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Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank

I. Introduction: A Crisis and a Response

The financial crisis that began in 2008 was the worst since the Great Depression.¹ Unemployment skyrocketed—more than doubling from 5% in December 2007 to 10% in October 2009.² The stock market tumbled, with the S&P 500 falling from over 1500 points in October 2007 to below 700 points by February 2009.³ The crash destroyed as much as 45% of the world's wealth within a year and a half.⁴ Making matters worse, the recovery from the crisis was the slowest of any recession in the past forty years: forty-seven months into the recession, employment remained 4% lower than when the crisis began.⁵

In the face of this crisis, Congress responded swiftly to prevent a future one. Passed by Congress in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) enacts several sweeping changes to the financial industry.⁶ The law's stated purposes are to “promote the financial stability of the United States by improving accountability and transparency in the financial system” and “to protect consumers from abusive financial services practices.”⁷ Among its many provisions are incentives and protections for whistleblowers. Dodd-Frank increases incentives for whistleblowers through a bounty system that rewards

1. Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG (Aug. 1, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI>.

2. Bureau of Labor Statistics, *The Recession of 2007-2009*, BLS SPOTLIGHT ON STATISTICS 1, 2 (Feb. 2012), http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

3. Caroline Valetkevitch, *Key Dates and Milestones in the S&P 500's History*, REUTERS (May 6, 2013), <http://www.reuters.com/article/2013/05/06/us-usa-stocks-sp-time-line-idUSBRE9450WL20130506>.

4. Megan Davies & Walden Siew, *45 Percent of World's Wealth Destroyed: Blackstone CEO*, REUTERS (Mar. 10, 2009), <http://www.reuters.com/article/2009/03/10/us-blackstone-idUSTRE52966Z20090310>.

5. *The Recession of 2007-2009*, *supra* note 2, at 7.

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

7. *Id.*

whistleblower tips and provides protection for whistleblowers by shielding them from employer retaliation.⁸

The Fifth Circuit's decision in *Asadi v. GE Energy*, however, dramatically and incorrectly decreased Dodd-Frank's anti-retaliation protections for whistleblowers who report potential violations to their employer instead of to the Securities and Exchange Commission (SEC).⁹ This decision ignores the text of the statute, its legislative history, and the consequences of limiting Dodd-Frank's anti-retaliation protections to external whistleblowers. In fact, whistleblowers play a critical role in the early detection of fraud.¹⁰

Part II of this Note analyzes the anti-retaliation provisions of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and Dodd-Frank, as well as their related administrative rules. Part III examines the facts, holding, and rationale of the Fifth Circuit's decision. Part IV explores the reasons why the Fifth Circuit's decision was incorrect (1) as a matter of statutory interpretation, (2) in light of the purpose of Dodd-Frank, (3) because of the benefits of internal reporting, and (4) for failing to defer to the SEC. Part IV advances a novel proposal that would allow the SEC to circumvent the Fifth Circuit's opinion by administrative rule and ensure the protection of internal whistleblowers.

II. Law Before Asadi v. GE Energy: Broad Protection for Internal Whistleblowers Under Both Sarbanes-Oxley and Dodd-Frank

Although the whistleblower provisions of Dodd-Frank are similar to those of Sarbanes-Oxley, they differ in significant ways. For example, Dodd-Frank contains an explicit definition of the term whistleblower, whereas Sarbanes-Oxley merely specifies protected activities.¹¹ Dodd-Frank also expands whistleblower protection and incentives by providing a longer statute of limitations,¹² permitting direct access to federal court,¹³ and implementing a bounty program.¹⁴ Perhaps most significantly, whistleblowers are protected when they report violations that would be

8. 15 U.S.C. § 78u-6(b), (h) (2012).

9. *See Asadi v. GE Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013).

10. *See infra* Part IV.C.

11. *Compare* 15 U.S.C. § 78u-6(a)(6), *with* 18 U.S.C. § 1514A(a).

12. *Compare* 15 U.S.C. § 78u-6(h)(1)(B)(iii), *with* 18 U.S.C. § 1514A(b)(2)(C).

13. 15 U.S.C. § 78u-6(h)(1)(B)(i).

14. *Id.* § 78u-6(b).

similarly protected under Sarbanes-Oxley.¹⁵ Therefore, the two statutes are inexorably linked. Their similarities and differences are discussed below.

A. Sarbanes-Oxley Whistleblower Provisions: Tell Your Boss

Sarbanes-Oxley provides broad whistleblower protections to employees of publicly traded companies.¹⁶ Sarbanes-Oxley does not contain an explicit definition of the term whistleblower; instead, the statute describes the types of employee activities that are protected against employer retaliation.¹⁷ Specifically, Sarbanes-Oxley prohibits employers from discharging, demoting, suspending, threatening, harassing, or discriminating against an employee who provides information about any act that the employee “reasonably believes constitutes a violation of . . . [statutes prohibiting mail fraud; wire, radio, or television fraud; or commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.”¹⁸ To benefit from these anti-retaliation provisions, the employee can report the foregoing violations to one of three entities: (1) the Occupational Safety and Health Administration (OSHA); (2) Congress; or (3) “a person with supervisory authority over the employee.”¹⁹ In other words, under Sarbanes-Oxley, employee-whistleblowers may report potential violations externally, to a regulatory agency or Congress, or internally, to a supervisor.

If an employee-whistleblower shows that she suffered retaliation at the hands of her employer, Sarbanes-Oxley provides the employee with several remedies. First, the employee is entitled to reinstatement to her previous job with the same level of seniority as she had prior to the retaliation.²⁰ Second, the employee is entitled to back pay with interest.²¹ Third, the employee can receive compensation for litigation costs, witness fees, and attorneys’ fees.²² Notably, however, the Sarbanes-Oxley whistleblower provisions only protect employees from retaliation, and they do not provide any incentive for employees to report potential violations.²³

15. *Id.* § 78u-6(h)(1)(A)(iii).

16. 18 U.S.C. § 1514A(a).

17. *See id.*

18. *Id.* § 1514A(a)(1).

19. *Id.* § 1514A(a)(1)(A)-(C); 29 C.F.R. § 1980.103(a)-(c) (2014).

20. 18 U.S.C. § 1514A(c)(2)(A).

21. *Id.* § 1514A(c)(2)(B).

22. *Id.* § 1514A(c)(2)(C).

23. *See id.* § 1514A.

In order to access these anti-retaliation remedies, the employee must first prevail in an enforcement action against her employer, which requires following the detailed process of administrative hurdles set forth below. The employee can bring a claim in federal court only if the Department of Labor (DOL) does not issue a final decision within 180 days of the filing of the complaint.²⁴ Therefore, an employee must first exhaust all administrative remedies before seeking relief in federal court. As discussed below, Dodd-Frank allows an employee-whistleblower to skip these administrative hurdles and file a claim directly in federal court.²⁵

Initially, an employee who believes that she has been retaliated against must file a complaint with OSHA, the agency charged with enforcement of Sarbanes-Oxley.²⁶ OSHA will not dismiss the complaint so long as the employee meets the low burden of making a prima facie case of retaliation, showing that (1) “[t]he employee engaged in a protected activity;” (2) the employer “knew or suspected that the employee engaged in the protected activity,” (3) “[t]he employee suffered an adverse action,” and (4) “[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.”²⁷ Once the employee meets this low burden, OSHA will not dismiss the complaint unless the employer can show by *clear and convincing evidence* that it would have undertaken the adverse action regardless of the protected activity.²⁸ If the employee makes a prima facie case and the employer cannot meet its burden of proof, OSHA proceeds with an investigation.²⁹ If OSHA finds reasonable cause to believe that the employee was retaliated against, it issues relief.³⁰ This relief can be reviewed by an administrative law judge (ALJ) and then again by the Administrative Review Board (ARB) of the DOL upon party request.³¹

Critically, under Sarbanes-Oxley the statute of limitations to file a claim with OSHA is relatively short. The employee must file a claim within 180 days of the date of the reported violation (or within 180 days after the date on which the employee became aware of the violation) or her retaliation

24. *Id.* § 1514A(b)(1)(B).

