> *Id.* at 148.

<sup>98</sup> *Id.* at 148–49.

<sup>99</sup> *Id.* at 149.

<sup>100</sup> *Id.*

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

the Dodd-Frank Whistleblowers Provisions together made the text sufficiently unclear to warrant *Chevron* deference to the SEC's interpretation.<sup>104</sup>

The court determined that reading the statutory definition of whistleblower and subsection (iii) together drastically limited the scope of subsection (iii) to cover only people who report a violation internally and to the SEC simultaneously.<sup>105</sup> Reading the statutory definition of whistleblower in conjunction with subsection (iii) is especially problematic because under federal law, some whistleblowers, like auditors and attorneys,<sup>106</sup> are required to report violations internally before reporting to the SEC.<sup>107</sup> The court recognized that subsection (iii) was added at the last minute.<sup>108</sup> In light of that, the court was "doubtful that the conferees who accepted the last-minute insertion of sub[section] (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the [SEC] reporting requirement in the 'whistleblower' definition in subsection 21F(a)(6)."<sup>109</sup> After discussing that in dicta,<sup>110</sup> the court determined that the tension between the definition section and the antiretaliation provision makes the statute ambiguous and determined the SEC's interpretation was reasonable under *Chevron*.<sup>111</sup> The case was remanded for further proceedings.<sup>112</sup>

The dissent criticized the majority's reasoning as an attempt to rewrite the statute in order to close a perceived gap in protection for whistleblowers.<sup>113</sup> The dissent noted that the

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<sup>104</sup> *Id.* at 150. The court stated that *King v. Burwell* was the controlling precedent for an analysis of a possibly ambiguous statute and that the court was not conducting a review under the absurdity doctrine. *Id.*

<sup>105</sup> *Id.* at 150–51.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 151.

<sup>108</sup> *Id.* at 152–53.

<sup>109</sup> *Id.* at 155.

<sup>110</sup> *Id.* ("If we had to choose between reading the statute literally or broadly to carry out its apparent purpose, we might well favor the latter course. However, we need not definitively construe the statute, because, at a minimum, the tension between the definition in subsection 21F(a)(6) and the limited protection provided by sub[section] (iii) of subsection 21F(h)(1)(A) if it is subject to that definition renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute.")

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 155 (Jacobs, J., dissenting).

majority misquoted the statute by substituting the term “employee” for the term “whistleblower” in the antiretaliation provision.<sup>114</sup> Because the term whistleblower is expressly defined, the majority should have looked to the definition section, but instead “look[ed] here, there and everywhere—except to the statutory text.”<sup>115</sup> The majority’s finding of ambiguity was improper because the plain reading of the statute only leaves subsection (iii) “extremely limited [in] scope.”<sup>116</sup> As the dissent pointed out, “[t]he U.S. Code is full of statutory provisions with ‘extremely limited’ effect,” and that alone does not make a statute ambiguous.<sup>117</sup> The dissent concluded that the majority should not have “cast aside plain statutory text just because they harbor ‘doubt[s]’ about what was going on in the heads of individual ‘conferees’ during the legislative process.”<sup>118</sup>

### B. District Court Rulings

Many district courts have interpreted the language and structure of the Dodd-Frank Whistleblower Provisions. These opinions are best understood in three categories: (1) reading as unambiguous; (2) reading as ambiguous; and (3) reading subsection (iii) as an implied exception to the definition of whistleblower. The second and third categories of reading occasionally overlap.<sup>119</sup>

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<sup>114</sup> *Id.* at 157.

<sup>115</sup> *Id.* at 158.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* The dissent also noted that the majority wisely did not discuss the absurdity doctrine, in recognition that the result of a plain reading does not create an absurd result, merely a narrow one. *Id.* at n.1. (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892) (holding that “[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”)). The dissent went on to distinguish from *King v. Burwell*, which the majority relied upon. *Id.* at 159. In *King*, the Supreme Court determined that one subsection’s plain meaning, which prevented establishing health care exchanges, cannot stand in an act that was designed to establish health care exchanges. *See Berman*, 801 F.3d at 159 (citing *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015)). The dissent pointed out that here “the sole consequence of applying the statute as written is that those who report securities violations only to their employer will receive statutory protection that in the SEC’s view is sub-optimal.” *Id.*

<sup>118</sup> *Id.* at 160 (alteration in original) (citing majority opinion at 155).

<sup>119</sup> *See e.g.*, *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*4–5 (S.D.N.Y. May 21, 2013); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. May 4, 2011).



## 1. Reading as Unambiguous

Three district courts (“the Unambiguous Courts”) have followed the Fifth Circuit’s reasoning and found the Dodd-Frank Whistleblower Provisions unambiguous.<sup>120</sup> “Each district court determined that the definition section defines whistleblower and that the anti-retaliation provision lists what protected actions whistleblowers can take.”<sup>121</sup> One court noted, “Congress could have used a word other than ‘whistleblower’ [in the antiretaliation provision] but chose not to.”<sup>122</sup> Another court remarked that there is nothing ambiguous about the fact that “one may engage in protected activity and yet not qualify as a whistleblower” under the statute.<sup>123</sup> That court stated that any argument against such understanding is an argument based solely on a disagreement about public policy, and not statutory interpretation.<sup>124</sup> The Unambiguous Courts disagreed with the courts that read the statute as ambiguous (the “Ambiguous Courts”) in their application of the surplusage doctrine to the Dodd-Frank Whistleblower Provisions. Further, the Unambiguous Courts stated that, although their interpretation may render the term “to the Commission” superfluous in the antiretaliation provision, the Ambiguous Courts’ interpretation renders the entire statutory whistleblower definition superfluous.<sup>125</sup>

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<sup>120</sup> See *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 644 (E.D. Wis. 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, Civil Action No. 12-cv-00381-RBJ, 2013 WL 3786643, at \*5 (D. Colo. July 19, 2013), *aff’d on different grounds*, 571 F. App’x. 698 (10th Cir. 2014).

