INTERPRETING THE ANTI-RETALIATION PROVISION OF THE DODD-FRANK ACT

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INTRODUCTION

In 2010 Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1] a comprehensive legislative response to the market crash of 2008.[2] Dodd-Frank is a major initiative aimed at strengthening and expanding the existing regulatory structure under which financial markets operate.[3] In that respect, Dodd-Frank is not unique.

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1. Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.).

2. *See* Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 96 (2012) ("The Dodd-Frank Act was the government's historic response to the causes of the economic crisis.").

3. *See* Dodd-Frank Act, 124 Stat. at 1376 (setting the goal of the Dodd-Frank Act as that to "promote the financial stability of the United States by improving accountability and transparency in the financial system"); *see also* Barr, *supra* note 2, at 92 (asserting that

Rather, it continues a long-standing pattern of remedial Congressional action following major systemic failures shaking the economy. The most significant instances of such governmental intervention were the enactment of the Securities and Exchange Act of 1934[4] following the Great Depression, and the Sarbanes-Oxley Act of 2002[5] in response to the Dot-Com Crash. Much the same way, Dodd-Frank was intended to build on existing legislation to remedy the aftermath of the 2008 financial crisis, and provide strong compliance and reporting incentive structures to prevent future market failures. One of the ways Congress sought to achieve this was by "expanding and strengthening corporate whistleblower protections"[6] through Dodd-Frank's whistleblower provision.[7]

Years before enacting the Dodd-Frank Act, Congress had recognized the need to afford protections to whistleblowers as part of a broad scheme aimed at protecting financial markets. Industrialization in the United States was coupled with an increase in the frequency and scale of corporate fraud, which at times resulted in severe systemic problems.[8] One of the latest instances of the far-reaching effects of fraud on the financial system prior to the adoption of Dodd-Frank was the stock market crash of 2002 following years of undetected accounting manipulation.[9] The largest fraud cases were revealed thanks to the internal and external disclosures of several corporate employees, including the Vice President of Enron, Sherron Watkins.[10] The long-sustained violations, coupled with the whistleblowers' contributions in exposing the persistent unlawful activity, prompted Congress to step in and enact the Sarbanes-Oxley Act, the first federal attempt at providing comprehensive uniform reporting protections.[11] Its whistleblower provision covered both internal and external disclosures

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Dodd-Frank was enacted as a response to Congress's conviction that "financial institutions cannot be left to regulate themselves, and that without clear rules, transparency, and accountability, financial markets break down, sometimes catastrophically").

4. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-pp (2012).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28 and 29 U.S.C.).

6. Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 131 (2014).

7. § 922(a), 124 Stat. at 1841 (codified at 15 U.S.C. § 78u-6 (2012)) ("The Securities Exchange Act of 1934 . . . is amended by inserting . . . 'Sec. 21F. Securities Whistleblower Incentives and Protection.'").

8. Robert E. Freer, Jr. & Raymond W. Burroughs, *Unintended Consequences: Sarbanes-Oxley and its Progeny*, 7 S.C. J. INT'L L. & BUS. 47, 50 (2010).

9. *See infra* note 96 and accompanying text.

10. Freer, *supra* note 8, at 51.

11. Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 842 (2007).

in an attempt to prevent future financial crises.[12] The imperfections of the Act, however, made the market crash of 2008 possible. In response, Congress attempted to expand the Sarbanes-Oxley whistleblower protections in the Dodd-Frank Act.[13]

Unfortunately, the statute has presented an inherent ambiguity in delineating who is protected from employer retaliation after blowing the whistle. Section 922, the Dodd-Frank whistleblower provision, 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."[14] Read in isolation, the whistleblower definition seems to indicate that only disclosures to the Securities and Exchange Commission ("SEC") are protected under Section 922. However, the statute then outlines three types of disclosures protected from retaliation. The prohibition against retaliation provides that employers may not discharge whistleblowers for (1) giving information to, or (2) assisting the SEC in investigations, or (3) "*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."[15] Since internal disclosure—made within a company rather than directly to the SEC—is protected under the Sarbanes-Oxley Act,[16] the third prong, read in isolation, indicates that those who choose to report a violation internally are also protected from retaliation under the Dodd-Frank Act. The difficulty surfaces when one attempts to interpret the broad anti-retaliation provision in light of the narrow whistleblower definition.

