COMMENT

CIRCUIT SPLIT: HOW FAR DOES WHISTLEBLOWER PROTECTION EXTEND UNDER DODD–FRANK?

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Khaled Asadi and Daniel Berman worked for companies that were subject to various U.S. securities laws. During the course of their employment, both became aware of potential violations of law and dutifully reported this information to their superiors. Soon thereafter, both men lost their jobs; they believe this was in retaliation for their whistleblowing activity. Both brought suit under Dodd–Frank's whistleblower protection provisions, which define a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the Commission." Because Mr. Asadi and Mr. Berman only reported violations to their supervisors internally and not to the Securities and Exchange Commission (SEC), their protection under Dodd–Frank was uncertain. The Fifth Circuit held that Dodd–Frank did not protect Mr. Asadi because it only protects employees who report to the SEC directly. The Second Circuit, in contrast, held that Mr. Berman's internal reporting was sufficient for him to gain protection under Dodd–Frank. These conflicting outcomes have created a circuit split with major implications for the law of whistleblower protection. This Comment ultimately argues that both the text and purpose of Dodd–Frank support the Second Circuit's conclusion: whistleblowers who report suspected violations of law internally, but not to the SEC, are protected by Dodd–Frank's anti-retaliation provisions.

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INTRODUCTION

Khaled Asadi and Daniel Berman are former employees of companies that were subject to various U.S. securities laws.[1] Over the course of their employment, both men learned of potential violations of the law and dutifully reported this information to their superiors.[2] Unfortunately, both men lost their jobs (they believe) in retaliation for their whistleblowing activities.[3] Both subsequently brought suit under the Dodd–Frank Wall Street Reform and Consumer Protection Act's (Dodd–Frank) whistleblower protection provisions.[4] However, because Mr. Asadi and Mr. Berman only reported these violations to their supervisors *internally*, and not to the Securities and Exchange Commission (SEC), their protection under Dodd–Frank was not clear. Ultimately, the Fifth

1 *See* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 621 (5th Cir. 2013) [hereinafter *Asadi II*] (discussing Mr. Asadi's concern that certain actions by his employer violated the Foreign Corrupt Practices Act); Berman v. Neo@Ogilvy LLC, No. 14-CV-00523, 2014 WL 6865718 (S.D.N.Y. Aug. 15, 2014), *adopted in part by* 72 F. Supp. 3d 404 (S.D.N.Y. 2014), *rev'd*, 801 F.3d 145 (2d Cir. 2015) [hereinafter *Berman I*] (noting that Mr. Berman's former employer Neo@Ogilvy (Neo) is subject to and regulated by U.S. securities laws); *see also* Nicholas Woodfield, *Why the 5th Circ. Was Wrong in* Asadi v. GE Energy, LAW360 (Feb. 14, 2014, 4:09 PM), http://www.law360.com/articles/509472/why-the-5th-circ-was-wrong-in-asadi-v-ge-energy [https://perma.cc/EYY2-6YLK] (noting that "Asadi did not include a viable theory of liability until he amended his complaint to include a section asserting that FCPA violations are required disclosures under Sarbanes–Oxley").

2 *See Asadi II*, 720 F.3d at 621; *Berman I*, 2014 WL 6865718, at *3.

3 *See Asadi II*, 720 F.3d at 621 (noting that Mr. Asadi was fired after he made internal reports and resisted pressure to accept a demotion); *Berman I*, 2014 WL 6865718, at *3 ("Berman alleges that Neo retaliated against him through adverse personnel actions, including the termination of his employment on April 30, 2013.").

4 15 U.S.C. § 78u-6 (2012). For clarity, this Comment refers to the U.S. Code for the relevant provisions of Dodd–Frank rather than to sections of the original Act.

Circuit held that Dodd–Frank did not protect Mr. Asadi,[5] while the Second Circuit held that it did protect Mr. Berman.[6] These conflicting outcomes are the result of a disagreement between two circuit courts about the statutory interpretation of Dodd–Frank, which has major implications for the law of whistleblower protection.

Section 21F of the Exchange Act of 1934,[7] as amended by Dodd–Frank, provides incentives for individuals to report violations of the securities laws to the SEC.[8] Dodd–Frank also protects whistleblowers from employer retaliation.[9] Section 78u-6(a)(6) defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*."[10] The question presented is whether Dodd–Frank's whistleblower retaliation provisions protect an employee who reports a violation of the securities laws internally, but does not report the violation directly to the SEC.

This Comment first presents the statutory and regulatory background necessary to resolve the question presented, including the relevant provisions of the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley),[11] Dodd–Frank, and the corresponding SEC rulemaking. It then presents the facts, procedural history, and reasoning of the circuit opinions in both Mr. Asadi's case and Mr. Berman's case. Next, this Comment argues that the text and purpose of Dodd–Frank support the Second Circuit's conclusion that whistleblowers who report suspected violations of law *internally*, but not to the SEC, are protected by Dodd–Frank's anti-retaliation provisions. Finally, this Comment speculates on the future of this issue, including the prospect of Supreme Court review.

I. Statement of the Cases

A. *Statutory and Regulatory Background*

1. Sarbanes–Oxley

In 2002, Congress enacted Sarbanes–Oxley to "safeguard investors in public companies and restore trust in the financial markets" as a result of "a series of

5 *Asadi II*, 720 F.3d 620, 630 (5th Cir. 2013).

6 Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) [hereinafter *Berman III*].

7 Securities Exchange Act of 1934 § 21F, 15 U.S.C. § 78a.

8 *See* 15 U.S.C. § 78u-6(b) (noting that the SEC will pay an award to people who provide "original information" that leads to a successful enforcement action).

9 *See id.* § 78u-6(h)(1) (providing specific protections for whistleblowers with respect to employer retaliation).

10 *Id.* § 78u-6(a)(6) (emphasis added). Section 21F is titled "Securities Whistleblower Incentives and Protection."

11 *Id.* § 7241.

celebrated accounting debacles"[12] at large corporations, including Enron and WorldCom.[13] Relevant to the cases discussed below, Sarbanes–Oxley includes protection for whistleblowers. It provides that "[n]o [public] company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [whistleblowing or other protected activity]."[14]

If companies do take retaliatory action, employees are entitled to relief under the statute.[15] Individuals who wish to bring claims under Sarbanes–Oxley's anti-retaliatory provisions must first file their complaint with the Secretary of Labor.[16] If the Secretary has not issued a decision within 180 days, the individual may file suit in federal court.[17] The statute provides that an "employee prevailing in any action under [this section] shall be entitled to all relief necessary to make the employee whole," including reinstatement to his same position in the company, back pay with interest, and other "compensation for special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."[18] Finally, individuals must file a claim "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation."[19]

While scholars initially praised the whistleblower protection provisions in Sarbanes–Oxley, some have questioned their effect in practice.[20] In fact, one study by Richard Moberly found that in the first three years after its passage, just 3.6% of employees won during the initial administrative process and only

12 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010); *see also* Yates v. United States, 135 S. Ct. 1074, 1081 (2015) ("The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Anderson LLP, had systematically destroyed potentially incriminating documents."); Brief of SEC, Amicus Curiae in Support of the Appellant at 6-8, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626) [hereinafter Brief of SEC] (exploring the legislative history of the Sarbanes–Oxley Act).