25. *See infra* Part II.B.1.

26. 29 C.F.R. §§ 1980.103(a)-(c).

27. *Id.* § 1980.104(e)(2).

28. *Id.* § 1980.104(e)(4).

29. *Id.* § 1980.104(e)(5).

30. *Id.* § 1980.105(a)(1).

31. *Id.* §§ 1980.107(b), 1980.110(a).

claim is forever barred.³² In contrast, Dodd-Frank contains a significantly longer statute of limitations.³³

B. Dodd-Frank Whistleblower Provisions: Don't Tell Your Boss?

1. Statutory Language: Confusion and Conflict

Dodd-Frank undoubtedly expands both the incentives for whistleblowers to report violations and the protections afforded to certain whistleblowers against anti-retaliation. Unlike Sarbanes-Oxley, Dodd-Frank contains a bounty reward program designed to incentivize employees to report potential violations.³⁴ Specifically, a whistleblower who “voluntarily provide[s] original information . . . that [leads] to the successful enforcement of the covered judicial or administrative action” is eligible to receive an award of between 10% and 30% “of what has been collected of the monetary sanctions imposed in the action or related actions.”³⁵ Therefore, Dodd-Frank offers an affirmative award to whistleblowers whose information leads to successful enforcement actions, rather than merely providing relief to employees that suffer retaliation.

Dodd-Frank also provides more extensive anti-retaliation provisions than Sarbanes-Oxley in several ways. First, like Sarbanes-Oxley, it requires reinstatement with the same seniority status and compensation for litigation costs, including witness fees and attorneys’ fees.³⁶ But it expands on these remedies by providing twice the amount of back pay that a whistleblower would receive under Sarbanes-Oxley.³⁷ Second, Dodd-Frank eliminates the administrative exhaustion requirement, allowing employees to bring their claims directly to federal court.³⁸ Third, the statute of limitations is six years after the date of the reported violation or three years after the date when the violation was known or should have been known to the employee; both of which are significantly longer than the 180-day statute of limitations under Sarbanes-Oxley.³⁹

The debate, therefore, is not whether the whistleblower provisions of Dodd-Frank are more whistleblower-friendly than those of Sarbanes-Oxley. Instead, it is over who qualifies for the whistleblower protections of Dodd-

32. 18 U.S.C. § 1514A(b)(2)(D) (2012).

33. *See infra* Part II.B.1.

34. 15 U.S.C. § 78u-6(b) (2012).

35. *Id.* § 78u-6(b)(1)(A)-(B).

36. *Id.* § 78u-6(h)(1)(C)(i), (iii).

37. *Id.* § 78u-6(h)(1)(C)(ii).

38. *Id.* § 78u-6(h)(1)(B)(i).

39. *Id.* § 78u-6(h)(1)(B)(iii)(I)(aa)-(bb).

Frank—specifically, who is included in Dodd-Frank’s definition of whistleblower? Unlike Sarbanes-Oxley, Dodd-Frank contains an explicit definition of the term whistleblower. Dodd-Frank broadly defines a whistleblower 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.”⁴⁰ Dodd-Frank then describes the whistleblower activities that are protected against retaliation, providing that “[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any manner discriminate against, a whistleblower” who (1) “provid[es] information to the Commission;” (2) “initiat[es], testif[ies] in, or assist[s] in any investigation or judicial or administrative action of the commission;” or, most significantly, (3) “mak[es] disclosures that are required or protected *under the Sarbanes-Oxley Act of 2002* . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.”⁴¹

Two conclusions are clear from the statutory language. First, the general definition of whistleblower requires that the employee report the suspected securities violation directly to the SEC. This means that in order to benefit from the Dodd-Frank bounty program, the whistleblower-employee must report the violations directly to the SEC, rather than to her employer. Second, and the focus of this Note, the scope of the employees who qualify as whistleblowers *for the purposes of the anti-retaliation* provisions is not immediately apparent. While the general definition of whistleblower requires external reporting to the SEC, the anti-retaliation provisions also provide protections to whistleblowers who make disclosures that are protected under Sarbanes-Oxley, which specifically provides protection for whistleblowers of public companies who report securities violations internally.

2. Rules Promulgated by the SEC: (Attempted) Clarification

The SEC attempted to clarify this ambiguity by promulgating a rule explaining the definition of whistleblower and the scope of the Dodd-Frank anti-retaliation provisions.⁴² According to the SEC, an employee generally is a whistleblower if she provides information about a potential violation directly to the SEC “[o]nline, through the Commission’s Web site” or “[b]y mailing or faxing a Form TCR (Tip, Complaint or Referral).”⁴³ Therefore,

40. *Id.* § 78u-6(a)(6).

41. *Id.* § 78u-6(h)(1)(A)(i)-(iii) (emphasis added).

42. *See* 17 C.F.R. § 240.21F1-2 (2014).

43. *Id.* § 240.21F-9(a)(1)-(2).

the SEC's general definition of whistleblower requires external reporting to the SEC.

The SEC, however, refines the whistleblower definition for the purposes of Dodd-Frank's anti-retaliation provisions.⁴⁴ Under the SEC's definition, an employee is a whistleblower if she "possess[es] a reasonable belief that the information . . . [she is] providing relates to a possible securities law violation" and "provide[s] that information in a manner described in [the anti-retaliation provisions of Dodd-Frank]."⁴⁵ Again, the third category of Dodd-Frank's anti-retaliation provisions shield whistleblowers who report violations that are protected under the anti-retaliation provisions of Sarbanes-Oxley, which in turn protects whistleblowers that report violations internally.⁴⁶ As the SEC explained in its commentary, "the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, *and the third category includes individuals who report to persons or governmental authorities other than the Commission.*"⁴⁷ The SEC, therefore, interprets the Dodd-Frank anti-retaliation provisions to apply to employees who internally report potential securities violations.

3. District Court Opinions: Go Ahead, Tell Your Boss

Prior to *Asadi*, every district court to consider the issue agreed with the SEC and determined that the anti-retaliation provisions of Dodd-Frank applied to employees of public companies who internally reported violations of securities laws pursuant to Sarbanes-Oxley.⁴⁸

The district court in *Egan v. TradingScreen, Inc.* noted that Dodd-Frank apparently conflicts with itself by requiring whistleblowers to report violations directly to the SEC but also providing anti-retaliation protection to whistleblowers that make disclosures protected under Sarbanes-Oxley.⁴⁹ The court ultimately held that "[t]he contradictory provisions of the Dodd-Frank Act are best harmonized by reading . . . [the anti-retaliation provision's] protection of certain whistleblower disclosures not requiring

44. *See id.* § 240.21F-2(b).

45. *Id.* § 240.21F-2(b)(1)(i)-(ii).

46. 15 U.S.C. § 78u-6(h)(1)(A)(iii); 18 U.S.C. § 1514A(a)(1)(C) (2012).

47. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34304 (2011) (to be codified at 17 C.F.R. pts 240, 249) (emphasis added).

48. *See 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, 994 (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).