In 2011 the SEC issued a regulation to clarify the ambiguity.[17] The SEC ruled that while the narrow definition applies to whistleblowers seeking monetary awards, the anti-retaliation provision covers three classes of whistleblowers, including those who make internal disclosures.[18] In spite of the SEC regulation, courts have remained divided on the issue. While the Second Circuit and district courts in California, Colorado, Connecticut, Nebraska, New York, Massachusetts, and Tennessee have adopted the broad reading espoused by the SEC,[19] the Fifth Circuit has refused to defer to the SEC interpretation and has limited the anti-

12. 18 U.S.C. § 1514A(a)(1) (2002).
13. *See* Leifer, *supra* note 6 and accompanying text.
14. 15 U.S.C. § 78u-6(a)(6) (2010) (emphasis added).
15. *Id*. § 78u-6(h)(1)(A).
16. 18 U.S.C. § 1514A(a)(1)(C) (2002).
17. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300 (June 13, 2011).
18. *Id*. at 34304.
19. *See infra* notes 40, 46-48 and accompanying text.

retaliation protection exclusively to external disclosures.[20]

This Comment argues that the narrow interpretation defies congressional intent and runs contrary to the goal of incentivizing disclosure and responsible business practices. Additionally, instead of achieving the goal of strengthening the incentives promoted by the Sarbanes-Oxley Act, the narrow interpretation has the potential to undermine the Sarbanes-Oxley whistleblower protection, and lead to even less disclosure than before the enactment of the Dodd-Frank Act.

Part I provides a brief account of the history leading up to the adoption of the Dodd-Frank whistleblower provision. Part II presents the ambiguity of the statute and the SEC interpretation. Part III introduces the circuit split in light of the statutory interpretation framework adopted by the Supreme Court in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[21] Part III also analyzes the narrow and broad approaches, arguing for the adoption of the broad interpretation of the anti-retaliation provision. First, a proper *Chevron* analysis leads to the conclusion that the statute is ambiguous in light of the statutory text and legislative intent. Second, the SEC interpretation is reasonable and should therefore be granted deference under *Chevron*. Part IV argues that adopting a narrow interpretation risks undermining the Sarbanes-Oxley anti-retaliation provision, which the Dodd-Frank Act sought to strengthen and expand.

I. HISTORICAL BACKGROUND

Congress has long recognized the need to provide whistleblower protections to encourage employees to come forward with information that could help prevent, unearth, and discipline securities fraud. The steady growth in the size and complexity of American corporations throughout the twentieth century, coupled with the workings of the U.S. capital markets, has consistently rewarded and so contributed to the increase of risk-taking behavior, which has often been misguided and unlawful, and at times led to major systemic failures.[22] Such failures have historically been difficult to prevent as employees have had little reason to report violations witnessed in the workplace. Prior to 2002, whistleblowers "had to rely on the 'vagaries' of state law for protection [and] most corporate employers knew exactly what they could do within state law to avoid a suit by a

20. *See infra* note 49 and accompanying text.

21. 467 U.S. 837 (1984) (outlining a two-part test for statutory interpretation).

22. *See generally* DAVID SKEEL, ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM (David Kairys ed. 2005) (providing recent examples of the pernicious effects of the trend toward excessive risk-taking labeled as "Icaran" after the legendary risk-taker Icarus).

whistleblowing employee."[23] As a result of the lack of meaningful protections, violations remained undetected for years, and ultimately made the stock market crash of 2002 possible.[24] The uncovering of nearly half a decade of fraud was largely due to the bravery of several employees of large corporations who reported their concerns to management and the SEC. In August of 2001, Enron's Vice President Sherron Watkins warned CEO Ken Lay of a series of improper accounting practices that later forced the company into bankruptcy.[25] Subsequently, a number of former WorldCom employees reported suspicions of similar accounting violations, later confirmed by the SEC.[26] These and several other corporate scandals led to the decline in investor confidence and the ultimate collapse of the stock market.[27]