13 Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014).

14 18 U.S.C. § 1514A(a) (2012).

15 *Id.* § 1514A(b)(1).

16 *Id.* § 1514A(b)(1)(A).

17 *Id.* § 1514A(b)(1)(B).

18 *Id.* § 1514A(c)(1)–(2).

19 *Id.* § 1514A(b)(2)(D).

20 *Compare* Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 103 (2005) ("[T]he Sarbanes–Oxley Act creates the first corporate whistleblower protection statute that is truly national in scope. Its enactment confirms the importance of encouraging whistleblowing by protecting those corporate whistleblowers who expose a broad range of misconduct. In doing so, the provision accepts the importance of personal responsibility and accountability to the law."), *with* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes–Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 91 (2007) (documenting a remarkably low win- rate among employees bringing retaliation claims under Sarbanes–Oxley that only "*decreas*[*ed*] over time").

6.5% won through the administrative appeals process.[21] Moberly revisited the study ten years after Sarbanes–Oxley's passage and found that an employee's chances of success had actually worsened with the passage of time.[22] From the Act's effective date through 2011, employees won just 1.8% of cases at the administrative level.[23]

2. Dodd–Frank

Congress enacted Dodd–Frank in response to the financial crisis in 2008.[24] The Act established incentives to encourage reporting to the SEC:

> Congress instructed the SEC to establish a whistleblower program, authorizing the SEC to pay an award to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action.[25]

Relevant here, Dodd–Frank also provides for whistleblower protection. Dodd–Frank 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."[26] Dodd–Frank includes the following protections for individuals who qualify as whistleblowers:

> No employer may discharge, demote, suspend, threaten, harass, . . . 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—*
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> (i) in providing information to the Commission in accordance with this section;
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> (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
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> (iii) *in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002* (15 U.S.C. 7201 et seq.), this chapter, . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.[27]

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21 Moberly, *supra* note 20, at 67.

22 *See* Richard E. Moberly, *Sarbanes–Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 27-29 (2012) (noting that the already-low employee win rates reported in the original study had only decreased).

23 *Id.* at 29.

24 *See Asadi II*, 720 F.3d 620, 622 (5th Cir. 2013).

25 STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 741 (3d ed. 2012); *see also* 17 C.F.R. §§ 240.21F–2, 240.21F–8, 240.21F–16 (2013) (outlining the conditions under which the SEC will provide awards). Awards under this incentive program can be substantial, ranging between ten and thirty percent of the value of the SEC sanction. *See* 17 C.F.R. § 240.21F-5.

26 15 U.S.C. § 78u-6(a)(6) (2012) (emphasis added).

27 *Id.* § 78u-6(h)(1)(A) (emphasis added).

The whistleblower provisions of Dodd–Frank and Sarbanes–Oxley differ in several important aspects. First, while individuals who wish to bring an anti-retaliation claim under Sarbanes–Oxley must first file an administrative action with the Secretary of Labor,[28] Dodd–Frank allows whistleblowers to file immediately in federal court.[29] Second, because Dodd–Frank provides for the *doubling* of back pay, monetary damages are potentially greater under Dodd–Frank than under Sarbanes–Oxley, which only provides back pay with interest.[30] Finally, Dodd–Frank's statute of limitations of at least six years dwarfs the 180-day statute of limitations provided by Sarbanes–Oxley.[31]

3. SEC Rulemaking

On August 12, 2011, the SEC promulgated the following rule to implement Section 21F of Dodd–Frank:

> (a) *Definition of a whistleblower*. (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.
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> (2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.

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28 *See* 18 U.S.C. § 1514A(b)(1)(A) (2012).

29 *Compare id.* ("A person who alleges discharge or other discrimination by any person in violation of [this section] . . . may seek relief . . . by . . . filing a complaint with the Secretary of Labor."), *with* 15 U.S.C. § 78u-6(h)(1)(B) ("An individual who alleges discharge or other discrimination in violation of [this section] may bring an action under this [section] in the appropriate district court of the United States . . . ."); *see also Asadi II*, 720 F.3d at 629 (explaining the procedural differences between Sarbanes–Oxley and Dodd–Frank); CHOI & PRITCHARD, *supra* note 25, at 741 ("Unlike the Sarbanes–Oxley whistleblower provision, employees need not exhaust their administrative remedies with [the Occupational Safety and Health Administration] before filing suit.").

30 *Compare* 15 U.S.C. § 78u-6(h)(1)(C) ("Relief for an individual prevailing in an action . . . shall include . . . 2 times the amount of back pay otherwise owed to the individual, with interest."), *with* 18 U.S.C. § 1514A(c)(2) (providing that relief "shall include . . . the amount of back pay, with interest"); *see also Asadi II*, 720 F.3d at 629 (noting the disparity in monetary damages between Sarbanes–Oxley and Dodd–Frank).

31 *Compare* 15 U.S.C. § 78u-6(h)(1)(B)(iii) (providing a six-year statute of limitations from the date of the violation, or a three-year statute of limitations "after the date when facts material to the right of the action are known or reasonably should have been known[,]" and an absolute ten-year statute of limitations), *with* 18 U.S.C. § 1514A(b)(2)(D) (imposing a 180-day statute of limitations); *see also Asadi II*, 720 F.3d at 629 (discussing the differing statutes of limitations between Sarbanes–Oxley and Dodd–Frank).

> (b) *Prohibition against retaliation*. (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:
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> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;
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> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).
>
> (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.
>
> (2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.[32]

The SEC released a statement accompanying the issuance of this rule, which made clear that this rule extended Dodd–Frank's anti-retaliation provisions to protect those individuals who report internally but do not report to the Commission. In it, the SEC noted that "the statutory anti-retaliation protections [of Dodd–Frank] apply to three different categories of whistleblowers, and the third category [described in 15 U.S.C. § 78u-6(h)(1)(A)(iii)] includes individuals who report to persons or governmental authorities *other than the Commission*."[33]

B. *Facts, Procedural History, and Circuit Opinions*

1. *Asadi v. G.E. Energy* (5th Cir. 2013)

Plaintiff, Khaled Asadi, was hired as G.E. Energy's Iraq Country Executive in 2006.[34] In 2010, Iraqi officials told Mr. Asadi that G.E. Energy had hired a woman with close ties to a certain senior Iraqi official.[35] The Iraqi officials were worried that G.E. Energy had hired the woman in order to curry favor in an upcoming negotiation.[36] Mr. Asadi, concerned that this conduct might violate the Foreign Corrupt Practices Act (FCPA),[37] reported this information to his

32 17 C.F.R. § 240.21F-2 (2013) (emphasis added).

33 Securities Whistleblower Incentives and Protections, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011).

34 *Asadi II*, 720 F.3d at 621.