49. 2011 WL 1672066, at *4.

reporting to the SEC as a narrow exception to . . . [the general] definition of a whistleblower as one who reports to the SEC.”⁵⁰

The district court in *Kramer v. Trans-Lux Corp.* observed that it was not “unambiguously clear” that the Dodd-Frank anti-retaliation provisions only apply to individuals who report directly to the Commission.⁵¹ Such an interpretation “would dramatically narrow . . . the protections available to potential whistleblowers” because “an individual would [either have to] submit the information online, through the Commission’s website, or by mailing or faxing a [f]orm Mailing a regular letter is insufficient.”⁵² This reading, the court concluded, “seems inconsistent with the goal of the Dodd-Frank Act,” which is to “‘improve the accountability and transparency of the financial system,’ and create ‘new incentives and protections for whistleblowers.’”⁵³

Because the statutory language is ambiguous, the *Kramer* court then turned to whether the SEC’s rule interpreting the statute was a permissible construction.⁵⁴ The defendant-employer in the case argued that the SEC’s rule is impermissible because it allows plaintiffs to pursue claims under Dodd-Frank’s anti-retaliation provisions that they would otherwise have to pursue under Sarbanes-Oxley, which has a shorter statute of limitations and requires the exhaustion of administrative remedies.⁵⁵ The court, however, rejected this argument and accepted the SEC’s interpretation of the statute because “the Dodd-Frank Act appears to have been intended to expand upon the protections of Sarbanes-Oxley, and thus the claimed problem is no problem at all.”⁵⁶

50. *Id.* at *5. The *Egan* decision has strongly influenced later district courts. For example, a second district court relied on *Egan* to similarly determine that “the third category does not require that the whistleblower have interacted directly with the SEC—only that the disclosure, to whomever made, was required or protected by certain laws within the SEC’s jurisdiction.” *Nollner*, 852 F. Supp. 2d at 993 (citations omitted) (internal quotation marks omitted). “Accordingly, the plain terms of anti-retaliation category (iii), which do *not* require reporting to the SEC, appear to conflict with the DFA definition of whistleblower.” *Id.* at 944 n.9. “However, both *Egan* . . . and the SEC have found that category (iii) provides a narrow exception to the definition of a whistleblower as someone who reports only ‘to the Commission.’” *Id.*

51. 2012 WL 4444820, at *4.

52. *Id.*

53. *Id.* (quoting *Asadi v. GE Energy (USA), L.L.C.*, No. 4:12-345, 2012 WL 2522599, at *3 (S.D. Tex. June 28, 2012)).

54. *Id.* at *4-5.

55. *Id.* at *5.

56. *Id.*

Ultimately, every district court prior to *Asadi* held that Dodd-Frank's anti-retaliation provisions applied to internal whistleblowers.⁵⁷ The Fifth Circuit, however, disagreed with these interpretations.

III. Asadi v. GE Energy: The Fifth Circuit's Narrow Approach to the Protection of Internal Whistleblowers

A. Facts

In 2006, GE Energy appointed Mr. Asadi as its Iraq Country Executive and relocated him to Jordan.⁵⁸ At a 2010 meeting, Iraqi officials told Asadi that they believed GE Energy had hired a woman closely associated with a senior Iraqi official for the purpose of currying favor for a lucrative joint venture agreement.⁵⁹ Asadi, upon hearing these allegations, became concerned that GE Energy was violating the Foreign Corrupt Practices Act and reported the potential violations to both his immediate supervisor and the GE Energy ombudsperson in the region.⁶⁰ Shortly after Asadi's internal reports, he was issued a negative performance review, and GE energy pressured him to step down from his current position and accept a job with less responsibility.⁶¹ Asadi refused to step down, and GE Energy fired him approximately one year after his internal reports.⁶² Asadi filed a complaint in federal court asserting that GE Energy violated Dodd-Frank's whistleblower anti-retaliation provisions by terminating him subsequent to his internal report of possible securities violations.⁶³

57. See *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013); *Murray v. UBS Sec., L.L.C.*, No. 12 Civ.5914 (JMF), 2013 WL 2190084, at *3-4, 7 (S.D.N.Y. May 21, 2013); *Kramer*, 2012 WL 4444820, at *4; *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994-95 (2012); *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4-5 (May 4, 2011). Interestingly, district courts outside of the Fifth Circuit continue to interpret the statute this way even after *Asadi*. See *Rosenblum v. Thomson Reuters (Markets) L.L.C.*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013) (“[I]t is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. Thus, the governing statute is ambiguous.”); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45-46 (D. Mass. 2013) (“It is apparent . . . that Congress intended that an employee terminated for reporting Sarbanes-Oxley violations to a supervisor or an outside compliance officer . . . have a private right of action under Dodd-Frank . . .”).

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

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

B. Procedural History, Issue, and Holding

At the district court level, GE Energy moved to dismiss Asadi's anti-retaliation claims for two reasons: (1) Asadi did not qualify as a whistleblower under Dodd-Frank, and (2) Dodd-Frank's whistleblower provisions did not apply to whistleblowing activity occurring outside of the United States (extraterritorial).⁶⁴ The district court did not reach a decision regarding Asadi's status as a whistleblower; it dismissed Asadi's complaint solely on the basis that Dodd-Frank's whistleblower provisions do not apply extraterritorially.⁶⁵

Therefore, on Asadi's appeal, the Fifth Circuit was seemingly presented with two issues: whether Asadi was a whistleblower and whether the whistleblower provisions of Dodd-Frank applied extraterritorially. Curiously, however, the Fifth Circuit chose not to reach a decision on the extraterritoriality issue, the basis of the district court's holding, and instead only considered whether Asadi was a whistleblower under Dodd-Frank.⁶⁶ Therefore, the issue decided by the Fifth Circuit was whether the Dodd-Frank whistleblower anti-retaliation provisions provide a narrow exception to the statutory definition of whistleblower, which ordinarily requires external reporting to the SEC, for employees of public companies who report internally.⁶⁷ The Fifth Circuit concluded that they did not and held that "the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC."⁶⁸

C. Decision: Tell the SEC, Not Your Boss

The Fifth Circuit "start[ed] and end[ed] [its] analysis with the text of the relevant statute."⁶⁹ The court found that the statutory definition of whistleblower requires the individual to report "information relating to a violation of the securities laws to the Commission,"⁷⁰ which, "expressly and unambiguously requires that an individual provide information to the

64. *Id.*

65. *Id.*

66. *See id.* at 622-23 ("With these principles in mind, we turn to the question presented in this appeal. . . . Whether an individual who is not a "whistleblower" under . . . § 78u-6(a)(6) may . . . seek relief under the whistleblower protection provision." (emphasis added)).

67. *Id.* at 623.

68. *Id.*

69. *Id.*

70. *Id.* (quoting 15 U.S.C. § 78u-6(a)(6) (2012)).

SEC” in order to qualify as a whistleblower under the statute.⁷¹ In other words, to qualify as a whistleblower under Dodd-Frank, an individual must report violations to the SEC.⁷²

The court then turned to Asadi’s assertion that, while he is not a whistleblower under the general definition, he is protected under the third category of the whistleblower anti-retaliation provisions.⁷³ According to Asadi, this third category shields whistleblowers who report securities violations internally because it protects disclosures that are similarly protected under Sarbanes-Oxley.⁷⁴ The Fifth Circuit rejected Asadi’s assertion outright by reiterating the fact that “[u]nder Dodd-Frank’s plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.”⁷⁵ The categories listed in the anti-retaliation provisions only represent the protected activities of individuals that qualify as whistleblowers.⁷⁶ In other words, according to the court, the categories of protected activities cannot change the definition of whistleblower to include individuals that did not provide information directly to the SEC.⁷⁷

Therefore, under the Fifth Circuit’s interpretation, the statute explains two things: “(1) who is protected” and “(2) what actions by protected individuals constitute protected activity.”⁷⁸ The answer to the first question was that only whistleblowers are protected under the anti-retaliation provisions.⁷⁹ The answer to the second question was that any of the listed activities are protected, but only when undertaken by a whistleblower.⁸⁰ The court noted that when the text of the statute is interpreted in this way, the meaning of the third category of protected activity is plain and unambiguous.⁸¹

71. *Id.*

72. *Id.* In arriving at this conclusion, the court relies on the proposition that when “a definitional section says that a word ‘means’ something, the clear import is that this is its *only* meaning.” *Id.* (quoting ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 226 (1st ed. 2012) [hereinafter *READING LAW*]).