<sup>121</sup> See *Verfuert*, 65 F. Supp. 3d at 645; *Wagner*, 2013 WL 3786643, at \*6 (citing *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)); *Banko*, 20 F. Supp. 3d at 756.

<sup>122</sup> *Banko*, 20 F. Supp. 3d at 756 (citing *Asadi*, 720 F.3d at 626).

<sup>123</sup> *Verfuert*, 65 F. Supp. 3d at 644. The *Verfuert* court made this point again, stating “[c]reating a class of people (whistleblowers) and then protecting them from various discriminatory acts *in addition* to the act that qualified them for that class does not produce ambiguity or conflict.” *Id.* at 645.

<sup>124</sup> See *id.* at 644.

<sup>125</sup> *Id.* at 644–45.

## 2. Reading as Ambiguous

The Ambiguous Courts analyzed the Dodd-Frank Whistleblower Provisions under the *Chevron* doctrine and ruled that the statute is ambiguous.<sup>126</sup> Under *Chevron*, a court must conduct a two-part analysis to determine whether an agency's interpretation of a statute is entitled to deference.<sup>127</sup> First, the court must determine if Congress has spoken precisely to the question at issue.<sup>128</sup> If Congress has not, then the statute is ambiguous.<sup>129</sup> Second, if the statute is ambiguous, the court must decide whether the responsible executive agency's interpretation of the statute is a reasonable one.<sup>130</sup> If reasonable, then the agency's interpretation is entitled to deference.<sup>131</sup>

The majority of district courts confronted with this statutory interpretation question have ruled that the text of the Dodd-Frank Whistleblower Provisions is ambiguous under the first step of the *Chevron* analysis.<sup>132</sup> One cited reason is to avoid surplusage.<sup>133</sup> These courts determined that applying the statutory definition of whistleblower would render subsection (iii) superfluous or would render the two sections in conflict with one another.<sup>134</sup> Some courts have also found that enforcing the plain

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<sup>126</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that a court should defer to a responsible executive agency's permissible construction of a statute where the statutory language is ambiguous or otherwise does not speak precisely to the question at issue).

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 842–43.

<sup>129</sup> See *id.* at 843.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 843–44.

<sup>132</sup> See, e.g., *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1104–05 (N.D. Cal. 2015); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 147–48 (S.D.N.Y. 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at \*4 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at \*4 (D. Conn. Sept. 25, 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. May 4, 2011).

<sup>133</sup> *Somers*, 119 F. Supp. 3d at 1102.

<sup>134</sup> See *id.* at 1100; *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014); *Rosenblum*, 984 F. Supp. 2d at 147–48; *Murray*, 2013 WL 2190084, at \*4; *Genberg*, 935 F. Supp. 2d at 1106; *Egan*, 2011 WL 1672066, at \*5.

definition of whistleblower would render the words “to the Commission” in subsection (i) superfluous<sup>135</sup> and have considered legislative history and public policy as controlling factors.<sup>136</sup>

Under the second step of the *Chevron* test, courts presume that a responsible agency's interpretation of a term is reasonable.<sup>137</sup> Every court that has reached this step of the *Chevron* analysis has ruled that the SEC's interpretation of the Dodd-Frank Whistleblower Provisions is a reasonable one and, as a result, entitled to deference.<sup>138</sup> The primary reason is that the SEC's interpretation settles the ambiguity that courts have found between the definition section and the antiretaliation provision.<sup>139</sup>

### 3. Reading Subsection (iii) as an Implied Exception to the Whistleblower Definition

The third interpretation of the Dodd-Frank Whistleblower Provisions is that subsection (iii) provides an implied exception to the definition of a whistleblower.<sup>140</sup> Under this reading, a person is a whistleblower if she discloses information to the SEC or meets one of the three categories of disclosure under subsection (iii).<sup>141</sup> District courts that have employed this interpretation reason that this interpretation preserves the statutory text while giving effect to SEC Rule 21F.<sup>142</sup>

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<sup>135</sup> *Somers*, 119 F. Supp. 3d at 1102; *Egan*, 2011 WL 1672066, at \*5.

<sup>136</sup> *Somers*, 119 F. Supp. 3d at 1103 (reasoning that because subsection (iii) was added at the last minute, it is reasonable to assume that Congress did not intend for this subsection to be limited to only those whistleblowers who report to the SEC); *Kramer*, 2012 WL 4444820, at \*4 (reasoning that it is 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 [SEC] . . . [as that] interpretation would dramatically narrow the available protections available to potential whistleblowers.”).