35 *Id.*

36 *Id.*

37 *Id.*; *see also* Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.). The FCPA "generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business" and applies "to publicly traded companies and their officers, directors, employees, stockholders, and agents" anywhere in the world. *Spotlight on Foreign*

supervisor and to a G.E. Energy ombudsman.[38] Shortly thereafter, Mr. Asadi received, in his opinion, a "surprisingly negative" performance review.[39] Following this review, he alleged the company pressured him to accept a demotion, which he refused.[40] G.E. Energy fired Mr. Asadi approximately one year after his initial report.[41] He did not report this potential FCPA violation to the SEC.[42]

Mr. Asadi brought suit against G.E. Energy, alleging the company violated Dodd–Frank's whistleblower-protection provision by firing him because of his internal reporting.[43] Relying on the presumption against extraterritoriality,[44] the court concluded that Dodd–Frank's anti-retaliatory provision did not apply abroad, and therefore, dismissed Mr. Asadi's case with prejudice for failing to state a claim.[45] Moreover, the court held that "the cited provisions of [Sarbanes–Oxley] and the FCPA, as incorporated in the Anti-Retaliation Provision, d[id] not provide [Mr. Asadi] with relief for the alleged retaliation against him."[46] Because the court relied on the presumption against extraterritoriality, it did not reach the question of whether Mr. Asadi was protected under Dodd–Frank despite failing to report to the SEC.[47] Mr. Asadi appealed.[48]

A unanimous panel of the Fifth Circuit affirmed.[49] Disregarding the district court's extraterritoriality theory, the panel instead held that "the plain language of the Dodd–Frank whistleblower-protection provisions creates a private cause of action only for individuals who provide information relating to a violation of

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Corrupt Practices Act, SEC, https://www.sec.gov/spotlight/fcpa.shtml [https://perma.cc/UEA9-JBY2] (last updated Oct. 16, 2014).

38 *Asadi II*, 720 F.3d at 621. An ombudsman is "one that investigates, reports on, and helps settle complaints." *Ombudsman*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ombudsman [https://perma.cc/GR7B-MVQR].

39 *Asadi II*, 720 F.3d at 621 (internal quotations omitted).

40 *Id.*

41 *Id.*

42 *Id.* at 624.

43 Asadi v. G.E. Energy (USA), L.L.C., No. 4:12-345, 2012 WL 2522599, at *1 (S.D. Tex. June 28, 2012), *aff'd*, 720 F.3d 620 (5th Cir. 2013) [hereinafter *Asadi I*]. Mr. Asadi also brought breach of contract claims, but since such claims are beyond the scope of this Comment, they will not be discussed further.

44 Extraterritoriality refers to the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 255 (2010) (internal quotation marks and citations omitted) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). Accordingly, "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect," courts presume statutes are "primarily concerned with domestic conditions." *Id.* (quoting *Arabian American Oil*, 499 U.S. at 248) (internal quotation marks omitted).

45 *Asadi I*, 2012 WL 2522599, at *5-6.

46 *Id.* at *7.

47 *See Asadi II*, 720 F.3d 620, 621 (5th Cir. 2013) ("Having reached this [extraterritoriality] conclusion, [the district court] declined to decide whether Asadi qualified as a 'whistleblower' under the whistleblower-protection provision.").

48 *Id.*

49 *Id.* at 630.

the securities laws to the SEC."[50] As Mr. Asadi did not report the potential violation to the SEC, the court concluded he had failed to state a claim.[51]

The court first emphasized that if the "statutory text is plain and unambiguous," the court "must apply the statute according to its terms."[52] The court identified the main textual inquiry before it as the interplay between the definitional section and the whistleblower protection section—subsection (a) and (h), respectively.[53] The term "whistleblower" is specifically defined in subsection (a),[54] and the court held that "[t]his definition, standing alone, expressly and unambiguously requires that an individual provide information *to the SEC* to qualify as a 'whistleblower' for purposes of § 78u-6."[55]

The court rejected Mr. Asadi's argument that subsection (h)'s cross-reference to Sarbanes–Oxley protects individuals such as himself who report internally.[56] The court noted that while "[t]he three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim[,] [t]hey do not . . . define which individuals qualify as whistleblowers."[57]

The court also found the categories in subsection (h) to be unambiguous.[58] Despite recognizing that the "practical result" of its reading of § 78u-6(h)(1)(A)(iii) meant "that individuals may take protected activity yet still not qualify as a whistleblower," the court did not think this rendered the statute "conflicting or superfluous."[59] First, a conflict between the definition of "whistleblower"[60] and the third category of protected whistleblower activity[61] would exist "only if [the court] read the three categories of protected activity as additional definitions of three types of whistleblowers."[62] Moreover, the court found it "significant" that Congress used the defined term "whistleblower" immediately preceding

50 *Id.* at 623.

51 *Id.*

52 *Id.* at 622 (quoting Carcieri v. Salazar, 555 U.S. 379, 387 (2009)); *see also* BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" (citation omitted)).

53 *Id.*

54 15 U.S.C. § 78u-6(a)(6) (2012).

55 *Asadi II*, 720 F.3d at 622 (emphasis added).

56 *See id.* at 624-25 (rejecting Mr. Asadi's submission that the third category of protected activity "does not necessarily require disclosure of information to the SEC"); *see also* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (cross-referencing Sarbanes–Oxley).

57 *Asadi II*, 720 F.3d at 625.

58 *Id.*

59 *Id.* at 626.

60 15 U.S.C. § 78u-6(a) (2012) ("You are a whistleblower if, alone or jointly with others, you provide the Commission with information [that] . . . relates to a possible violation of the Federal securities laws.").

61 *Id.* § 78u-6(h)(1)(A)(iii) (protecting whistleblowers against employer retaliation for "making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002").

62 *Asadi II*, 720 F.3d at 626.

the three categories of protected activity.[63] Second, the court emphasized that § 78u-6(h)(1)(A)(iii) is not made superfluous by this interpretation because "this category protects whistleblowers from retaliation, based not on the individual's disclosure of information to the SEC but, instead, on that individual's other possible required or protected disclosure(s)."[64] The court employed a hypothetical[65] to support this theory, and it concluded that it was actually Mr. Asadi's suggested construction that would render part of the statute superfluous because it "would read the words 'to the Commission' out of the statute."[66]

The court also noted its concern that Mr. Asadi's construction would render moot Sarbanes–Oxley's whistleblower protections insofar as whistleblower protections would be greater under Dodd–Frank, leaving plaintiffs no reason to bring claims under Sarbanes–Oxley's provisions.[67] The court noted three differences between Sarbanes–Oxley's anti-retaliation provisions and Dodd–Frank's provisions to support this proposition: (1) Dodd–Frank provides for greater monetary damages, (2) Sarbanes–Oxley restricts how plaintiffs may file their claims, and (3) Dodd–Frank provides a longer statute of limitations period.[68]

Finally, the court rejected Mr. Asadi's argument that it should defer to the SEC's recent Dodd–Frank whistleblower regulation.[69] The court acknowledged that the SEC's regulation did in fact adopt Mr. Asadi's suggested construction of § 78u-(h), but it maintained that the plain language of the statute does not support this reading.[70] Rather, the court reasoned that "[b]ecause Congress ha[d] directly addressed the precise question at issue," it was bound to "reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the

63 *See id.* at 626; *see also* 15 U.S.C. § 78u-6(h)(1)(A) ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower* . . . ." (emphasis added)).