As the events unfolded, Congress recognized the need for better and uniform reporting protections, and it enacted the Sarbanes-Oxley Act in an attempt to prevent another market collapse.[28] The whistleblower provision covered internal and external disclosures, and forbade retaliation against both.[29] Congress's decision to protect internal reporting was justified by a number of advantages it offered, including relieving some of the pressure from the SEC, enhancing the efficiency of internal controls, and avoiding the waste of corporate and governmental resources where the suspicions proved unwarranted.[30] However, Congress's execution of that policy objective was imperfect. Sarbanes-Oxley's whistleblower provision arguably provided insufficient protections to offset the risk of a job loss, coupled with a set of procedural hurdles further discouraging disclosure.[31] Some believe that the availability of monetary incentives undermined internal compliance programs by encouraging employees to leave violations uncorrected in order to report to the SEC and obtain an award.[32] Partly as a result of the inadequacies of Sarbanes-Oxley, only six years after the Act's adoption, the nation suffered the worst financial crisis since the Great Depression.[33] Congress's response was the adoption of the Dodd-

23. Watnick, *supra* note 11.

24. *See infra* note 96 and accompanying text.

25. Freer, *supra* note 8, at 51.

26. *Id*. at 51–52.

27. *Id*.

28. *See infra* note 28 and accompanying text.

29. 18 U.S.C. § 1514A(a)(1) (2002).

30. For a more comprehensive discussion on the benefits of protecting internal disclosure, *see infra* notes 137-143 and accompanying text.

31. *See infra* notes 105-108 and accompanying text.

32. Steve Spivack & Erin Sullivan, *The SEC Whistleblower Program: What Companies Need to Know*, 21 BUS. CRIMES BULL., no. 7, Mar. 2014, at 3.

33. *See generally* GEORGE SOROS, THE NEW PARADIGM FOR FINANCIAL MARKETS: THE CREDIT CRISIS OF 2008 AND WHAT IT MEANS (2008) (characterizing the 2008 market crash

Frank Act.[34] Its goal was to build on and strengthen the protections of Sarbanes-Oxley, and thus prevent another systemic collapse.[35] Its success in achieving that goal has recently been threatened by the Fifth Circuit's refusal to recognize the internal whistleblower protections.

II. THE DODD-FRANK WHISTLEBLOWER PROVISION AND THE SEC INTERPRETATION

The language of the Dodd-Frank Act presents an internal inconsistency between the whistleblower definition and the anti-retaliation provision. Section 922, titled "Whistleblower Protection," begins with the general statement that it amends the Securities Exchange Act of 1934.[36] The statute then lays out a list of definitions applying to the remainder of the section. A whistleblower is defined as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission."[37] That definition read in isolation, therefore, seems to clearly and unambiguously indicate that only individuals making disclosures of suspected violations directly to the SEC enjoy the protections of Section 922. However, Section 922 then continues by outlining three instances in which retaliation is forbidden. The anti-retaliation provision states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . .[38]

A quick consultation with the Sarbanes-Oxley Act reveals that under

as the worst one since the mid-30s).

34. *See supra* notes 2-3.

35. *Id*.

36. § 922(a), 124 Stat. at 1841 (codified at 15 U.S.C. § 78u-6 (2012)).

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

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

subsection (iii) the protection applies to any employee who has reported to the SEC, Congress, or "*a person with supervisory authority over the employee*."[39] Therefore, the third prong of the Dodd-Frank anti-retaliation provision, read in isolation, seems to clearly and unambiguously define three categories of whistleblowers protected from retaliation, including those who make internal disclosures. Read together, however, the whistleblower definition contained in § 78u-6(a)(6) and the anti-retaliation provision in § 78u-6(h)(1)(A)(iii) present a textual inconsistency within the statute. The resulting confusion is centered on the inclusiveness of the whistleblower anti-retaliation protection; namely, whether coverage extends to all employees disclosing securities laws violations, or only to those reporting to the SEC.