<sup>137</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

<sup>138</sup> See, e.g., *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015); *Somers*, 119 F. Supp. 3d at 1105–06; *Rosenblum*, 984 F. Supp. 2d at 147–48; *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Kramer*, 2012 WL 4444820 at \*5.

<sup>139</sup> See *Somers*, 119 F. Supp. 3d at 1105; *Rosenblum*, 984 F. Supp. 2d at 147–48; *Murray*, 2013 WL 2190084, at \*5.

<sup>140</sup> See *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 532, 534 (S.D.N.Y. 2014); *Murray*, 2013 WL 2190084, at \*5; *Genberg*, 935 F. Supp. 2d at 1106; *Egan*, 2011 WL 1672066, at \*5.

<sup>141</sup> See, e.g., *Murray*, 2013 WL 2190084, at \*5.

<sup>142</sup> See, e.g., *Yang*, 18 F. Supp. 3d at 534.

### III. A PLAIN, UNAMBIGUOUS READING OF THE STATUTE IS THE CORRECT READING AND IS THE POLICY THAT CONGRESS INTENDED

#### A. *Statutory Interpretation*

It is the preeminent canon of statutory interpretation that courts “presume that [the] legislature says in a statute what it means and means in a statute what it says there.”<sup>143</sup> The first step of statutory interpretation is to determine if the text is plain and unambiguous.<sup>144</sup> Judges have long recognized that if a statute is plain and unambiguous, a court must apply the statute according to its terms.<sup>145</sup> Ambiguity is defined as “doubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision.”<sup>146</sup> In the context of statutory interpretation, ambiguity is “the doubt which a judge must entertain before she can search for and, if possible, apply a secondary meaning.”<sup>147</sup> In order to determine if a statute is

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<sup>143</sup> *BedRoc Ltd., LLC v. United States*, 541 US 176, 183 (2004) (alteration in original) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

<sup>144</sup> *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citing *United States v. Gonzalez*, 520 U.S. 1, 4 (1997)).

<sup>145</sup> *See, e.g., Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (“We must enforce plain and unambiguous statutory language according to its terms.”); *Carcieri*, 555 U.S. at 387 (“[W]e must apply [an unambiguous] statute according to its terms.”); *Dodd v. United States*, 545 U.S. 353, 359 (2005) (alteration in original) (“[W]e are not free to rewrite the statute that Congress has enacted. [W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000))); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (“It is well established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” (quoting *Hartford Underwriters Ins. Co.*, 530 U.S. at 6)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“[The Court’s] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989))); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945) (“The plain words and meaning of a statute cannot be overcome by a legislative [sic] history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.”); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that . . . if [the meaning of the statute] is plain . . . the sole function of the courts is to enforce it according to its terms.”); *Thornley v. United States*, 113 U.S. 310, 313 (1885) (“Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms.”).

<sup>146</sup> *Ambiguity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>147</sup> *Id.* (quoting RUPERT CROSS, STATUTORY INTERPRETATION 76–77 (1st ed. 1976)).

ambiguous, a court looks to “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>148</sup> While even textualist readers admit that a definition can be contradicted by other indications,<sup>149</sup> “[w]hen . . . a definitional section says that a word ‘means’ something, the clear import is that this is its *only* meaning.”<sup>150</sup> A court may not refuse to enforce the plain reading of the statute simply because it would create a hardship.<sup>151</sup>

Where a statute is clear, a court should not resort to reviewing legislative history—this “only muddies the waters.”<sup>152</sup> There are strong reasons why. First, legislative materials generally contain the thoughts of only a handful of representatives who actively discussed the bill at issue.<sup>153</sup> “[I]t is impossible to aggregate the individual expectations of 435 House Members and match them up with an aggregation of as many as 100 Senators and with the President’s intent when he or she signs the measure into law.”<sup>154</sup> Second, using legislative history affords judges the opportunity to supplant the plain meaning of a statute with whatever external evidence they can locate favoring their own ideological views.<sup>155</sup> That is not to say that all judges

<sup>148</sup> *Robinson*, 519 U.S. at 341.

<sup>149</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 228 (2012).

<sup>150</sup> *Id.* at 226.

<sup>151</sup> *Helvering v. N.Y. Tr. Co.*, 292 U.S. 455, 464 (1934) (“The rule that, where the statute contains no ambiguity, it must be taken literally and given effect accord[ing] to its language, is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose.”); *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924) (“[When] the words of the statute are plain, with nothing in the context to make their meaning doubtful [and] no room is left for construction . . . we are not at liberty to add an exception in order to remove apparent hardship in particular cases.”); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1895) (“It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of congress, but it is the imperative duty of the court to do so.”); see also SCALIA & GARNER, *supra* note 149, at 181 (“Not every harsh result indicates a contradiction that must be ‘reconciled’ away.”).

<sup>152</sup> *United States v. Gonzalez*, 520 U.S. 1, 4 (1997).

<sup>153</sup> WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 605 (2014) [hereinafter *LEGISLATION AND ADMINISTRATION*].

<sup>154</sup> *Id.* (citing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930)).