64 *Asadi II*, 720 F.3d at 627 (alteration in original).

65 The court proposed the following hypothetical: A mid-level manager discovers fraud and reports it both internally and to the SEC. His supervisor does not know of the report to the SEC, and he fires the mid-level manager. "[E]ven though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under [Dodd–Frank] because he was a 'whistleblower' and suffered retaliation based on his disclosure to the CEO, which is protected under [Sarbanes–Oxley]." *Id.* at 627-28.

66 *Id.* at 628 (quoting 15 U.S.C. § 78u-6(a)(6) (2012)).

67 *See Asadi II*, 720 F.3d at 628-29 (reviewing the reasons an individual would be unlikely to raise an anti-retaliation claim under Sarbanes–Oxley if the court accepted a construction of "the Dodd–Frank whistleblower-protection provision [that] extend[ed] beyond the statutory definition of 'whistleblowers'").

68 *See id.* at 629.

69 *See id.* at 629-30.

70 *See id.*

whistleblower-protection provision."[71] Moreover, the court found the SEC's regulations defining "whistleblower" to be inconsistent.[72]

2. *Berman v. Neo@Ogilvy* (2d Cir. 2015)

Plaintiff, Daniel Berman, was the finance director at Neo@Ogilvy (Neo), a media agency, from October 2010 to April 2013.[73] Mr. Berman was responsible for Neo's financial reporting and its compliance with the Generally Accepted Accounting Principles (GAAP).[74]

Mr. Berman brought suit against Neo in January 2014, alleging that he was wrongfully terminated in violation of Dodd–Frank's whistleblower protection provisions.[75] In his complaint, Mr. Berman alleged that he discovered various accounting practices that he considered fraudulent and violations of GAAP, Sarbanes–Oxley, and Dodd–Frank.[76] According to Mr. Berman, he reported these alleged violations to his supervisor at Neo.[77] In April 2013, he was fired.[78] Mr. Berman claimed that his internal reporting of fraud had angered a senior officer at Neo and that he was fired as a result.[79] In August 2013, Mr. Berman reported his allegations of fraud to the audit committee of Neo's parent company.[80] In October 2013, nearly six months after Mr. Berman was terminated, he reported the alleged accounting violations to the SEC.[81]

Neo filed a motion to dismiss Mr. Berman's complaint.[82] Relying on several earlier decisions from the Southern District of New York and the 2011 SEC rule promulgated to clarify the definition of whistleblower under Dodd–Frank, the magistrate court concluded that Mr. Berman qualified as a whistleblower under Dodd–Frank.[83] However, for other reasons, the magistrate court ultimately

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71 *Id.* (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) for the proposition that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

72 *See id.* at 630.

73 *Berman III*, 801 F.3d 145, 148-49 (2d Cir. 2015).

74 *Id.*

75 *Id.* at 149. Mr. Berman also brought breach of contract claims related to his employment contract with Neo. *Id.* These claims are beyond the scope of this Comment and therefore will not be addressed further.

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *See id.* (describing Mr. Berman's report to the audit committee of WPP Group USA, Inc.).

81 *Id.*

82 *Berman I*, No. 14-00523, 2014 WL 6865718, at *1 (S.D.N.Y. Aug. 15, 2014).

83 *See id.* at *6-*8.

recommended that Mr. Berman's claims be dismissed without prejudice for failure to state a claim.[84]

The district court rejected the magistrate judge's recommendation with respect to Mr. Berman's anti-retaliation claims.[85] The court, relying instead on the Fifth Circuit's decision in *Asadi*,[86] held that "the language of the statute unambiguously requires that a person provide information *to the Commission* in order to qualify as a whistleblower under the Act."[87] Because Mr. Berman had only reported violations internally before his termination, he did not have a remedy under Dodd–Frank.[88]

Mr. Berman appealed, and a divided panel of the Second Circuit reversed.[89] The panel concluded that "the pertinent provisions of Dodd–Frank create[d] a sufficient ambiguity to warrant [the court's] deference to the SEC's interpretive rule, which support[ed] Berman's view of the statute."[90] Discussing the relevant text of Dodd–Frank, the court noted that "there is no absolute conflict between the Commission notification requirement in the definition of 'whistleblower' and the absence of such a requirement in both subdivision (iii) of subsection [78u-6(h)(1)(A)] of Dodd–Frank and the Sarbanes–Oxley provisions incorporated by subdivision (iii)."[91] Despite no outright conflict,[92] however, the court recognized that "a significant tension within subsection [78u-6(h)(1)(A)(iii)] nevertheless remain[ed]," as applying such a reading "would leave that subdivision with an extremely limited scope."[93] Other than the "rare example of simultaneous . . . reporting to an employer and to the Commission, there would

84 *See id.* at *14. With respect to the anti-retaliation claim, the court found that Mr. Berman failed to plead facts establishing "both that he subjectively and objectively held a reasonable belief that the reported conduct violated Sarbanes–Oxley or federal securities laws *and* that 'a law or rule in the SEC's jurisdiction explicitly requires or protects disclosure of that violation.'" *Id.* at *10 (quoting Egan v. TradingScreen, Inc., 2011 WL 162066, at *6 (S.D.N.Y. May 4, 2011)). As "Dodd–Frank does not protect whistleblowers who report violations of *any* laws or regulations subject to the SEC's jurisdiction," *id.* at *9 (quoting *Egan*, 2011 WL 1672066, at *6) (emphasis added), the court recommended dismissing Mr. Berman's claim with leave to amend. *Id.* at *12. With respect to the breach of contract claims, the court found fatal Neo's "disclaimer, which explicitly preserve[d] the right to terminate an employee without cause or notice." *Id.* at *14.

85 Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 411 (S.D.N.Y. 2014), *rev'd*, 801 F.3d 145 (2d Cir. 2015) [hereinafter *Berman II*].

86 *Asadi II*, 720 F.3d 620 (5th Cir. 2013).

87 *Berman II*, 72 F. Supp. 3d at 405 (emphasis added).

88 *See id.* at 410-11 (granting Neo's motion to dismiss for failure to state a claim).

89 *Berman III*, 801 F.3d 145 (2d Cir. 2015).

90 *Id.* at 146.

91 *Id.* at 150.

92 *See id.* at 150-51 (providing, as an example of a situation in which "an absolute contradiction" is avoided, a scenario where an employee simultaneously reports suspected wrongdoing to his supervisor and the SEC); *see also Asadi II*, 720 F.3d 620, 627-28 (5th Cir. 2013) (relaying a similar example involving a mid-level manager who reports a violation of securities laws to both his company's CEO and the SEC).