The direct clash between § 78u-6(a)(6) and § 78u-6(h)(1)(A) proved confusing for courts almost immediately. The court in *Egan v. TradingScreen* was the first to address the issue in dicta, suggesting that internal disclosures are covered by the anti-retaliation provision.[40]

In 2011, in an attempt to clarify the ambiguity, the SEC promulgated a final rule addressing the issue of eligibility both for a monetary award and for anti-retaliation protection under Section 922.[41] The rule provides that a public company employee is a whistleblower protected from retaliation if he or she has "a reasonable belief" that the reported information "relates to a possible securities law violation," and the disclosure is made as described by § 78u-6(h)(1)(A), the anti-retaliation provision.[42] The rule further clarifies that a whistleblower, as described above, enjoys protection from retaliation regardless of whether he or she also qualifies as a whistleblower for a monetary award under the bounty program.[43] Therefore, the SEC resolved the apparent conflict by adopting two distinct whistleblower definitions for the two distinct incentive provisions of Section 922. To be eligible for the bounty program and entitled to a monetary award, a whistleblower is an employee who provides information to the Commission, as provided in § 78u-6(a)(6).[44] However, for anti-retaliation protection purposes, the SEC defines three categories of whistleblowers, as

39. 18 U.S.C. § 1514A(a)(1)(C) (2002) (emphasis added).

40. No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. WL 1672066, at *5–6 (S.D.N.Y. May 4, 2011) (holding that the SEC had no jurisdiction in the case, but outlining four protected categories of disclosures under Dodd-Frank, including internal disclosures protected under Sarbanes-Oxley).

41. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300 (June 13, 2011).

42. *Id.* at 34363.

43. *Id.*

44. *See id.* ("To be eligible for an award, [an employee] must submit original information to the Commission . . . .").

outlined in § 78u-6(h)(1)(A).[45]

III. THE CIRCUIT SPLIT AND *CHEVRON*

In spite of the SEC clarification on the issue, the confusion surrounding the definition of whistleblower under Dodd-Frank has continued. On one hand, the Second Circuit and the majority of district courts have deferred to the SEC interpretation and adopted the broad reading of the anti-retaliation protection. Just a few months after the final rule was published, the *Nollner* decision came out citing both *Egan* and the SEC rule to summarize in dicta that internal disclosures are covered under the anti-retaliation provision.[46] California, Colorado, Connecticut, Nebraska, New York, and Massachusetts soon followed course, holding for the first time that the broad whistleblower definition should apply to employees seeking protection from retaliation.[47] Most recently, the Second Circuit in *Berman v. Neo@Ogilvy LLC* concluded that "the pertinent provisions of Dodd-Frank create a sufficient ambiguity to warrant . . . deference to the SEC's interpretive rule, which supports [the broad interpretation]."[48] On the other hand, the Fifth Circuit has consistently refused to follow the SEC interpretation, arguing that the statute unambiguously defines a whistleblower as someone who has provided information to the Commission, and that therefore the anti-retaliation provision only applies to external disclosures.[49] While the two lines of

45. *See id*. at 34304 ("[T]he 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*. Specifically, [§ 78u-6(h)(1)(A)(iii)] provides anti-retaliation protections for employees [who report to] a person with supervisory authority over the employee . . . .").

46. Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 993–95 (M.D. Tenn. 2012).

47. Bussing v. COR Cleaning, LLC, 20 F. Supp. 3d 719 (D. Neb. 2014); Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519 (S.D.N.Y. 2014); Khazin v. TD Ameritrade Holding Corp., No. 13-4149(SDW)(MCA), 2014 U.S. Dist. WL 940703 (D.N.J. Mar. 11, 2014); Connolly v. Remkes, No. 5:14-CV-01344-LHK, 2014 U.S. Dist. WL 5473144 (N.D. Cal. Oct. 28, 2014); Rosenblum v. Thomson Reuters Mkts. LLC, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); Ellington v. Giacoumakis, 977 F. Supp. 2d (D. Mass. 2013); Murray v. UBS Securities, LLC, No. 12 Civ. 5914(JMF), 2013 U.S. Dist. WL 2190084 (S.D.N.Y. May 21, 2013); Genberg v. Porter, 935 F. Supp. 2d 1094 (D. Colo. 2013); Kramer v. Translux Corp., No. 3:11cv1424(SRU), 2012 U.S. Dist. WL 4444820 (D. Conn. Sept. 25, 2012).