<sup>155</sup> See *id.* at 603 (noting the concern that judges should not usurp plain meaning by relying on legislative history to favor their own ideological views).

are willfully manipulative. They may use legislative history to unconsciously reinforce their own dispositions toward the statute.<sup>156</sup> Third, a heavy emphasis on legislative history creates a perverse incentive for lobbyists and legislators “to stack the legislative history.”<sup>157</sup> It is much easier for interest groups “to insert language into a committee report than to alter the language of a statute.”<sup>158</sup> These arguments do not suggest that legislative history should never be used; rather, the use of legislative history should be reserved for situations where statutes are facially ambiguous.<sup>159</sup>

The surplusage canon is another canon of statutory interpretation, which states, “if possible, every word and every provision [of a statute] is to be given effect.”<sup>160</sup> The surplusage canon exemplifies the idea that it is not within a court’s function to remove language from a statute.<sup>161</sup> But the surplusage canon is not always dispositive because “drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to . . . [use the] belt-and-suspenders approach.”<sup>162</sup> Sometimes Congress intentionally adds redundancies to ensure the needs of various supporters and interest groups are satisfied.<sup>163</sup>

Statutory analysis often involves administrative law analysis because Congress delegates rulemaking authority to executive agencies.<sup>164</sup> To determine if an agency interpretation of a statute is entitled to deference, courts conduct a *Chevron* analysis.<sup>165</sup>

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<sup>156</sup> KENT GREENAWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 181 (1999).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 74–77 (1989).

<sup>160</sup> SCALIA & GARNER, *supra* note 149, at 174.

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

<sup>162</sup> *Id.* at 176–77.

<sup>163</sup> LEGISLATION AND ADMINISTRATION, *supra* note 153, at 468 (citing Abbe R. Gluck & Linda Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 933–36 (2013)).

<sup>164</sup> Here, Congress has delegated rulemaking authority to the SEC. See 15 U.S.C. § 78u-6(j) (2012) (“The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.”).

<sup>165</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

First, a court must determine whether Congress has directly spoken to the precise question at issue.<sup>166</sup> If Congress has directly spoken to the question at issue, the court must effectuate Congress's unambiguously expressed intent.<sup>167</sup> Fundamentally, this stems from the separation of powers in the Constitution.<sup>168</sup> The Constitution vests the power to create law with Congress, not administrative agencies.<sup>169</sup> Second, and only if the court determines Congress has not answered the precise question at issue, the court must determine whether the agency's interpretation of the statute is a reasonable one.<sup>170</sup> If the agency's interpretation is reasonable, then that interpretation is entitled to deference.<sup>171</sup>

### 1. The Text of the Dodd–Frank Whistleblower Provisions Is Unambiguous

The text of the Dodd–Frank Whistleblower Provisions is unambiguous, thus, the plain, statutory definition of whistleblower should be applied. Congress expressly provided that a whistleblower “means any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”<sup>172</sup> The United States Court of Appeals for the Second Circuit and like-minded district courts insist that, because subsection (iii) forbids employer retaliation against whistleblowers for internal disclosures, it must follow that the term whistleblower include persons who disclose internally.<sup>173</sup>

However, the Fifth Circuit and like-minded district courts correctly point out the major mistake that the Second Circuit and like-minded courts have made: they ignore the fact that the antiretaliation provision incorporates the statutory definition of

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<sup>166</sup> *Id.* at 842.

<sup>167</sup> *Id.* at 842–43.

<sup>168</sup> *See Mich. v. Env'tl Prot. Agency*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

<sup>169</sup> *See id.*

<sup>170</sup> *Chevron*, 467 U.S. at 843.

<sup>171</sup> *Id.*

<sup>172</sup> 15 U.S.C. § 78u-6(a)(6) (2012). Recall that when Congress says a term “means” something that is its only meaning. *See SCALIA & GARNER, supra* note 149, at 226.

<sup>173</sup> *See, e.g., Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 154–55 (2d Cir. 2015); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45–46 (D. Mass. 2013).

whistleblower.<sup>174</sup> As the *Berman* dissent points out, there is no conflict or ambiguity; there is merely a statute that provides protection that judges and the SEC find suboptimal.<sup>175</sup> It is improper for the courts to hide behind the veil of ambiguity to avoid hardships that may sometimes result from giving effect to the statutory protection as written.<sup>176</sup> The courts should not make rulings “based solely on a disagreement about public policy.”<sup>177</sup>

The Second Circuit and like-minded district courts incorrectly reasoned that a plain reading of the statute would render subsection (iii) superfluous.<sup>178</sup> However, even the Second Circuit admitted that subsection (iii) would not be superfluous—just “extremely limited [in] scope”<sup>179</sup>—in its response to the Fifth Circuit’s reasoning that subsection (iii) is not superfluous because it protects whistleblowers that report to the SEC and internally simultaneously.<sup>180</sup> As the *Berman* dissent points out, it is unclear why this timing of reporting is relevant; an individual might disclose to multiple people at the same time or over a longer period.<sup>181</sup> Nothing in the antiretaliation provision prevents a person from reporting to the SEC to qualify as a whistleblower and then, at some later date, reporting to an internal compliance program.<sup>182</sup> The only important timing factor is if and when an employer learns that an employee has reported to the SEC.<sup>183</sup> Subsection (iii) is best understood as protecting whistleblowers who have reported violations to the SEC without their employer’s knowledge from retaliation, based on an internal report of the same securities law violation. That is, if subsection (iii) did not exist, then an employer would only be

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<sup>174</sup> *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 626–27 (5th Cir. 2013); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013). In a clever sleight of hand, the SEC also uses the terms “whistleblower” and “individual” interchangeably in its arguments. See SEC 2d Cir. Amicus Brief, *supra* note 64, at 13–15.