93 *Berman III*, 801 F.3d at 151.

be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope."[94]

Finding it difficult to believe that Congress wished subsection (iii) to have such a limited effect, the court turned to the legislative history—an inquiry it ultimately found "yield[ed] nothing," as the legislative history shed no light on the inclusion of subsection (iii).[95] The court acknowledged that its conclusion was at odds with the Fifth Circuit's finding in *Asadi* that the "statutory text [was] plain and unambiguous,"[96] but it noted that a large number of district courts had found the statute ambiguous and, as a result, accorded the SEC interpretation *Chevron* deference.[97] "Thus," the court expounded, "although our decision creates a circuit split, it does so against a landscape of existing disagreement among a large number of district courts."[98]

The court noted that while both appellant and appellee accused each other of creating superfluous language, "these arguments ignore[d] the realities of the legislative process."[99] "[I]t is not at all surprising," the court remarked, "that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly."[100] Ultimately, the Second Circuit majority believed the statutory text left "the matter unclear."[101] The court concluded that it

> need not definitively construe the statute, because, at a minimum, the tension between the definition in subsection [78u-6(a)(6)] and the limited protection provided by subdivision (iii) of subsection [78u-6(h)(1)(A)] if it is subject to that definition renders section [78u-6] as a whole sufficiently ambiguous to oblige [the court] to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute.[102]

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94 *Id.* at 152.

95 *Id.* The court likened the origins of subsection (iii) to those of the Alien Tort Act, which Judge Friendly "felicitous[ly] characterize[ed] as 'a kind of legal Lohengrin; . . . no one seems to know whence it came.'" *Id.* at 153 (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank, 561 U.S. 247 (2010)).

96 *Asadi II*, 720 F.3d at 622.

97 Courts defer to an agency's reasonable exercise of discretion in interpreting statutes that are "silent or ambiguous with respect to a specific issue at hand." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984). "A statute is considered ambiguous if it can be read more than one way." AFL-CIO v. FEC, 333 F.3d 168, 173 (D.C. Cir. 2003).

98 *Berman III*, 801 F.3d at 153.

99 *Id.* at 154; *see also id.* (comparing Berman's contention that subjecting subsection (iii) to a Commission reporting requirement "would be superfluous because the Sarbanes–Oxley protections purportedly incorporated would have no effect," with Neo and the SEC's argument that applying the whistleblower definition to all three subsections would render the Commission reporting requirement superfluous).

100 *Id.* This observation is particularly germane considering the hasty addition of subsection (iii). *See id.* (referring to subsection (iii) as a "last-minute insertion").

101 *Id.* at 155.

102 *Id.*

Judge Jacobs dissented. He argued that the panel majority and the SEC through its rulemaking had simply deleted the words "to the Commission" from the statute.[103] Judge Jacobs noted that the definition of "whistleblower" in 15 U.S.C. § 78u-6(a)(6) was unambiguous and that statutory definitions, in particular, are "one of the 'prominent manner[s]' for limiting the meaning of statutory text."[104] According to Judge Jacobs, the majority "assume[d] its own conclusion" by arguing that § 78u-6(h)(1)(A)(iii) protects *employees*.[105] Judge Jacobs did not believe his interpretation created any problems because plaintiffs could still rely on protection under Sarbanes–Oxley. He explained that while "[a] shorter statute of limitations [under Sarbanes–Oxley] may be inconvenient for some plaintiffs . . . it does not threaten the entire statutory scheme."[106] On the contrary, "[t]he only palpable danger lurking here is that bureaucrats and federal judges assume and exercise power to redraft a statute to give it a more respectable reach."[107]

II. The Second Circuit's Position Is Correct

The Second Circuit was correct to conclude that Dodd–Frank's whistleblower protection provisions protect an employee who reports a suspected violation to his supervisors but who does not report the violation to the SEC. As a result of sloppy drafting, the statute is ambiguous such that a court's inquiry should not end with the text. Instead, as the agency charged with administering and enforcing federal securities laws, the SEC is properly owed *Chevron* deference.[108] The SEC's 2011 rule and accompanying guidance make clear that Dodd–Frank protects all employees who engage in whistleblower activity, even if they do not report directly to the Commission. This outcome is consistent with a fair reading of the text of the statute. It is also consistent with an important purpose of Dodd–Frank, as the statute aims not only to create incentives for individuals to blow the whistle but also to encourage individuals, where appropriate, to report potential violations internally *first*. Future circuit courts should follow the well-reasoned decision of the Second Circuit in *Berman v. Neo@Ogilvy*.

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103 *Id.*

104 *Id.* at 156 (alteration in original) (quoting King v. Burwell, 135 S. Ct. 2480, 2495 (2015)).

105 *See id.* at 157 ("Dodd–Frank's whistleblower-protection provisions do not mention this (generic) employee.").

106 *Id.* at 159.

107 *Id.*

108 *See supra* note 97.

A. *The Plain Meaning of Dodd–Frank's Text*

While it may appear to be an easy solution to an otherwise difficult analysis of statutory interpretation, a court should not simply stop at the definition of "whistleblower." This would be shortsighted analysis. Instead, the definition of whistleblower under Dodd–Frank must be understood within its entire statutory and regulatory context.[109]

Dodd–Frank defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*."[110] The statute also provides protection for such individuals: "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower* . . . ."[111] In *Asadi*, the Fifth Circuit stopped here and concluded that because the definition of "whistleblower" requires that an individual report to the SEC, and because this defined term is used in the anti-retaliation provision, the statute only protects someone who reports to the SEC.[112] At first glance, this may appear to be a fair reading of the text. However, the language that follows this general prohibition against employer retaliation casts doubt on this interpretation.

Immediately following the language quoted above, the statute provides three categories that further refine the phrase "any lawful act done by the whistleblower."[113] The first category states simply that a whistleblower is protected "in providing information to the Commission in accordance with this section."[114] Notably, Congress again utilized the phrase "to the Commission." The second category explains that whistleblowers are protected if they participate in any investigation with the SEC related to the information they provide.[115] Like the first category, the focus of this category is on the whistleblower's interaction with the SEC.

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109 *See, e.g.*, Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

110 15 U.S.C. § 78u-6(a)(6) (emphasis added).

111 *Id.* § 78u-6(h)(1)(A) (emphasis added).

112 *See supra* text accompanying note 50.

113 15 U.S.C. § 78u-6(h)(1)(A)(i)–(iii).

114 *Id.* § 78u-6(h)(1)(A)(i).

115 *See id.* § 78u-6(h)(1)(A)(ii) (noting specifically that a whistleblower's "lawful act" includes "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information").