48. 801 F.3d 145, 146 (2d Cir. 2015).

49. Asadi v. G.E. Energy United States, 720 F.3d 620 (5th Cir. 2013); *see also* Verfuerth v. Orion Energy Systems, Inc., 65 F. Supp. 640, 646 (E.D. Wis. 2014) (holding that the statute is not ambiguous, and only those who fall within the definition of a whistleblower are entitled to protection); Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 U.S. Dist. WL 2619501, at *9 (M.D. Fla. May 12, 2014) (holding that the

cases reach a different conclusion, both follow the same course of analysis. Since the dispute revolves around statutory interpretation, courts follow the two-part standard laid out in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[50] First, a court reviewing an agency's construction of a statute needs to determine "[i]f the intent of Congress is clear."[51] If congressional intent is clear and unambiguous, the court must adhere to it regardless of the agency's interpretation.[52] If, however, "the statute is silent or ambiguous," the court must grant the agency's interpretation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."[53] In Parts III.A and III.B I argue that, in light of the statutory text, the legislative history, and the goal of the Dodd-Frank Act, a court may not reasonably determine that Congress clearly and unambiguously sought to limit the anti-retaliation protection to external disclosures. In Part III.C I argue that the SEC interpretation is reasonable and must therefore be adhered to.

A. *The Dodd-Frank Act's Statutory Language and Structure Render the Whistleblower Provision Ambiguous*

Much of the disagreement over the interpretation of Section 922 lies in the conclusions courts have reached with respect to step one of *Chevron*. The Fifth Circuit, starting with *Asadi*, has consistently held that Congress clearly and unambiguously meant to protect only external whistleblowers from retaliation.[54] The Second Circuit and the majority of district courts adopting the broad interpretation, on the other hand, have determined that the statute is inherently ambiguous.[55] Both lines of cases, however, have predominantly focused on the text and structure of Section 922. In

plaintiff who had not provided information to the SEC was not a whistleblower because the Act unambiguously limited coverage to external disclosures); Banko v. Apple Inc., 20 F.3d 749 (N.D. Cal. Sept. 26, 2013) (stating that the anti-retaliation provision only applies to external disclosures, as unambiguously provided in the statute).

50. 467 U.S. 837, 842 (1984).

51. *Id*.

52. *Id*. at 842–43.

53. *Id*. at 843–44.

54. *Asadi*, 720 F.3d at 623; *see also Englehart*, 2014 U.S. Dist. WL 2619501 (finding that Congress "intended the whistleblower-protection provision to apply explicitly to an individual who falls within the definition 'whistleblower' [as defined in §78u-6(a)(6)]"); *Verfuerth*, 65 F. Supp. at 644 (finding "no ambiguity in the statute at all" and adopting the narrow interpretation).

55. *Berman*, 801 F.3d at 146; *Connolly*, 2014 U.S. Dist. WL 5473144, at *6; *Yang*, 18 F. Supp. 3d at 534; *Khazin*, 2014 U.S. Dist. WL 940703, at *6; *Genberg*, 935 F. Supp. 2d at 1106; *Murray*, 2013 U.S. Dist. WL 2190084, at *4; *Ronsenblum*, 984 F. Supp. 2d at 147; *Kramer*, 2012 U.S. Dist. WL 4444820, at *4.

interpreting the statutory language, courts have almost universally cited to *TRW Inc. v. Andrews* for the contention that "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[56] The adherence to the principle, however, has led to divergent results.