<sup>175</sup> *Berman*, 801 F.3d at 158–59 (Dennis, J., dissenting).

<sup>176</sup> *Helvering v. New York Tr. Co.*, 292 U.S. 455, 464 (1934).

<sup>177</sup> *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 644 (E.D. Wis. 2014).

<sup>178</sup> See, e.g., *Berman*, 801 F.3d at 151; *Somers v. Digital Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1100 (N.D. Cal. 2015).

<sup>179</sup> *Berman*, 801 F.3d at 151.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 157 (Jacobs, J., dissenting).

<sup>182</sup> See generally 15 U.S.C. § 78u-6 (2012).

<sup>183</sup> See *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 648 (E.D. Tenn. 2015); *supra* notes 110–112 and accompanying text.



prohibited from retaliating against an employee for a report to the SEC or for obeying a judicial subpoena. This would give the employer an opportunity to argue that it did not terminate the employee for the report to the SEC because the employer did not know about the report to the SEC. Indeed, the employer could explain that it terminated the employee because of the internal report, not the report to the SEC. Without subsection (iii) this would be unsavory, but not prohibited.

Some district courts also cite the surplusage canon to support their rulings that the statute is ambiguous; particularly, that the plain reading of the statute renders "to the Commission" in subsection (i) superfluous.<sup>184</sup> As noted earlier, the surplusage canon is not always dispositive; Congress sometimes creates redundancies intentionally.<sup>185</sup> It is perfectly reasonable to think that Congress was redundantly clarifying the antiretaliation provision, which has six sections between it and the definition section.<sup>186</sup> More problematic is that, in an effort to avoid finding a small clause superfluous, these district courts have rendered superfluous the entire statutory definition of whistleblower.<sup>187</sup>

According to the Second Circuit, the plain reading of the statute also presents another problem with subsection (iii): Under SOX, auditors and attorneys are required to report internally before reporting to the SEC.<sup>188</sup> The Second Circuit reasoned that Congress could not have intended to exclude these two groups from whistleblower protection.<sup>189</sup>

The statute does not, under any section, address whether any groups are to be excluded from the definition of whistleblower.<sup>190</sup> In this statutory silence, SEC regulations have created categorical exceptions, making certain groups ineligible for whistleblower rewards.<sup>191</sup> Several prominent independent

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<sup>184</sup> *Somers v. Digital Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1102–03 (N.D. Cal. 2015); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. 2011).

<sup>185</sup> See *supra* notes 160–162 and accompanying text.

<sup>186</sup> See generally 15 U.S.C. § 78u-6.

<sup>187</sup> *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 645 (E.D. Wis. 2014).

<sup>188</sup> *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2016).

<sup>189</sup> *Id.* at 151–52, 155.

<sup>190</sup> See 15 U.S.C. § 78u-6.

<sup>191</sup> See 17 C.F.R. § 240.21F-4(b)(4) (2011) (excluding auditors, attorneys, and internal compliance personnel by creating a rule that information obtained for an

auditing firms voiced strong objections to proposed Rule 21F-4,<sup>192</sup> which was unclear on whether auditors would be eligible for whistleblower awards.<sup>193</sup> In addition to individual firms, auditor associations objected to the proposed rules, requesting that the SEC categorically exclude auditors from whistleblower awards because allowing auditors to receive such awards would discourage the free flow of honest information to the auditor.<sup>194</sup> One commenter noted that auditors have other reporting

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audit, legal advice, or internal compliance does not qualify as “independent knowledge”).

<sup>192</sup> All of the “Big Four” accounting firms filed comments criticizing this provision of proposed rule 21F-4. *See, e.g.*, Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from PricewaterhouseCoopers LLP, to SEC (Dec. 22, 2010) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-281.pdf> (“[W]e believe that the whistleblower rules should not establish an alternative reporting channel for any information derived by accounts from performance of a professional engagement. [W]e agree with the exclusion of information reported by accountants regarding violations by an engagement client or the client’s personnel.”); Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from Ernst & Young LLP, to Elizabeth M. Murphy, Sec’y, SEC (Dec. 17, 2010) [hereinafter Ernst & Young Comment Letter] (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-176.pdf> (“[T]he Proposing Release states, awards would be available ‘with respect to the independent accountant’s performance of the engagement itself . . . . We do not believe this aspect of the Rule Proposal is workable or necessary, and it is likely to disrupt the traditional sort of trust and dialogue that must exist within an audit engagement team to perform an effective audit.’”); Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from Deloitte LLP, to Elizabeth M. Murphy, Sec’y, SEC (Dec. 17, 2010) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-184.pdf> (“Deloitte strongly supports implementation of an exclusion in the Proposed Rules for individuals who obtained their information through the audit of a company’s financial statements and for whom making a whistleblower submission would be contrary to the requirements of Section 10A of the Securities Exchange Act of 1934.”); Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from KPMG LLP, to Elizabeth M. Murphy, Sec’y, SEC (Dec. 17, 2010) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-152.pdf> (stating that the proposed eligibility exclusion is “too narrow” and would encourage accountants to violate professional standards).