73. *Id.* at 624.

74. *See id.* (citing 18 U.S.C. § 78u-6(h)(1)(A)(iii)).

75. *Id.* at 625.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

The court then rejected Asadi's assertion that, while the language used in the categories of protected activity is not ambiguous, it conflicts with the definition of whistleblower.⁸² Asadi's theory rested on the fact that an individual can take protected actions that fall within the third category, such as internally reporting a securities violation, and still fail to qualify as a whistleblower.⁸³ The court summarily dismissed this argument by noting that Congress placed the three categories of protected activities immediately "follow[ing] the phrase '[n]o employer may discharge . . . a whistleblower . . . because of any lawful act done by the whistleblower,'" and concluded that it was significant that Congress chose to use the term whistleblower rather than "employee" or "individual."⁸⁴ Had Congress used terms other than whistleblower, then Asadi's construction would be valid because it would clearly show that Congress intended persons other than statutorily-defined whistleblowers to be protected from retaliation.⁸⁵ Yet, because Congress used the term "whistleblower," the court must give effect to the language of the statute.⁸⁶

Next, the court addressed Asadi's argument that limiting the scope of the anti-retaliation provisions to individuals that report violations externally to the SEC renders the third category of protected activity superfluous.⁸⁷ In response, the court gave an example of a limited fact-pattern under which the third category would not be superfluous.⁸⁸ According to the court, the third category of protected activity would protect an employee that simultaneously reported a securities law violation to her CEO and to the SEC.⁸⁹ If the CEO, who was unaware of the employee's disclosure to the SEC, fired the employee because of the internal disclosure, then the employee could avail herself of the third category of protected activity.⁹⁰ Clearly, the employee would be a whistleblower under Dodd-Frank because she reported a securities violation to the SEC.⁹¹ The employee, however, would be unable to prove that she was retaliated against because of her

82. *Id.* at 626-27.

83. *Id.* at 626.

84. *Id.* (quoting 15 U.S.C. § 78u-6(h)(1)(A) (2012)).

85. *Id.*

86. *Id.* at 627.

87. *Id.*

88. *Id.*

89. *Id.* The court's logic applies equally to a situation where an employee initially reports a violation to the SEC and then reports internally.

90. *Id.* at 627-28.

91. *See* 15 U.S.C. § 78u-6(a)(6) (2012).

disclosure to the SEC.⁹² Here, the employee could rely upon the third category of protected activity, which protects her internal disclosure by incorporating the protections of Sarbanes-Oxley.⁹³ Therefore, the employee “can state a claim under the Dodd-Frank whistleblower-protection provision because [she] was a ‘whistleblower’ and suffered retaliation based on [her] disclosure to the CEO, which was protected under [Sarbanes-Oxley].”⁹⁴

The court then commented that Asadi’s construction of the statute was problematic for another reason: it “render[ed] the [Sarbanes-Oxley] anti-retaliation provision, for practical purposes, moot.”⁹⁵ Specifically, Asadi’s construction would allow any individual that makes a disclosure protected under Sarbanes-Oxley to bring a claim under the Dodd-Frank anti-retaliation provisions on the basis that the disclosure was protected by the third category of the Dodd-Frank anti-retaliation provisions.⁹⁶ In fact, according to the court, it would be unlikely that an individual would ever bring a claim under Sarbanes-Oxley rather than Dodd-Frank because Dodd-Frank provides greater monetary damages, direct access to federal court, and a significantly longer statute of limitations.⁹⁷

Finally, the court concluded its analysis by asserting that the SEC’s definition of whistleblower should not receive any deference.⁹⁸ Specifically, the SEC’s interpretation is incorrect because it “redefines ‘whistleblower’ more broadly by providing that an individual qualifies as a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in [the anti-retaliation provisions].”⁹⁹ In other words, the regulation violates the plain language of the statute by defining whistleblower more broadly for the anti-retaliation provisions than for the bounty provisions.¹⁰⁰ Because Congress has already unambiguously defined the term whistleblower, the court rejected the SEC’s expansive whistleblower definition.¹⁰¹

92. *See Asadi*, 720 F.3d at 627.

93. *Id.* at 627-28.

94. *Id.* at 628.

95. *Id.*

96. *Id.*

97. *Id.* at 628-29.

98. *Id.* at 629.

99. *Id.*

100. *See id.* at 629-30.

101. *Id.*

Ultimately, the Fifth Circuit rejected Asadi's claim because he did not report directly to the SEC, which the court held was a necessary predicate for Asadi to avail himself of the Dodd-Frank anti-retaliation provisions.¹⁰²

IV. Analysis: Blowing the Whistle on Asadi v. GE Energy

The Fifth Circuit's decision in *Asadi* is incorrect for several reasons. As a matter of statutory construction, the court placed too much weight on the definitional section while ignoring contrary textual indicators. Also, the court ignored the legislative purpose behind Dodd-Frank—promoting financial stability. In fact, internal whistleblowing plays an integral role in early detection of fraud.¹⁰³ Unlike the Fifth Circuit's definition, the SEC's definition of whistleblower maintains the emphasis on internal reporting created by Sarbanes-Oxley.¹⁰⁴ This allows internal whistleblowers to avoid the procedural hurdles that have dampened Sarbanes-Oxley's effectiveness.

A. "Whistleblower" or Whistleblower? The Term's Multiple Meanings

The Fifth Circuit's decision fails as a matter of statutory interpretation because it places too much weight on applying the definition of whistleblower uniformly throughout the statute, despite contrary textual indicators. Also, it renders much of the language contained in the anti-retaliation provisions superfluous. The court was correct in noting that, generally speaking, when a definitional section "says that a word 'means' something, the clear import is that this is its *only* meaning."¹⁰⁵ Yet, while it is "rare that a defined meaning can be replaced with another permissible meaning of the word on the basis of other textual indications," it is "not inconceivable."¹⁰⁶ Definitions are nothing more than a strong indication of a word's meaning, and the definition can be contradicted by other textual indications of meaning.¹⁰⁷ Courts can apply different interpretations to the

102. *Id.*

103. *See infra* Part IV.C.

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

105. *Asadi*, 720 F.3d at 623 (quoting *READING LAW*, *supra* note 72, at 226).

106. *READING LAW*, *supra* note 72, at 228.

107. *Id.*; *see also* *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995) (citation omitted) ("[A] characterization fitting in certain contexts may be unsuitable in others."); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (citation omitted) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. . . . But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.").

same word throughout a statute in order to give the word the meaning that Congress intended.¹⁰⁸

There are clear textual indicators that Congress intended to define whistleblower differently for the purposes of the anti-retaliation provisions. Contrary to the Fifth Circuit's assertions, applying the general definition of whistleblower to the anti-retaliation provisions does in fact render much of the anti-retaliation provision's text superfluous. The surplusage canon holds that every provision of a statute should be given effect, and, "[b]ecause legal drafters should not include words that have no effect, courts [should] avoid a reading that renders some words altogether redundant."¹⁰⁹ Here, the court's application of the general definition of whistleblower to the anti-retaliation provisions violates the surplusage canon and renders much of the statute superfluous in three ways.

First, applying the general definition of whistleblower to the anti-retaliation provisions renders the first protected activity of the anti-retaliation provisions redundant.¹¹⁰ The first category protects "whistleblowers" that "provid[e] information to the Commission."¹¹¹ Therefore, the Fifth Circuit's application of the general definition of whistleblower to this section essentially transforms the meaning of the statute into "an individual who reports violations directly to the SEC is protected when she reports violations to the SEC" or "a whistleblower is protected when she is a whistleblower." This interpretation renders the first category of protected activity redundant because Congress could have merely specified that whistleblowers are protected, which, under the general definition, already protects whistleblowers when they report to the SEC. Congress's decision to specify that whistleblowers are protected *when they report information to the SEC* strongly indicates that the term whistleblower, when used in the anti-retaliation provision, is used in its more ordinary, general sense, and the term is not limited to employees that report securities law violations to the SEC.¹¹²

108. *Atl. Cleaners*, 286 U.S. at 433 ("[T]here is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.").