Some district courts have found the statute ambiguous on the basis of the "direct conflict" between §78u-6(a)(6) and §78u-6(h)(1)(A)(iii), and have then chosen to protect internal disclosures concluding that the narrow interpretation would render §78u-6(h)(1)(A)(iii) superfluous.[57] They have adopted the SEC's reading, and treated §78u-6(h)(1)(A)(iii) as a "narrow exception" to the definition of whistleblower.[58] Most recently, the Second Circuit in *Berman* has concluded that while there is "no absolute conflict" between the two sections, there remains "a significant tension" between them, which renders the statute ambiguous, and warrants deference to the reasonable SEC interpretation.[59] *Asadi* and the rest of the Fifth Circuit cases, on the other hand, have found no tension between the two sections, and have held that the plain language of the Dodd-Frank Act only affords whistleblower protection to individuals who provide information to the SEC.[60] The court in *Asadi* attempted to reconcile the "perceived conflict" between the definition section and the anti-retaliation section by attributing it to a misreading of the statute.[61] According to the court, §78u-6(a)(6) delineates *who* is protected under the statute, while §78u-6(h)(1)(A) outlines *what activities* are protected.[62] Pursuant to this reading of Section 922, the definition provision serves as a gateway requirement that must be satisfied in order to seek protection under the anti-retaliation provision. A court must first determine that a plaintiff is a whistleblower pursuant to §78u-6(a)(6), and only then apply the three-part test of §78u-6(h)(1)(A) to

56. 534 U.S. 19, 31 (2001).

57. *Genberg*, 935 F. Supp. 2d at 1106; *Connolly*, 2014 U.S. Dist. WL 5473144, at *6; *Khazin*, 2014 U.S. Dist. WL 940703, at *6.

58. *Egan*, 2011 U.S. Dist. WL 1672066, at *5; *Yang*, 18 F. Supp. 3d at 532; *Murray*, 2013 U.S. Dist. WL 2190084, at *5; *Genberg*, 935 F.2d at 1106; *Kramer*, 2012 U.S. Dist. WL 4444820, at *5.

59. *Berman*, 801 F.3d at 150–51, 154–55.

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

61. *Id*. at 625.

62. *Id*. Relatedly, the court in *Englehart* asserted that a broad reading of the anti-retaliation provision, inclusive of internal disclosures, "would contradict the section's title—'Protection of Whistleblowers.'" 2014 U.S. Dist. WL 2619501, at *8. No such contradiction appears if the court adopts the SEC interpretation and assumes that §78u-6(h)(1)(A), rather than §78u-6(a)(6) provides the definition of whistleblower for purposes of the anti-retaliation protection. The court, however, fails to address the SEC interpretation altogether.

determine if the plaintiff's actions are protected against retaliation.[63]

In choosing that reading, the *Asadi* court focused on the term "whistleblower" used in the anti-retaliation provision finding it "significant."[64] "If Congress had elected the terms 'individual' or 'employee,' [the broad interpretation] would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee . . . to be protected from retaliatory actions by their employers."[65] The problem with that statement, however, is that it is almost tautological. Had Congress used the term "individual" or "employee," the statute would present no internal inconsistency and ambiguity, and the broad reading would be the only permissible reading. The *Asadi* court therefore only stated the obvious: that the use of the term whistleblower is what presents the ambiguity that gives rise to the confusion. However, the mere fact that the court may not conclude that Congress clearly and unambiguously intended to protect internal disclosures does not prove the opposite, that Congress clearly and unambiguously intended to *only* cover external disclosures.

The *Asadi* court, however, contended that the narrow interpretation is the more logical reading of the statute, and that it would not render a substantial part of the anti-retaliation provision superfluous, as some of the district courts had argued.[66] In support, it presented the hypothetical situation of an employee who disclosed his suspicions to the SEC and his employer on the same day, and got fired even though his employer was unaware of the SEC disclosure.[67] That employee, the court reasoned, would be protected from retaliation against the internal disclosure under §78u-6(h)(1)(A)(iii) because, by virtue of reporting to the SEC, he was already a whistleblower under §78u-6(a)(6).[68]

While the court managed to conceive of a scenario where the two sections would be reconciled, it did not advance the *only* reasonable explanation. Rather, as argued by the court in *Connolly*, the two sections "are—at a minimum—susceptible to more than one interpretation when read together," and nothing indicates that the unusual hypothetical situation advanced by *Asadi* is what Congress intended to address.[69] An alternative

63. Banko v. Apple Inc., 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013) ("[T]he 'whistleblower protection' provided by Section 78u-6(h) is only available to individuals who meet the Dodd-Frank definition of 'whistleblower' found in Section 78u-6(a).").

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

65. *Id*.

66. *Id*. at 627.

67. *Id*.

68. *Id*.