<sup>193</sup> *See* Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70493 (proposed Nov. 17, 2010) (codified at 17 C.F.R. § 240.21F-4(b)).

<sup>194</sup> *See, e.g.*, Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from Cynthia M. Fornelli, Exec. Dir., Ctr. for Audit Quality, to Elizabeth M. Murphy, Sec’y, SEC (Dec. 23, 2010) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-242.pdf>.

requirements and protections available to them.<sup>195</sup> After reviewing comments, the SEC's final rule excluded auditors by determining that knowledge gained by an internal audit did not qualify as "independent knowledge."<sup>196</sup> Therefore, the Second Circuit's concern about auditors being unprotected is unfounded because, under SEC regulations, auditors are already excluded from whistleblower awards.

The SEC, in its proposed rules, recognized that attorneys should also be categorically excluded from whistleblower awards.<sup>197</sup> When a commenter suggested that lawyers should be eligible for awards based on nonprivileged information, the American Bar Association ("ABA") replied with serious concerns.<sup>198</sup> The ABA was concerned that whistleblower awards:

[M]ay create a strong incentive for a lawyer to compromise his or her ethical obligations and undermine the client confidence that the U.S. Supreme Court [has] recognized . . . as critical in assuring the continued effectiveness of the attorney-client privilege and the work product doctrine. A client's awareness that its attorneys may use information provided confidentially to obtain large whistleblower awards could well prevent the free flow of information necessary to the client's right to effective counsel.<sup>199</sup>

In light of these strong objections, the SEC's final rule excluded attorneys from obtaining whistleblower awards from any knowledge gained by the attorney-client relationship, including

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<sup>195</sup> See Ernst & Young Comment Letter, *supra* note 192 ("[U]nlike the typical corporate employee, for whom Congress clearly thought a bounty could encourage reporting of wrongdoing, accountants are already subject to reporting requirements by virtue of their professional status.").

<sup>196</sup> See Securities Whistleblower Incentives and Protections, 76 FR 34300, 34317-18 (June 13, 2011) (codified at 17 C.F.R. § 240.21F-4(b)(4)). Under 15 U.S.C. § 78u-6 (2012), a person must give "original information" to qualify for a whistleblower award. § 78u-6 (a)(3)(A) ("The term 'original information' means information that . . . is derived from the independent knowledge . . . of a whistleblower."). Because "original information" is a vague term, the SEC has promulgated rules to clarify.

<sup>197</sup> See Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70492. (proposed Nov. 17, 2010) (codified at 17 C.F.R. § 240.21F-4(b)).

<sup>198</sup> See *generally* Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from Stephen N. Zack, President, American Bar Association, to Mary L. Schapiro, Chairwoman, SEC (May 20, 2011) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-315.pdf>.

<sup>199</sup> *Id.* at 3.

from nonprivileged information.<sup>200</sup> Thus, the Second Circuit's concern about attorneys being unprotected is also unfounded because attorneys are already excluded from whistleblower awards under SEC regulations.

## 2. Reading Subsection (iii) as a Judicially-Implied Exception Is Improper

Courts may not create exceptions to a statute if a plain provision of the statute does not contain one.<sup>201</sup> Moreover, when a statute contains exceptions, courts do not have authority to create others,<sup>202</sup> even if the absence of an exception within the statute may produce harsh results.<sup>203</sup>

The SEC's structuralist choices regarding categorical exceptions<sup>204</sup> support the result that the antiretaliation provision is not an appropriate location for an exception to a statutory definition located in a different section of the Dodd-Frank Whistleblower Provisions. Because the SEC chose to exclude certain categories of individuals by creating regulations concerning the definition of "independent knowledge,"<sup>205</sup> the SEC impliedly admitted that the definition section, and not the antiretaliation provision, is the appropriate section to find exceptions to the whistleblower definition.

Even if the antiretaliation provision was an appropriate location for an exception to the whistleblower definition, the text of the antiretaliation provision is not styled as an exception. Subsection (iii) is not grammatically or structurally different from subsections (i) and (ii).<sup>206</sup> As one court noted, all subsection (iii) does is provide disclosure protections for individuals in addition to the protection triggered by the first disclosure to the Commission.<sup>207</sup>

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<sup>200</sup> See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34314–15 (June 13, 2011) (codified at 17 C.F.R. § 240.21F-4(b)(4)).

<sup>201</sup> *Lessee of French v. Spencer*, 62 U.S. 228, 238 (1858).

<sup>202</sup> *United States v. Johnson*, 529 U.S. 53, 58 (2000).

<sup>203</sup> See *supra* note 151 and accompanying text.

<sup>204</sup> See *supra* notes 188–197 and accompanying text.

<sup>205</sup> See *supra* notes 188–197 and accompanying text.

<sup>206</sup> See generally 15 U.S.C. § 78u-6(h)(1)(A) (2012).

<sup>207</sup> See *Verfueth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 645 (E.D. Wis. 2014).