However, it is the third category that provides the most difficult hurdle for the straightforward textualist approach espoused by the Fifth Circuit in *Asadi*. The third category protects whistleblowers "in making disclosures that are *required or protected under the Sarbanes–Oxley Act* . . . and any other law, rule, or *regulation* subject to the jurisdiction of the Commission."[116] This final category is very broad, and unlike the first two categories, it neither emphasizes disclosure to the Commission nor contemplates participation in an ongoing investigation with the Commission. The only mention of "the Commission" in this category is with respect to "regulation[s]" from the SEC, which would only expand the category of protection. It is undisputed that employees, like Mr. Asadi and Mr. Berman, who report suspected violations of law to their supervisors, are protected under Sarbanes–Oxley.[117]

The Fifth Circuit's textualist reading creates many problems. First, if the Fifth Circuit's reading is correct, it is hard to understand what if anything was accomplished when Congress added this third category. The Fifth Circuit tried to resolve this problem with the tortured hypothetical alluded to above:[118]

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports [it] (1) to his company's [CEO] and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a "whistleblower" as defined in Dodd–Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO . . . is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes–Oxley Act of 2002 . . . . Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd–Frank whistleblower-protection provision because he was a "whistleblower" and suffered retaliation based on his disclosure to the CEO, which was protected under [Sarbanes–Oxley].[119]

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

117 *See Berman III*, 801 F.3d 145, 156 (2d Cir. 2015) (Jacobs, J., dissenting) ("The plaintiff in this case reported the violation to his employer, and did not report it 'to the [Securities and Exchange] Commission,' and he is therefore protected from retaliation under Sarbanes–Oxley only." (citations omitted)); *see also* Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendants-Appellees at 4, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626), 2015 WL 3533004 [hereinafter Chamber of Commerce Brief] ("[T]he parties agree [that] there is no requirement that a claimant have made a report to the SEC [under Sarbanes–Oxley].").

118 *See supra* note 65 and accompanying text.

119 *Asadi II*, 720 F.3d 620, 627–628 (5th Cir. 2013) (citations omitted).

According to the Fifth Circuit, the third category would apply in the rare situation where an employee simultaneously reports a suspected violation of law to both his employer and to the SEC, and he is fired instantly, such that his employer has no time to learn of the report to the SEC prior to termination. As the Second Circuit acknowledged, this is a highly questionable outcome that "would leave [category three] with an extremely limited scope."[120] Such an outcome also "raises an immediate question"[121]: why would Congress not have been more specific and direct if it had truly intended to protect such a small category of individuals?[122]

Moreover, it is not even clear that this hypothetical provides any scope to category three. First, it is far from certain that the whistleblower who simultaneously reports to his employer and to the SEC could rely on category three to pursue a private action against his employer. As the SEC pointed out in its amicus brief to the Second Circuit, "if an employer is genuinely unaware that the employee has separately disclosed to the Commission, any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent—*i.e.*, the intent to punish the employee for engaging in protected activity."[123]

This reading also creates a structural problem within the statute. Subparagraph (A) of § 78u-6(h)(1) "principally operates as a prohibition directed to employers [and] seeks to *prevent* retaliation by placing employers on notice that they may not take adverse employment action against employees who engage in certain whistleblowing activity."[124] However, under the Fifth Circuit's interpretation, category three would be ineffective as a preventive measure. Since "employers would not know that a report was made to the Commission, [category three] would have no appreciable effect in deterring employers from taking adverse employment action for internal reports."[125] Therefore, "apart from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would

120 *Berman III*, 801 F.3d at 155.

121 Brief of SEC, *supra* note 12, at 21.

122 *Id.* ("If Congress had actually intended to protect only those 'required or protected' disclosures that satisfy these two conditions, why would Congress craft clause (iii) to unnecessarily suggest that it protects a much broader class of disclosures than it actually does? Surely Congress could have been more explicit and more direct if it in fact intended to protect only those disclosures that involve securities law violations, and only if the employee has made a separate disclosure to the Commission.").

123 *Id.* at 23; *cf.* Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 844 (2d Cir. 2013) ("Under the first step of the *McDonnell Douglas* framework, the plaintiff must establish a prima facie case of retaliation by showing . . . the defendant's knowledge of the protected activity . . . [and] 'a causal connection between the protected activity and the adverse employment action.'" (quoting Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005))).

124 Brief of SEC, *supra* note 12, at 22-23.

125 *Id.*

be virtually no situation where an SEC reporting requirement would leave [category three] with any scope."[126]

The Fifth Circuit also justified its reading by arguing that Mr. Asadi's interpretation rendered the words "to the Commission" in the definition of whistleblower superfluous, but that its reading did not.[127] This is incorrect. The Fifth Circuit's reading also renders the statute superfluous because § 78u-6(h)(1)(A)(i) includes the phrase "to the Commission." In other words, the Fifth Circuit reads the statute in the following manner: "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by [an individual who provides information relating to a violation of the Securities laws *to the Commission*] . . . in providing information *to the Commission* in accordance with this section."[128] The fact "[t]hat either of two competing interpretations yields superfluous statutory language confirms that Congress did not speak unambiguously on the issue."[129] Thus, because there is no clear and unambiguous interpretation of the statute, the SEC's rule is owed *Chevron* deference.[130]

Ultimately, the Second Circuit's interpretation is consistent with a fair reading of the statute, while the Fifth Circuit's reading leaves category three superfluous and without any scope. One cannot simply stop at the definition of "whistleblower"; instead, this definition must be understood in context. In any event, as both interpretations arguably yield statutory superfluity, the text is by definition ambiguous such that the SEC is properly owed *Chevron* deference.

B. *The Purpose of Dodd–Frank*

The Fifth Circuit's position also runs afoul of the purpose of Dodd–Frank's whistleblower protection provisions. In Dodd–Frank, Congress tasked the SEC with creating rules to incentivize whistleblowing.[131] The SEC responded

126 *Berman III*, 801 F.3d 145, 152 (2d Cir. 2015) (citations omitted).

127 *Asadi II*, 720 F.3d 620, 626 (5th Cir. 2013) ("While it is correct that [under our reading] individuals may take protected activity yet still not qualify as a whistleblower, that practical result does not render § 78u-6(h)(1)(A)(iii) conflicting or superfluous.").

128 15 U.S.C. § 78u-6(h)(1)(A) (2012).

129 Brief of SEC, *supra* note 12, at 27; *see also* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2248 (2011) ("[T]he canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'" (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

130 *See supra* note 97.

131 *See* 15 U.S.C. § 78u-6(b)(1) ("[T]he Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action . . . ."); *id.* § 78u-6(j) ("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

by creating what is now commonly referred to as the whistleblower "bounty" program.[132] During the notice-and-comment process, "[m]any commenters[,] . . . particularly industry-affiliated commenters, urged the Commission to encourage or require individuals to report internally before reporting to the Commission."[133] The U.S. Chamber of Commerce (the Chamber) was among those who argued for such rules. In its comments, the Chamber urged that "[i]n the absence of an affirmative restriction on external reporting when effective internal compliance channels are available, *or provision of significant incentive for using those internal channels*, employees will face an irresistible temptation to go to the SEC with their report."[134]

The SEC agreed with many of the commenters and concluded that it did not want this whistleblower program to "undermine the willingness of individuals to make whistleblower reports internally at their companies before they make reports to the Commission."[135] The SEC stated that ensuring "employees and others were not dissuaded from reporting internally due to the possibility of a monetary award" was a "principal challenge" in creating the whistleblower award program under Dodd–Frank.[136] In fact, the SEC noted that "the subject company may at times be better able to distinguish between meritorious and frivolous claims."[137] Additionally, the SEC did not want to undermine companies' existing compliance programs.[138] Therefore, the final rules issued by the Commission "were carefully calibrated to achieve this objective by providing 'strong incentives' for individuals in appropriate

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section."); *see also* CHOI & PRITCHARD, *supra* note 25, at 741 (discussing Congress's instruction to the SEC to establish a program that included the payment of monetary awards to individuals who furnish information leading to successful enforcement of the federal securities laws).