109. READING LAW, *supra* note 72, at 176.

110. Again, the general definition of whistleblower under Dodd-Frank is "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." 15 U.S.C. § 78u-6(a)(6) (2012).

111. *Id.* § 78u-6(h)(1)(A)(i).

112. For example, the term could merely refer to an employee that reports wrongdoing, whether internally or externally.

Second, the court's interpretation renders the third category of protected activity effectively moot.¹¹³ When it held that the text is not superfluous, the Fifth Circuit invented an implausible fact pattern under which an employee reports a violation of securities laws to both the SEC and her company's management.¹¹⁴ Yet, when this employee reports internally to her company's management, she inexplicably *does not mention the fact that she also reported externally* and is fired solely on the basis of her internal reporting.¹¹⁵ This fact pattern ignores the practical reality that the vast majority of whistleblowers choose to only report internally and *never report externally*.¹¹⁶ In fact, according to 2011 data regarding the behavior of whistleblowers, only 3% of whistleblower reports are initially made externally rather than internally.¹¹⁷ Thus, under the Fifth Circuit's interpretation, the vast majority of whistleblowers who report internally do not receive any protection from anti-retaliation under Dodd-Frank; instead, only the 3% that initially report externally receive protection.

Also, the fact pattern under which employees report violations externally prior to reporting internally ignores the fact that whistleblowers choose to report internally or externally based on different factors, and rarely would these factors lead a whistleblower to report externally prior to reporting internally. The prime reason that employees choose to report internally rather than externally is to report to somebody that the employee knows and trusts, either her direct supervisor or higher management.¹¹⁸ In contrast, employees frequently choose to report externally when they do not trust their managers because they perceive the ethics or overall culture of senior management to be weak.¹¹⁹ Also, employees are more likely to report

113. Specifically, the statute states that whistleblowers are protected when they "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002." 15 U.S.C. § 78u-6(h)(1)(A)(iii).

114. See *Asadi v. GE Energy (USA), L.L.C.*, 720 F.3d 620, 627 (5th Cir. 2013).

115. *Id.*

116. One survey found that in 2011, among employees that report wrongdoing, only 18% eventually report outside of their company. *Inside the Mind of a Whistleblower*, ETHICS RESOURCE CENTER 13 (2012), www.ethics.org/files/us/reportingfinal.pdf. A 2010 survey, examining four years of data, found that 90% of whistleblowers that eventually seek bounty awards initially report violations internally. *Impact of Qui Tam Laws on Internal Compliance: A Report to the Securities Exchange Commission*, NAT'L WHISTLEBLOWERS CENTER 5 (Dec. 17, 2010), <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreporttosecfinal.pdf>.

117. *Inside the Mind of a Whistleblower*, *supra* note 116, at 13.

118. *Id.* at 11.

119. *Id.* at 13.

externally as the severity of the violation increases.¹²⁰ Given these motivations, it seems highly improbable that an employee who chooses to report externally because of a perceived lack of trust or ethics in a company's top management would then choose to report internally to those that she considers untrustworthy and unethical. Also, if an employee reports externally because of the perceived severity of an issue, it similarly makes little sense that, after the employee has taken the drastic step of externally reporting in order to address a problem of great severity, she would then choose to take the less drastic step of reporting internally.

Third, the conflict between the general definition of whistleblower and the third category of protected activity is greater than the Fifth Circuit acknowledges. The Fifth Circuit focuses solely on the potential conflict between *who* can report under the anti-retaliation provisions and concludes that only those who report to the SEC can benefit from the anti-retaliation protections.¹²¹ Yet, the third category of protected activity under the anti-retaliation provisions conflicts with the general definition of whistleblower for a second reason. Specifically, the two provisions conflict regarding *what types* of disclosures are protected. Dodd-Frank's general definition of whistleblower requires an individual to report "information relating to a violation of the securities laws."¹²² In contrast, Dodd-Frank's third category of whistleblower activity shields disclosures that are similarly protected under Sarbanes-Oxley, and the disclosures protected under Sarbanes-Oxley are significantly broader than just information relating to a violation of the securities laws.¹²³ Specifically, Sarbanes-Oxley protects disclosures that relate to mail fraud, wire fraud, bank fraud, and commodities fraud, as well as those relating to "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."¹²⁴

Therefore, the Fifth Circuit's application of the general definition of whistleblower to the third category of the anti-retaliation provisions eviscerates the Sarbanes-Oxley protection of disclosures relating to matters other than "violation[s] of the securities laws," and renders the Dodd-Frank protection of "disclosures that are required or protected under the Sarbanes-

120. *Id.* at 14.

121. *See Asadi v. GE Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013) ("Under Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.").

122. 15 U.S.C. § 78u-6(a)(6) (2012) (emphasis added).

123. *See* 18 U.S.C. § 1514A(a) (2012).

124. *Id.* § 1514A(a)(1).

Oxley Act of 2002” superfluous.¹²⁵ Under the Fifth Circuit’s interpretation, employees could only benefit from the Sarbanes-Oxley protections, such as the protection for disclosure of mail fraud or bank fraud, under Dodd-Frank if the employee has initially reported a violation relating to securities laws to the SEC.¹²⁶ This result makes little sense because it suggests that an employee would not be protected under Dodd-Frank if she chose to initially report a violation of the mail fraud statute internally. But the same employee would be protected under Dodd-Frank if she reported a violation of the mail fraud statute internally *after* reporting a violation of securities laws to the SEC. Under this scenario, the Fifth Circuit’s interpretation raises more questions than it answers. For example, would the internally-reported violations of Sarbanes-Oxley have to be related to the previously-reported violations of securities laws to the SEC? Or can an employee that first reports violations of the securities laws to the SEC, thus qualifying her as a statutory whistleblower, then internally report completely unrelated violations and still receive the protections of Dodd-Frank? Because of this potential confusion, the only way to give full effect to Dodd-Frank’s protection of disclosures that are protected under Sarbanes-Oxley is to define whistleblower differently for the purpose of the anti-retaliation provisions. This secondary definition of whistleblower would not require that a whistleblower first report violations of securities laws to the SEC in order to benefit from the anti-retaliation provisions.

Ultimately, the Fifth Circuit’s application of the general definition of whistleblower to the anti-retaliation provisions of Dodd-Frank fails as a matter of statutory construction because it renders two of the protected activities redundant or superfluous. Specifically, with regard to the third category of protected activity, the Fifth Circuit’s interpretation effectively eliminates Dodd-Frank’s protection of disclosures that are protected under Sarbanes-Oxley by dramatically limiting both *who* can report violations internally and the *types* of reported violations that are protected.

B. Who Cares About Sarbanes-Oxley? Rendering Its Anti-Retaliation Provisions Moot Is Consistent with Dodd-Frank’s Purpose

The Fifth Circuit notes with disapproval that allowing internal reporting under Dodd-Frank would effectively invalidate Sarbanes-Oxley’s anti-retaliation provisions because all claims that could be brought under

125. 15 U.S.C. § 78u-6(a)(6), (h)(1)(A)(iii).

126. *Asadi*, 720 F.3d at 624 (holding that employees must meet the statutory definition of whistleblower to be protected from anti-retaliation under Dodd-Frank).

Sarbanes-Oxley could instead be brought under Dodd-Frank.¹²⁷ The Fifth Circuit does not, however, explain why this result is bad or why it is inconsistent with the purpose of Dodd-Frank: “promot[ing] the financial stability of the United States” through “accountability and transparency.”¹²⁸ Instead, the Fifth Circuit paradoxically supports its disapproval by noting all of the ways that Dodd-Frank increases the protections for whistleblowers, including a longer statute of limitations, greater monetary damages, and direct access to federal courts.¹²⁹ In fact, increasing the protection of whistleblowers by allowing them to bring anti-retaliation claims protected by Sarbanes-Oxley through Dodd-Frank is entirely consistent with the purpose of Dodd-Frank.