### 3. Legislative History Indicates That Congress Wanted Whistleblowers To Disclose to the SEC

Courts rely on the fact that Congress added subsection (iii) at the eleventh hour to support the conclusion that Congress could not have intended subsection (iii) to be such a narrow exception.<sup>208</sup> But such courts ignore the specific statements of the House and Senate reports, both of which indicate that Congress's primary goal was to persuade potential whistleblowers to disclose to the SEC.<sup>209</sup> This is far more concrete evidence than inferential "doubt[s]" about what was going on in the heads of individual 'conferees' during the legislative process."<sup>210</sup>

#### B. Implications

This plain reading of the statute has practical implications for real world behavior. This Section addresses those implications for three distinct groups: (1) potential whistleblowers; (2) employers; and (3) the SEC.

First, due to the split of authority between the Second and Fifth Circuits, potential whistleblowers will likely begin reporting directly to the SEC in order to qualify for antiretaliation protection. This presents two likely future scenarios: (1) potential whistleblowers will report internally and to the SEC simultaneously, or (2) potential whistleblowers will report directly to the SEC and not report internally at all. While this appears to give incomplete protection to whistleblowers who only report internally, recall that one of the purposes of the Dodd-Frank Act was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system . . . ."<sup>211</sup> Whistleblowers are a means to achieving financial stability because whistleblowers report

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<sup>208</sup> See, e.g., *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

<sup>209</sup> Both the House and Senate reports indicate that Congress's intent was to increase the flow of information to the SEC. See *supra* notes 48–49 and accompanying text.

<sup>210</sup> *Berman*, 801 F.3d at 160 (Jacobs, J., dissenting) (citing to majority language at 155).

<sup>211</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

hidden securities fraud based on firsthand knowledge of facts that would not ordinarily be available to regulators.<sup>212</sup> This reading does not leave potential whistleblowers without recourse; they still have a cause of action under SOX, which protects internal disclosures.<sup>213</sup>

Second, employers may be alarmed that their internal compliance policies are futile. However, there is still a strong incentive to report internally because Dodd-Frank whistleblower awards are higher if the whistleblower reports internally.<sup>214</sup> Also, after research, the SEC concluded that most whistleblowers who report internally are motivated by nonmonetary reasons, usually a sense of loyalty to the employer or of social welfare,<sup>215</sup> which means that those who already report internally will continue to do so. If employers are still concerned about preserving the status quo of their compliance systems, they should petition the SEC to have the SEC revise its rules to require simultaneous reporting, which would be consistent with Congress's explicit requirement that an individual report to the SEC to qualify as a whistleblower.<sup>216</sup>

The SEC may have three concerns with this reading: (1) that the agency might be overwhelmed with frivolous complaints; (2) that the statute will not sufficiently protect potential

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<sup>212</sup> See Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting,"* 45 CONN. L. REV. 483, 519 (2012).

<sup>213</sup> See 18 U.S.C. § 1514A(a) (2012); see also discussion *supra* Section I.A.

<sup>214</sup> See 17 C.F.R. § 240.21F-6(a)(4) (2011).

<sup>215</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34360, n.453 (June 13, 2011) (codified at 17 C.F.R. § 240.21F-4(b)(4)).

<sup>216</sup> During the comment period on the proposed rules, many companies and organizations suggested using internal compliance programs simultaneously with SEC reporting or before reporting to the SEC to handle the alleged violation internally. See e.g., *Hearing on Legis. Proposals To Address the Negative Consequences of the Dodd Frank Whistleblower Provisions Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters.*, 112th Cong. (2011) (statement of Ken Daly, President and CEO, NACD), <https://www.sec.gov/comments/s7-33-10/s73310-312.pdf>; Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from Robert A. Long, Covington & Burling LLP, to Elizabeth M. Murphy, Sec'y, SEC (February 18, 2011) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-283.pdf>; Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 from Neila B. Radin, Chair, Soc'y of Corporate Sec'ys & Governance Prof'ls, to Elizabeth M. Murphey, SEC (Dec. 17, 2010) (on file with SEC), <https://www.sec.gov/comments/s7-33-10/s73310-230.pdf>; Ass'n of Bank Dirs. Comment Letter, *supra* note 58.

whistleblowers that report to internal compliance programs; and (3) that the statute will not sufficiently protect potential whistleblowers who report to federal law enforcement agencies or self-regulatory organizations (“SROs”). The first issue has already been resolved by the SEC Rule 21F-2(a)(2) which requires that there be a possible violation,<sup>217</sup> coupled with a requirement that a potential whistleblower make the disclosures subject to the penalty of perjury.<sup>218</sup> By enforcing these requirements, the SEC can ensure that it continues to receive non-frivolous complaints. For example, in 2014, the SEC permanently disqualified an individual from any future award because the individual filed 196 separate administrative actions using false information and baseless claims.<sup>219</sup>

To address the second issue, the SEC should amend its rules to require simultaneous internal disclosure and disclosure to the SEC.<sup>220</sup> Several organizations suggested this approach during the comment period,<sup>221</sup> but the SEC rejected it.<sup>222</sup> The SEC should reconsider this proposal as a means of protecting potential whistleblowers that report to internal compliance programs.

Last, despite its rhetoric, discouraging reports to federal law enforcement agencies<sup>223</sup> is a nonissue for potential Dodd-Frank whistleblowers. The SEC has offered no evidence supporting its assertion that this is a significant issue. In its amicus briefs, the SEC asserts that this is an issue, and uses the Federal Bureau of Investigation (the “FBI”) as an example, but offers no information on how often whistleblowers report to law

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<sup>217</sup> See 17 C.F.R. § 240.21F-2(a)(1) (2011).