132 *See, e.g.*, Catherine Foti, *SEC, The Whistleblowers' "Advocate*,*"* FORBES (June 18, 2015, 10:14 AM), http://www.forbes.com/sites/insider/2015/06/18/sec-the-whistleblowers-advocate/#198f721e129d [https://perma.cc/429J-ZK6Q] (referring to the Dodd–Frank whistleblower incentive structure as a "bounty program" that has "award[ed] payments totaling over $50 million to whistleblowers"). *See generally* David Cooper, Comment, *Blowing the Whistle on Consumer Financial Abuse*, 163 U. PA. L. REV. 557 (2015) (comparing the impact of the Dodd–Frank whistleblowing protection provisions at the SEC, which provide for bounty payments to eligible informants, to the impact of those provisions at the Consumer Financial Protection Bureau, which include no such bounty payments).

133 Brief of SEC, *supra* note 12, at 11 n.13.

134 Securities Whistleblower Incentives and Protections, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,326 n.231 (June 13, 2011).

135 Brief of SEC, *supra* note 12, at 3.

136 *Id.* at 10.

137 *Id.* at 11 (internal quotation marks omitted).

138 *Id.* at 10 (recognizing the potential for reduced "effectiveness of a company's existing compliance, legal, audit and similar internal processes" in light of possible monetary awards (quoting Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,488 (Nov. 17, 2010))).

circumstances to report internally in the first instance."[139] The SEC noted that "internal reporting processes can help companies to promptly identify, correct, and self-report unlawful conduct by officers, employees, or others connected to the company."[140] Thus, reporting "through internal compliance procedures can complement or otherwise appreciably enhance" the SEC's enforcement efforts.[141]

Surprisingly, the Chamber appears to have reversed its position since it submitted comments during the SEC rulemaking process. In its amicus brief to the Second Circuit, the Chamber endorsed the Fifth Circuit's interpretation of the statute.[142] Despite agreeing with the SEC that the "internal reporting of potential securities violations should be encouraged," the Chamber argued that this was "not Congress's purpose in enacting Dodd–Frank's whistleblower provision" and therefore ultimately agreed with the Fifth Circuit.[143] The Chamber seems to have taken a position that is expedient in the short-term insofar as such an interpretation could potentially reduce whistleblower litigation,[144] at the cost of important long-term goals, such as maintaining effective compliance programs that encourage internal reporting before reporting to the SEC in appropriate circumstances. This position is shortsighted and misguided, for the same reasons previously asserted.[145]

The Fifth Circuit's position also ignores categories of whistleblowers who are statutorily required to first report internally, including lawyers and auditors.[146] Sarbanes–Oxley requires lawyers to report suspected violations "to the chief legal counsel or chief executive officer" of a public company.[147] "[I]f the counsel or officer does not appropriately respond to the evidence[,]" the attorney is "requir[ed] . . . to report the evidence to the audit committee of the board of directors" or other appropriate board.[148] Moreover, the SEC's Standards of Professional Conduct, which govern the behavior of lawyers

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139 *Id.* at 3 (quoting Securities Whistleblower Incentives and Protections, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300–01, 34,322 (June 13, 2011)).

140 *Id.* at 4-5.

141 *Id.* at 5 (internal quotation marks omitted).

142 *See* Chamber of Commerce Brief, *supra* note 117, at 4 (asserting that the Fifth Circuit "properly dismissed the Dodd–Frank whistleblower retaliation claim in [*Asadi II*]" because an employee can only receive whistleblower protection if he or she files a complaint with the SEC).

143 *Id.* at 18.

144 An SEC reporting requirement would automatically eliminate from the category of litigants entitled to relief under the Dodd–Frank whistleblower-protection provisions any whistleblower who did not report the potential violation to the Commission.

145 As noted above, this reading would afford subsection (iii) an inexplicably narrow scope, introduce structural problems within the statute itself, and yield statutory superfluity. *See supra* Section II.A.

146 *See Berman III*, 801 F.3d 145, 151 (2d Cir. 2015) (noting that there are types of whistleblowers who cannot first report suspected violations to the SEC).

147 15 U.S.C. § 7245(1) (2012).

148 *Id.* § 7245(2).

practicing before the Commission, assume a lawyer will first report the violation of law internally and only report to the SEC if necessary.[149] If the Fifth Circuit is correct that category three requires reporting to the SEC, then lawyers—who in many cases must report internally—are vulnerable to retaliation with no remedy under Dodd–Frank.

Sarbanes–Oxley also requires auditors under certain circumstances to "inform the appropriate level of the management . . . [of] illegal acts that have been detected . . . in the course of the audit."[150] Moreover, an auditor is required to "directly report its conclusions to the board of directors" if, inter alia, senior management has not taken "timely and appropriate remedial actions."[151] An auditor is permitted to report the violation to the SEC only if the board of directors or management does not take appropriate remedial action.[152] Accordingly, "if [category three] requires reporting to the Commission, its express cross-reference to the provisions of Sarbanes–Oxley would afford an auditor almost no Dodd–Frank protection for retaliation because the auditor must await a company response to internal reporting before reporting to the Commission, and any retaliation would almost always precede Commission reporting."[153]

Lawyers and auditors represent a huge portion of the universe of potential whistleblowers.[154] It would be utterly illogical for Congress to require these large groups of potential whistleblowers to report under Sarbanes–Oxley but then carve them out of the protections offered by Dodd–Frank. It is far more likely that Congress intended category three to be read broadly to protect categories of likely whistleblowers, like lawyers and auditors.

Moreover, under the Fifth Circuit's unreasonably strict reading, an individual who first reports a suspected securities law violation to the Federal Bureau of Investigation (FBI), the U.S. Department of Justice (DOJ), or a self-regulatory

149 *See* 17 C.F.R. § 205.3(b)(1) (2011) ("If an attorney . . . becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, . . . the attorney shall report such evidence to the issuer's chief legal officer . . . or to both the issuer's chief legal officer and its chief executive officer . . . forthwith."); *id.* § 205.3(d)(2)(iii) (permitting an "attorney appearing and practicing before the Commission in the representation of an issuer [to] reveal to the Commission, without the issuer's consent, confidential information related to the representation," including making disclosures "[t]o rectify the consequences of a material violation by the issuer that caused . . . substantial injury to the financial interest or property of the issuer or investors"); *see also Berman III*, 801 F.3d at 152 (reiterating SEC guidelines for attorneys who contemplate reporting suspected violations).