Dodd-Frank seeks to achieve its goal of promoting financial stability by “establishing an early warning system to detect and address emerging threats to financial stability and the economy” and “strengthening the supervision of large complex financial organizations.”¹³⁰ Unfortunately, the legislative history of the whistleblower provisions is sparse and virtually non-existent.¹³¹ Congress evidently held no hearings to examine existing whistleblower law or potential changes thereto.¹³² The lack of legislative history is especially prevalent with regard to the anti-retaliation provisions. The third category of anti-retaliation provisions does not appear in the Dodd-Frank bill until after the conference committee between the House

127. *Id.* at 628.

128. *Id.* at 628-29; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

129. *Asadi*, 720 F.3d at 629.

130. S. REP. NO. 111-176, at 2 (2010).

131. Recent Legislation, *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, 1830 (2011) (“[T]he whistleblower provisions received little attention on the road to passage.”).

132. *Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions: Hearing Before the Subcomm. on Capital Markets and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 112th Cong. 1 (2011) (statement of Rep. Garrett, Chairman, H. Subcomm. on Capital Markets and Government Sponsored Enterprises). In a hearing on the whistleblower provisions held after the passage of Dodd-Frank, one Representative coyly noted that holding the hearing was “appropriate in a better-late-than-never kind of way.” *Id.* “What would have been more appropriate is if [Congress] had prior to this a full and robust discussion about potential adjustments to the SEC whistleblower program.” *Id.* “And if they had done that before the provisions were signed into law.” *Id.*

and the Senate.¹³³ The versions of the bill that were introduced in the House, passed by the House, and passed by the Senate all protect just two types of whistleblower activity: reporting violations of securities laws to the SEC and participating in a judicial or administrative action.¹³⁴ Therefore, there is little evidence of what Congress intended the third category of protected activity to encompass. Additionally, there is no evidence of what meaning, if any, should be ascribed to the provision's late addition to the bill.

Further, while the Senate Report discusses the purposes of the whistleblower bounty provisions at length, it only makes a passing reference to the anti-retaliation provisions.¹³⁵ At one point, however, the Senate Report notes that the bill “*also expands existing whistleblower law.*”¹³⁶ This comment immediately follows a sentence focusing exclusively on the bounty provisions.¹³⁷ Therefore, the clear implication is that the anti-retaliation provisions are designed to expand existing whistleblower law *in addition to* the bounty provisions.

Given the lack of specific legislative history regarding the whistleblower anti-retaliation provisions, the provisions should be interpreted according to the legislative purpose: promoting financial stability through accountability and transparency.¹³⁸ To this end, courts should interpret the Dodd-Frank anti-retaliation provisions broadly because whistleblowers play an integral role in detecting and preventing corporate fraud.¹³⁹ Studies have

133. Compare H.R. 4173, 111th Cong. § 922(h)(1)(A)(i)-(ii) (as passed by Senate, May 20, 2010), available at <https://www.govtrack.us/congress/bills/111/hr4173/text/eas>, with 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii) (2012).

134. See H.R. 4173, 111th Cong. § 7203 (as introduced in House, Dec. 2, 2009), available at <https://www.govtrack.us/congress/bills/111/hr4173/text/ih>; H.R. 4173, 111th Cong. § 7203 (as passed by House, Dec. 11, 2009), available at <https://www.govtrack.us/congress/bills/111/hr4173/text/eh>; H.R. 4173, 111th Cong. § 922 (as passed by Senate, May 20, 2010), available at <https://www.govtrack.us/congress/bills/111/hr4173/text/eas>.

135. S. REP. NO. 111-176, at 111-12 (2010)

136. *Id.* at 38 (emphasis added).

137. *Id.* (“The SEC would have more help in identifying securities law violations through a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC.”).

138. See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

139. See Chelsea Hunt Overhuls, Comment, *Unfinished Business: Dodd-Frank's Whistleblower Anti-Retaliation Protections Fall Short for Private Companies and Their Employees*, 6 J. BUS. ENTREPRENEURSHIP & L. 1, 4 (2012) (“The role whistleblowers play in preventing and detecting fraud is more than conceptual.”); Timothy J. Fitzmaurice, Note, *The Scope of Protected Activity Under Section 806 of SOX*, 80 FORDHAM L. REV. 2041, 2046

consistently confirmed the importance of whistleblowers. A 2012 report by the Association of Certified Fraud Examiners analyzed 1388 cases of fraud and found that tipsters accounted for 43.3% of the initial detections of fraud.¹⁴⁰ Employee-whistleblowers accounted for 50.9% of the tips within the study (or roughly 22% of all initial detections of fraud).¹⁴¹ A similar study of 216 cases of alleged corporate frauds between 1996 and 2004 found that employees accounted for 17% of initial detections of corporate fraud, whereas the SEC accounted for only 7% of the initial detections.¹⁴² Employees also detected a higher percentage of corporate fraud than financial analysts, auditors, short sellers, equity holders, the media, and non-financial market regulators.¹⁴³ The reasons why employee-whistleblowers report fraud at a higher percentage than other groups is simple: fraud is likely clandestine or hidden, and employees, as insiders to the company, have access to information that is unavailable to the public or to regulators.¹⁴⁴

The incentives against an employee blowing the whistle, however, are quite strong. In a large number of cases the whistleblower is fired, quits under duress, or has her responsibilities significantly altered.¹⁴⁵ In light of the possible consequences, one of the main reasons that employees do not blow the whistle is because of fear of employer retaliation, either through termination or demotion.¹⁴⁶ Given the strong disincentives against blowing

(2012) (citation omitted) (“[Whistleblowers] are indispensable to detecting and preventing corporate fraud.”).

140. ASS’N OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE: 2012 GLOBAL FRAUD STUDY 14 (2012), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rtn/2012-report-to-nations.pdf.

141. *Id.* at 16.

142. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010).

143. *Id.*

144. See ASS’N OF CERTIFIED FRAUD EXAMINERS, 2008 REPORT TO THE NATION ON OCCUPATIONAL FRAUD AND ABUSE 8 (2008), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rtn.pdf (“One of the primary characteristics of fraud is that it is clandestine, or hidden; almost all fraud involves the attempted concealment of the crime.”); Dyck, Morse & Zingales, *supra* note 142, at 2240 (“Employees clearly have the best access to information. Few, if any, frauds can be committed without the knowledge and often the support of several employees.”).

145. Dyck, Morse & Zingales, *supra* note 142, at 2240 (noting 82% of whistleblowers were “fired, quite under duress, or had significantly altered responsibilities”).

146. Rachel Beller, Note, *Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the*

the whistle, the law must encourage potential whistleblowers by providing strong employer anti-retaliation provisions.¹⁴⁷ It is here—the protection of whistleblowers against employer retaliation—that Sarbanes-Oxley has been a failure.

An empirical study conducted by Professor Richard E. Moberly, analyzing 700 administrative investigations and hearings from the first three years of Sarbanes-Oxley, reveals a startling lack of success for whistleblowers that brought anti-retaliation claims.¹⁴⁸ According to Professor Moberly, only 3.6% (13 out of 361) of whistleblowers were successful after filing a complaint with OSHA, the first stage of the Sarbanes-Oxley administrative process.¹⁴⁹ On appeal to ALJs, only 6.5% (6 out of 93) of whistleblowers were successful in their anti-retaliation claims.¹⁵⁰ The futility of bringing an anti-retaliation claim, however, was not limited to the first three years after the passage of Sarbanes-Oxley. From 2002 until 2011, employees were successful in only 1.8% of the 1260 cases decided by OSHA, and between 2006 and 2008, “*OSHA did not decide a single case in favor of a Sarbanes-Oxley claimant.*”¹⁵¹

Professor Moberly advanced several reasons for the low success rates, including the short statute of limitations period¹⁵² and misapplication of the employee-friendly burden of proof.¹⁵³ During the study period, OSHA rejected 18.8% of employee claims for failure to meet the statute of limitations period, and ALJs rejected 33.8% of claims for failure to meet the statute of limitations.¹⁵⁴

When OSHA resolved cases on the merits and determined whether the employee-claimant was fired for undertaking a protected activity, the

Successes and Failures of Whistleblower Protection Legislation in the US and China, 7 N.Y.U. J.L. & BUS. 873, 875 (2011).