<sup>218</sup> See *id.* § 240.21F-9.

<sup>219</sup> 2014 ANNUAL REPORT, *supra* note 3, at 14–15.

<sup>220</sup> The author suggests this course of action because it is unlikely that the ideal result—congressional clarification—will take place because of current congressional gridlock and inactivity. See Drew Desilver, *In Late Spurt of Activity, Congress Avoids ‘Least Productive’ Title*, PEW RESEARCH CENTER (Dec. 29, 2014), <http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title>.

<sup>221</sup> See *supra* note 199 and accompanying text.

<sup>222</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34361 (June 13, 2011) (codified at 17 C.F.R. § 240.21F-4(b)(4)).

<sup>223</sup> The SEC concedes that reports to state attorneys general would never qualify as “to the Commission” under subsection (iii). SEC 2d Cir. Amicus Brief, *supra* note 64, at n.27; Brief for SEC as Amicus Curiae Supporting Appellant at 15 n.28, *Verble v. Morgan Stanley Smith Barney LLC*, No. 15-06397, 2016 WL 492224 (6th Cir. Feb. 4, 2016) [hereinafter SEC 6th Cir. Amicus Brief].

enforcement agencies rather than reporting to the SEC.<sup>224</sup> In its 2015 report to Congress, the Office of the Whistleblower provided detailed information about how many tips are given to the SEC, where those tips originate from geographically, and what types of allegations are made.<sup>225</sup> Noticeably, however, the report had no information on how many tips were referred to the SEC by federal law enforcement agencies.<sup>226</sup> In its *Securities Fraud Awareness & Prevention Tips* sheet, the FBI advises investors to file a complaint with the SEC.<sup>227</sup> In fact, the FBI does not even list itself on its own list of who to contact and, instead, merely states that a whistleblower could file a complaint with “a law enforcement agency.”<sup>228</sup> Therefore, the SEC’s concern about discouraging reports to federal law enforcement agencies is unfounded.

For similar reasons, discouraging reports to self-regulatory organizations (“SROs”) is an unfounded issue for potential Dodd-Frank whistleblowers. Again, the Office of the Whistleblower provided no information in its 2015 report on how many referrals it receives from SROs.<sup>229</sup> Other sources provide only imprecise figures. For example, the Financial Industry Regulatory Authority (“FINRA”) referred approximately 700 cases to the SEC for investigation, but it did not provide a detailed breakdown based on types of claim.<sup>230</sup> FINRA did provide some examples of claims that were referred to the SEC; however,

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<sup>224</sup> See SEC 2d Cir Amicus Brief, *supra* note 64; SEC 6th Cir. Amicus Brief, *supra* note 223.

<sup>225</sup> SEC, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 21–24, 28–30, <https://www.sec.gov/whistleblower/reports/pubs/annual-reports/owb-annual-report-2015.pdf> [hereinafter 2015 ANNUAL REPORT].

<sup>226</sup> See generally *id.*

<sup>227</sup> *Securities Fraud Awareness & Prevention Tips*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/stats-services/publications/securities-fraud> (last visited Nov. 7, 2016).

<sup>228</sup> See *id.*

<sup>229</sup> See 2015 ANNUAL REPORT, *supra* note 225.

<sup>230</sup> *Office of Fraud Detection and Market Intelligence*, FIN. INDUSTRY REG. AUTHORITY, <http://www.finra.org/industry/ofdmi> [hereinafter *OFDMI*] (last visited Nov. 7, 2016). This Note only discusses reports made to FINRA because both the New York Stock Exchange and NASDAQ direct complaints and inquiries to FINRA. See *Complaints and Inquiries*, N.Y. STOCK EXCHANGE, <https://www.nyse.com/regulation/complaints-and-inquiries> (last visited Nov. 7, 2016); *Contact NASDAQ*, NASDAQ, <http://www.nasdaq.com/help/contact-information.aspx> (last visited Nov. 7, 2016).



“Office of the Whistleblower” is last on the list provided.<sup>231</sup> Moreover, it is reasonable to assume that whistleblowers—insiders of a company and experienced professionals in the securities industry—are aware that possible securities law violations should be reported directly to the SEC, which is “the primary overseer and regulator of the U.S. securities markets.”<sup>232</sup> Therefore, any implications of this plain, unambiguous reading of the Dodd-Frank Whistleblower Provisions are without merit or insignificant.

#### CONCLUSION

A plain, unambiguous reading of the Dodd-Frank whistleblower provision is correct, and courts should give effect to Congress’s intent. In light of the growing uncertainty as a result of the split of authority among circuit courts, concerned employers should petition the SEC to amend its regulations, and the SEC should amend its regulations. Unless Congress or the Supreme Court weigh in—which is unlikely<sup>233</sup>—the burden remains with the SEC to amend its unsound regulations to protect only those individuals who report to the SEC or to require simultaneous disclosure. In this way, everyone reports to the SEC, and everyone is protected.

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<sup>231</sup> See *OFDMI*, *supra* note 230.

<sup>232</sup> *What We Do*, SEC, <https://www.sec.gov/about/whatwedo.shtml> (last visited Nov. 7, 2016).

<sup>233</sup> See *Desilver*, *supra* note 220.