150 15 U.S.C. § 78j-1(b)(1)(B).

151 *Id.* § 78j-1(b)(2).

152 *Id.* § 78j-1(b)(2)(B).

153 *Berman III*, 801 F.3d at 151.

154 *See* Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1405 (2000) (discussing lawyers' responsibility upon discovering "an organization client is about to commit, or is already committing, a crime or fraud"); *see also id.* at 1411 (noting that it is incumbent upon auditors "to disclose illegal acts of their clients, including violations of securities disclosure laws").

organization like the Financial Industry Regulatory Authority (FINRA) in lieu of reporting "to the Commission" is not protected under Dodd–Frank.[155] This is an absurd result and should be avoided.[156] As the SEC asserted in its Second Circuit amicus brief, "[t]here is no basis to believe that Congress would have intended this disparate treatment based purely on the happenstance of which agency the individual reported to first given the dual responsibility that the Commission and DOJ have for the enforcement of the securities laws."[157]

The Fifth Circuit also wrongly concluded, after citing three distinctions between Dodd–Frank and Sarbanes–Oxley's whistleblower provisions, that under Mr. Asadi's interpretation no whistleblower would ever have reason to sue under Sarbanes–Oxley, rendering its remedy provisions moot.[158] This is simply not true. In its amicus brief to the Second Circuit, the SEC provided two reasons that a whistleblower might still prefer an action under Sarbanes–Oxley to an action under Dodd–Frank. First, individuals wishing to "avoid the burdens of pursuing the claim in court, including potential high litigation costs that they might bear if they do not prevail" may find Sarbanes–Oxley's administrative forum within the Department of Labor (DOL) very attractive.[159] DOL "assumes responsibility for investigating the retaliation claim and preparing the evidence for an administrative law judge's review,"[160] substantially reducing an individual's burden.

Second, it is not always the case that a successful suit under Dodd–Frank will offer greater damages than it would under Sarbanes–Oxley. Unlike Dodd–Frank, § 806 of Sarbanes–Oxley "provides for 'all relief necessary to make the employee whole' and for 'compensation for any special damages.'"[161] As the SEC noted, "[t]his language has been held to authorize compensation for emotional distress and reputational harm [such that] . . . individuals who have experienced

155 Brief of SEC, *supra* note 12, at 31.

156 *See* Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *see also* United States v. Wilson, 503 U.S. 329, 334 (1992) (noting that an interpretation of a statute designed to allocate credit at sentencing to defendants for time spent in custody that "would make the award of credit arbitrary [is] a result not to be presumed lightly"); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819) ("But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.").

157 Brief of SEC, *supra* note 12, 34-35.

158 *Asadi II*, 720 F.3d 620, 628 (5th Cir. 2013) ("Asadi's construction of the whistleblower-protection provision is problematic for another reason. Specifically, construing the Dodd–Frank whistleblower-protection provision to extend beyond the statutory definition of 'whistleblowers' renders the [Sarbanes–Oxley] anti-retaliation provision, for practical purposes, moot.").

159 Brief of SEC, *supra* note 12, at 26.

160 *Id.*

161 *Id.* (quoting 18 U.S.C. § 1514A(c)(1), (c)(2)(C)).

minimal pay loss, but significant emotional injuries, may find [Sarbanes–Oxley] actions more attractive."[162] Sarbanes–Oxley's whistleblower provisions are not entirely displaced by Dodd–Frank and are therefore not rendered moot by the Second Circuit's decision.

The Second Circuit's reading of the whistleblower protection provisions is far more consistent with the purpose of Dodd–Frank to incentivize whistleblowing than is the reading endorsed by the Fifth Circuit. Indeed, the Fifth Circuit all but ignores this purpose, as its position effectively *dis*incentivizes internal reporting. This is diametrically opposed to the intentions and interests of Congress, the SEC, and various stakeholders. Put simply, the Fifth Circuit's reading produces bad law and bad policy. Future circuit courts should follow the Second Circuit's well-reasoned decision in *Berman v. Neo@Ogilvy*.

CONCLUSION

On September 30, 2015, Neo filed a motion to stay the Second Circuit's mandate pending its filing and the disposition of a petition for a writ of certiorari from the Supreme Court of the United States.[163] The Second Circuit granted Neo's motion and issued a stay on October 14, 2015.[164] Surprisingly, Neo reconsidered its decision. On November 10, 2015, the company filed a letter with the Second Circuit informing the court that it no longer planned to file a petition for certiorari.[165] This was a curious turn of events for Neo, as there was a reasonable chance for Supreme Court review.[166] It is likely that *Berman v. Neo@Ogilvy* would have piqued the Court's interest because it created a clear circuit split,[167] the

162 *Id.*; *see also* Jones v. Southpeak Interactive Corp., 777 F.3d 658, 672 (4th Cir. 2015) (concluding that damages for emotional distress are available under section 806 of Sarbanes–Oxley); Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 266 (5th Cir. 2014) (per curiam) ("In light of [Sarbanes–Oxley]'s plain text and the foregoing considerations, we find that the statute affords noneconomic compensatory damages, including emotional distress and reputational harm.").

163 *See* Defendant-Appellees' Motion to Stay Issuance of the Mandate Pending the Filing and Disposition of a Petition for Writ of Certiorari, Berman v. Neo@Ogilvy LLC, No. 14-4626 (2d Cir. Sept. 30, 2015), ECF No. 96.

164 *See* Berman v. Neo@Ogilvy LLC, No. 14-4626 (2d Cir. Oct. 14, 2015) (order granting stay of mandate pending timely filing of petition for writ of certiorari and disposition of petition).

165 Letter on Behalf of Defendants-Appellees, Berman v. Neo@Ogilvy LLC, No. 14-4626 (2d Cir. Nov. 10, 2015), ECF No. 99.

166 When evaluating a certiorari petition, the Supreme Court focuses primarily on four factors: (1) the existence of a circuit split, (2) the importance of the issue, (3) the merits of the case, and (4) whether specific aspects of the case in question prevent the issue from being squarely presented to the Court (also known as "vehicle" issues). *See* U.S. Sup. Ct. R. 10 (outlining the Court's "[c]onsiderations [g]overning [r]eview on [c]ertiorari"); *see also* Timothy S. Bishop et al., *Tips on Petitioning for and Opposing Certiorari in the U.S. Supreme Court*, 34 LITIG. MAG., Winter 2008, at 26, 27 (classifying these considerations into four similar categories).

167 A genuine circuit split exists when one can say with certainty that had this case arisen in another circuit, a panel of the other circuit would be bound by its own precedent to reach the opposite conclusion in the case. Here, had Mr. Berman's case arisen in the Fifth Circuit, a panel of the Fifth

underlying issue is very important, and the case lacked any vehicle issues. Unfortunately, because Neo has forfeited its right to file a petition for certiorari, this circuit split will remain unresolved until another case presents the issue.

Circuit would have been bound by its *Asadi* decision to rule in favor of Neo@Ogilvy. Thus, a genuine circuit split exists here, as recognized by the Second Circuit. *See supra* note 98 and accompanying text.