69. *Connolly*, 2014 U.S. Dist. WL 5473144, at *6; *see also Murray*, 2013 U.S. Dist. WL 2190084, at *5 ("No doubt this reading of the two statutory provisions is permissible,

way to reconcile the two sections may be that adopted by *Egan*, *Kramer*, and *Genberg*; namely, that §78u-6(h)(1)(A) is a narrow exception to the §78u-6(a)(6) whistleblower definition.[70] This interpretation, endorsed by the SEC, likely captures Congress's intent better. First, the *Asadi* interpretation addresses only a very unusual and rare set of cases. It is difficult to imagine why one would choose to report a suspected violation internally once he has already decided to report to the SEC. Upon disclosure to the SEC, the employee loses the major incentives for disclosing internally, such as "displaying loyalty to one's company and allowing for quick, efficient, and private resolutions of violations."[71] The *Asadi* court did not claim that there had ever been such a case. Moreover, as the court in *Connolly* acknowledged, citing to the SEC amicus brief to the Second Circuit, "under *Asadi*, 'clause (iii) would be utterly ineffective as a preventative measure' because 'employers would not know that a report was made to the Commission.'"[72] Even if the hypothetical example provides one possible explanation of the textual inconsistency, it is far from the clear and unambiguous display of congressional intent required by *Chevron*.[73] As the *Murray* court concluded, "[t]he existence of these 'competing, plausible interpretations' of the statutory provisions compels the conclusion that 'the statutory text is ambiguous in conveying Congress's intent.'"[74] By presuming one possible (and arguably not the most reasonable) interpretation[75] of the statute, the *Asadi* court effectively skipped step one of *Chevron*, and engaged in impermissible judicial lawmaking.[76]

The *Asadi* court, however, did not end its argument by offering a way to reconcile the two provisions. It also contended that the broad interpretation would render the definition section superfluous.[77] The court asserted that the words "to the Commission" would be given no meaning if

but . . . it is by no means mandatory.").

70. *Egan*, 2011 U.S. Dist. WL 1672066, at *5; *Genberg*, 935 F. Supp. 2d at 1106; *Kramer*, 2012 U.S. Dist. WL 4444820, at *5.

71. Leifer, *supra* note 6, at 139.

72. 2014 U.S. Dist. WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014).

73. *Chevron*, 467 U.S. at 842.

74. *Murray*, 2013 U.S. Dist. WL 2190084, at *5.

75. *See* Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 745 (2014) (describing the *Asadi* interpretation as "an attempt to grasp at straws to give meaning to § 78u-6(h)(1)(A)(iii)").

76. *See Chevron*, 467 U.S. at 843 (holding that when a statute has been ambiguous, and an administrative agency has interpreted the statute, a court may not "simply impose its own construction on the statute").

77. *Asadi*, 720 F.3d at 628.

the broad definition were adopted.[78] This presents an interesting juxtaposition with the stance taken by the Second Circuit and the district courts outside the Fifth Circuit that adopting the narrow interpretation would render part of the anti-retaliation provision "inoperable and moot"[79] or, at best, "extremely limited [in] scope."[80] As illustrated by the SEC rule and the *Asadi* hypothetical, neither concern is completely justified. The SEC rule and the *Asadi* hypothetical both present possible ways to reconcile the textual inconsistency.[81] However, neither evidences that Congress's intent was clear and unambiguous. As the court in *Murray* noted, the fact that both the broad and the narrow interpretation are reasonable serves as evidence that the statute is ambiguous.[82] And upon a finding of ambiguity, the court must defer to a reasonable agency interpretation rather than substituting its own construction.[83] Even though the *Asadi* court in another section of the opinion acknowledged the SEC's reading would avoid the problem by applying the narrow definition to the bounty program, it failed to address it when stating that the broad interpretation would render the definition section superfluous.