147. *See id.* at 881; Overhuls, *supra* note 139, at 4.

148. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 66-67 (2007) [hereinafter Moberly, *Unfulfilled Expectations*].

149. *Id.* Of course, a low success rate might just be indicative of poor claims; however, even accounting for the possibility of weak claims, the success rate under Sarbanes-Oxley seems abnormally low.

150. *Id.*

151. Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 29 (2012) (citation omitted).

152. Moberly, *Unfulfilled Expectations*, *supra* note 148, at 107.

153. *Id.* at 120. Other reasons for the low-success rate include OSHA and the ALJs strictly construing which employers and activities are covered. *Id.* at 110-20.

154. *Id.* at 107. At the time of the study, however, the statute of limitations to bring a claim under Sarbanes-Oxley was ninety days rather than 180 days. *Id.*

evidence suggests that OSHA failed to apply Sarbanes-Oxley's employee-friendly burden of proof.¹⁵⁵ It should be a relatively easy burden for employees to prove that their protected activity was a contributing factor in their retaliation.¹⁵⁶ In 69.4% of OSHA cases that considered the causation issue, however, OSHA concluded that the employee did not meet this low burden of proof.¹⁵⁷ Further, when the burden was shifted back to the employer to show by clear and convincing evidence that the retaliation was unrelated to the employee's protected activity, OSHA resolved cases in favor of the employer 64.9% of the time—a fairly high percentage in light of the high burden of “clear and convincing” evidence.¹⁵⁸

The Dodd-Frank anti-retaliation provisions eliminate both of these Sarbanes-Oxley procedural hurdles by extending the statute of limitations to at least six years and allowing employees to bring claims directly in federal courts.¹⁵⁹ In turn, federal courts are more able to correctly apply burdens of proof than administrative agencies.¹⁶⁰ In light of Dodd-Frank's purpose of promoting financial stability and the critical role that whistleblowers play in detecting fraud, it makes little sense to fix Sarbanes-Oxley's problems solely for the small minority of whistleblowers that initially report externally.¹⁶¹ Instead, it is far more consistent with Dodd-Frank's purpose to recognize that Dodd-Frank's anti-retaliation provisions fix several of the problems that were prevalent in Sarbanes-Oxley and to broadly apply the Dodd-Frank anti-retaliation provisions to whistleblowers that report both externally and internally.

C. Internal Whistleblowers Matter: The Fifth Circuit Ignores the Critical Role that Internal Reporting Plays in Detecting Securities Violations

The Fifth Circuit's failure to protect internal reporting under Dodd-Frank undermines the internal compliance mechanisms mandated by Sarbanes-Oxley and exacerbates the perverse incentive for employees to report externally under Dodd-Frank's bounty provision. Internal reporting and

155. *Id.* at 122.

156. *Id.*

157. *Id.*

158. *Id.* at 123.

159. *See supra* Part II.B.1 (describing the Dodd-Frank whistleblower provisions).

160. Moberly, *Unfulfilled Expectations*, *supra* note 148, at 147.

161. Again, one study suggested that only 3% of whistleblowers initially report externally. *Inside the Mind of a Whistleblower*, *supra* note 116, at 11-13. *See supra* notes 113-120 and accompanying text for a comparison of whistleblowers that choose to report internally versus externally.

compliance programs are at the heart of Sarbanes-Oxley.¹⁶² Sarbanes-Oxley requires companies to establish and maintain internal control and reporting structures.¹⁶³ Each year, companies must include an assessment of the effectiveness of the internal control structure in their annual reports.¹⁶⁴ Also, companies must have an independent auditor sign off on management's report on the effectiveness of internal controls.¹⁶⁵ In the wake of Sarbanes-Oxley, companies expended considerable time and effort to set up strong internal compliance programs in order to encourage employees to report violations internally.¹⁶⁶

Sarbanes-Oxley's emphasis on internal reporting is well placed. The SEC has consistently reaffirmed that internal reporting is a critical tool to detect fraud within companies because it facilitates compliance with federal securities laws.¹⁶⁷ Internal compliance programs are consistent with "best practices" in the field of corporate compliance because they place information about potential violations in the hands of employees with "access to first-hand information [who] are in the best position to detect and prevent potential securities violations."¹⁶⁸ Internal reporting allows companies to take immediate action to investigate and solve any reported violations, rather than wait weeks, months, or years to be informed of potential violations by the SEC.¹⁶⁹ Further, internal control programs

162. The remedies for whistleblowers that are retaliated against have been lacking under Sarbanes Oxley. *See supra* Part IV.B. In spite of this, the internal reporting mechanism mandated by Sarbanes-Oxley is beneficial. 15 U.S.C. § 7262(a)-(b) (2012).

163. 15 U.S.C. § 7262(a)-(b).

164. *Id.*

165. *Id.* § 7262(b).

166. *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); Shannon Kay Quigley, Comment, *Whistleblower Tug-of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 264-65 (2012).

167. *See* 76 Fed. Reg. 34,300, 34,323 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) ("[C]ompliance with the Federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct [I]nternal compliance and reporting systems are essential sources of information for companies . . .").

168. Vega, *supra* note 166, at 519.

169. *U.S. Chamber Warns New SEC Whistleblower Rule Will Undermine Corporate Compliance Programs*, U.S. CHAMBER OF COMMERCE (May 24, 2011), <http://www.uschamber.com/press-release/us-chamber-warns-new-sec-whistleblower-rule-will-undermine-corporate-compliance> ("Not informing the company of a potential fraud and waiting for the SEC to act is the equivalent of not calling the firefighters down the street to put

encourage a culture of compliance within a company and can often lead companies “to achieve norms that are actually better than what the law requires.”¹⁷⁰

The Dodd-Frank whistleblower bounty provisions,¹⁷¹ however, threaten internal compliance programs by providing incentives for employees to report potential securities violations directly to the SEC.¹⁷² Encouraging external reporting over internal reporting is problematic for several reasons. First, the bounty provisions require whistleblowers to report *original* information to the SEC.¹⁷³ Therefore, employees are more likely to rush to report information about securities violations to the SEC—without verifying the information’s accuracy—in order to be the first party to report the violation.¹⁷⁴ This rush to report violations without verification leads, in turn, to the second problem with external reporting: flooding the SEC with frivolous tips.¹⁷⁵ The SEC, burdened with a flood of frivolous tips, may have trouble distinguishing legitimate tips of securities violations from meritless ones, and it will have to spend time and effort weeding out the frivolous tips rather than focusing on correcting legitimate violations of securities laws.¹⁷⁶ Finally, encouraging employees to race to report violations to the SEC undermines the culture of corporate compliance that companies set up in the wake of Sarbanes-Oxley.¹⁷⁷ The bounty program will “promote the very culture of opportunism that these [internal] compliance systems are intended to combat.”¹⁷⁸

Recognizing the benefits of internal compliance programs, and the potential perverse incentives to bypass internal compliance programs in light of the bounty provisions, the SEC’s final rules for the bounty program seek to incentivize internal reporting in several ways. First, whistleblowers

out a raging fire and instead calling the lawyers from the next town to sue over the fire instead.”).

170. Vega, *supra* note 166, at 520.

171. 15 U.S.C. § 78u-6(b)(1)(A)-(B) (2012).

172. Vega, *supra* note 166, at 519-21.

173. 15 U.S.C. § 78u-6(a)(3)(B) (providing that original information is information “not known to the Commission from any other source”).

174. Jessica Luhrs, Note, *Encouraging Litigation: Why Dodd-Frank Goes Too Far in Eliminating the Procedural Difficulties in Sarbanes-Oxley*, 8 HASTINGS BUS. L.J. 175, 183 (2012).

175. Dave Ebersole, Comment, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 135-36 (2011).

176. Luhrs, *supra* note 174, at 183-84.

177. Vega, *supra* note 166, at 520.

178. *Id.*

are still eligible to receive the bounty if the employee first reports the information through her company's internal compliance program and the company later reports the violation to the SEC.¹⁷⁹ Second, if the employee initially reports information relating to a potential violation through her company's internal compliance program and then reports the violation to the SEC within 120 days of the internal report, the SEC will consider the employee to have reported the information directly to the SEC on the date of internal disclosure for the purposes of the bounty provisions.¹⁸⁰ Third, and perhaps most critically, a whistleblower's participation and assistance in her company's internal compliance program before or at the same time she reports the violation to the SEC is a "plus" factor that can increase the amount of the bounty award.¹⁸¹ Conversely, interference with her company's internal compliance programs is a negative factor, which can decrease the amount of the whistleblower's bounty.¹⁸²

The SEC's encouragement of internal reporting for the purposes of the bounty provision, however, has one major flaw. In order to receive the bounty, a whistleblower must provide information that leads to a *successful* enforcement action.¹⁸³ In other words, if the information does not lead to a successful prosecution for a violation of securities laws, the whistleblower receives nothing. Viewed through this lens, a whistleblower's decision to report internally prior to reporting externally is fraught with peril. If the whistleblower reports information through her company's internal compliance system, she runs the risk of facing retaliation in the form of firing or demotion. Consider the following hypothetical: A whistleblower initially reports a violation internally and is fired. Then, within 120 days, she reports the information to the SEC, and is thus eligible to receive a bounty. Unfortunately for the whistleblower, the information that she provided to the SEC did not lead to a successful enforcement action, so she does not receive a bounty. Therefore, her only recourse is to rely on anti-retaliation provisions to provide her with reinstatement and back pay. Under the Fifth Circuit's interpretation of the Dodd-Frank anti-retaliation provisions, however, *she would not receive any protection because she*

179. 17 C.F.R. § 240.21F-4(c)(3) (2012).

180. *Id.* § 240.21F-4(b)(7).

181. *Id.* § 240.21F-6(a)(4).

182. *Id.* § 240.21F-6(b)(3).

183. 15 U.S.C. § 78u-6(b)(1)(A) (2012).

*initially reported the violation internally rather than to the SEC.*¹⁸⁴ Any rational whistleblower with knowledge of the Fifth Circuit's interpretation would bypass her company's internal compliance programs, regardless of the SEC's incentives to report internally. This hypothetical, therefore, indicates the extent to which the Fifth Circuit's decision undermines the SEC's efforts to encourage internal reporting under the bounty provisions. And because the SEC's incentives were designed to encourage continued participation in successful corporate compliance systems in spite of the bounty provisions, the Fifth Circuit's decision threatens to undermine all internal corporate compliance programs.

V. Administrative Deference and a Novel Proposal

A. Just Defer: The SEC's Definition and Chevron Deference

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts must defer to an administrative agency's regulation if it is a permissible construction of an ambiguous statute.¹⁸⁵ Determining whether a court should defer to an administrative agency is a multi-step process. Initially, the court must determine if the intent of Congress is clear—if so, then the court “must give effect to the unambiguously expressed intent of Congress.”¹⁸⁶ If the statute is ambiguous with regard to a specific issue, however, then courts must determine whether the agency's interpretation “is based on a permissible construction of the statute.”¹⁸⁷ If so, then courts must defer.¹⁸⁸

The Fifth Circuit erred by finding that Dodd-Frank's definition of whistleblower is unambiguous and by failing to defer to the SEC's nuanced definition of whistleblower.¹⁸⁹ In fact, the term whistleblower is highly ambiguous throughout the text of the statute.¹⁹⁰ Although Dodd-Frank contains an explicit definition of whistleblower, numerous textual indicators lead to the conclusion that the term means something else entirely when used in the anti-retaliation provisions.¹⁹¹

184. While she could rely on the Sarbanes-Oxley whistleblower anti-retaliation provisions, these provisions have proven to be a complete failure at protecting whistleblowers from retaliation. *See supra* Part IV.B.

185. 467 U.S. 837, 843-44 (1984).

186. *Id.* at 842-43.

187. *Id.* at 843.

188. *Id.* At 843-44.

189. *See Asadi v. GE Energy (USA), L.L.C.*, 720 F.3d 620, 629-30 (5th Cir. 2013).

190. *See supra* Part IV.A.

191. *See supra* Part IV.A.

Further, because the term whistleblower is ambiguous, courts should defer to the SEC's definition because it is a permissible construction of the statute. The SEC's definition recognizes the conflict between the general definition of whistleblower and the anti-retaliation provisions.¹⁹² By carving out an exception to the general definition, the SEC prevents much of the text of the anti-retaliation provisions from becoming superfluous.¹⁹³ Also, the SEC's definition is consistent with Dodd-Frank's purpose of maintaining financial stability. It ensures that internal reporting—a critical fraud detection tool—remains at the heart of Dodd-Frank's whistleblower provisions.¹⁹⁴

B. A Novel Proposal

Although courts can and should defer to the SEC's definition of whistleblower, the SEC can effectively overturn the *Asadi* decision by rule. The general definition of whistleblower under Dodd-Frank is “any individual who provides . . . information relating to a violation of the securities laws to the Commission.”¹⁹⁵ The second half of the definition further provides that the disclosure must be made to the SEC “in a manner established, by rule or regulation, by the Commission.”¹⁹⁶ Therefore, Dodd-Frank explicitly authorizes the SEC to determine *how* individuals report violations to the SEC. In situations like this, where Congress has expressly delegated authority to an administrative agency, courts must defer to agency regulations.¹⁹⁷

In light of its broad authority to determine the manner in which violations are reported to the SEC, the SEC can establish that internally-reported violations are—by rule—reported to the SEC. In other words, the SEC should proclaim that one of the ways to report violations to the SEC is to report violations through internal company channels. This rule would be consistent with the statutory text and allow the SEC to maintain its nuanced definition of whistleblower, even after *Asadi*.

192. *See supra* Part IV.A.

193. *See supra* Part IV.A.

194. *See supra* Part IV.C.

195. 15 U.S.C. § 78u-6(a)(6) (2012).

196. *Id.*

197. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

VI. Conclusion

Congress passed Dodd-Frank in response to the financial crisis that began in 2008—the worst crisis since the Great Depression. Whistleblowers are essential to the early detection and prevention of fraud, and Dodd-Frank’s whistleblower anti-retaliation provisions play an integral role in preventing another financial crisis. The Fifth Circuit’s decision in *Asadi*, however, ignores the purpose behind Dodd-Frank by dramatically decreasing the protections available for whistleblowers. The Fifth Circuit’s holding that internal whistleblowers are not protected under Dodd-Frank places too much weight on the definition of whistleblower and ignores contrary textual indicators. In fact, the term whistleblower is ambiguous within the section containing the anti-retaliation provisions. Instead of adopting the Fifth Circuit’s view, courts should defer to the SEC’s definition of whistleblower because it properly recognizes the value of internal whistleblowers.

Even when courts, like *Asadi*, refuse to defer, the SEC can avoid the problem entirely by establishing a rule that mandates internal reporting as one of the ways to report violations to the SEC. Such a rule would be permissible because Dodd-Frank expressly grants the SEC the power to determine the manner in which whistleblowers report violations to the SEC.

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