The *Asadi* court also asserted that the broad definition would render the Sarbanes-Oxley whistleblower protection moot.[84] The court recognized that the greater monetary award, reduced procedural hurdles, and extended statute of limitations in the Dodd-Frank Act, coupled with the broad interpretation, would supplant the need to file under Sarbanes-Oxley.[85] Although the statement is factually correct, it does not constitute a persuasive argument for adoption of the narrow interpretation. As argued by some courts and evidenced by legislative history, the Dodd-Frank Act sought to remedy the shortcomings of prior legislation, including the Sarbanes-Oxley Act, and to strengthen and expand its protections.[86]

78. *Id.*; *see also Verfuerth*, 2014 U.S. Dist. WL 5682514, at *3 ("The SEC's interpretation renders an entire *section* of the statute superfluous, namely, the definition of 'whistleblower' itself.").

79. *Genberg*, 935 F. Supp. 2d at 1106.

80. *Berman*, 2015 WL 5254916, at *5.

81. *See Khazin*, 2014 U.S. Dist. WL 940703, at *6 ("The SEC's rule harmonizes the contradictory provisions of the Dodd-Frank Act while not rendering any word or section superfluous.").

82. *Murray*, 2013 U.S. Dist. WL 2190084, at *5.

83. *Chevron*, 467 U.S. at 843.

84. *Asadi*, 720 F.3d at 628.

85. *Id.* at 629; *Verfuerth*, 2014 U.S. Dist. WL 5682514, at *4 (arguing that a broad construction of the Dodd-Frank anti-retaliation provision "would essentially replicate and render moot the SOX whistleblower protections already in place").

86. *See Kramer*, 2012 U.S. Dist. WL 4444820, at *4 (asserting that "the Dodd-Frank Act appears to have been intended to expand upon the protections of Sarbanes-Oxley"); *Murray*, 2013 U.S. Dist. WL 2190084, at *6 (S.D.N.Y. May 21, 2013) (acknowledging that

"[T]hus the claimed problem is no problem at all."[87]

Another court adopting the narrow interpretation used the Sarbanes-Oxley Act as evidence that Congress intended to limit the Dodd-Frank anti-retaliation provision to external disclosure.[88] It argued that while Dodd-Frank sought to "improve the accountability and transparency of the financial system, . . . it is not the only protection available to individuals."[89] The court advanced no justification for treating the existence of other law providing protections against retaliation as evidence that the Dodd-Frank Act should not and was not intended to broaden those protections. In fact, there is at least some evidence that Dodd-Frank intended to do just that: strengthen and expand the Sarbanes-Oxley whistleblower protections.[90]

One of the weakest arguments advanced by courts in finding the statute unambiguous addresses the structure of the statute. The court in *Banko* adopted the narrow interpretation, reasoning that since §78u-6(a)(6), the definition provision, came before §78u-6(h)(1)(A), the anti-retaliation provision, the latter was subordinate to the former.[91] The court cited no authority supporting the assumption that the order of the statutory text could be used as evidence of the order of importance. It is even harder to imagine it could be used as evidence of Congress's clear and unambiguous intent to attribute such order of importance to the sections of the statute.

In light of the direct textual conflict between the definition section and the anti-retaliation section, the multiple ways to reconcile the inconsistency, and the lack of a persuasive structural argument to the contrary, the language of Section 922 remains ambiguous.

B. *Congressional Intent Renders the Statute Ambiguous*

In determining whether the whistleblower protection provision presents an ambiguity, courts should look at the legislative intent not only

Congress intended to expand on the protections of Sarbanes-Oxley); *Bussing*, 20 F. Supp. 3d at 730 (asserting that Congress aimed at "protecting a very broad range of disclosures, including many to persons or entities other than the SEC"); Pacella, *supra* note 75, at 746 (2014) ("Dodd-Frank expands SOX's antiretaliation provisions to address weaknesses that have been revealed in the years since SOX's enactment, thereby granting whistleblowers better protections than what had previously been available under the law.").

87. *Kramer*, 2012 U.S. Dist. WL 4444820, at *5.

88. *Banko*, 20 F. Supp. 3d at 757.

89. *Id*. at 755–57; *see also* Berman v. Neo@Ogilvy LLC, No. 1:14-cv-523-GHW-SN, 2014 U.S. Dist. WL 6860583, at *5 (S.D.N.Y. Dec. 5, 2014), *rev'd*, No. 14-4626, 2015 WL 5254916 (2d Cir. Sept. 10, 2015) (justifying its adoption of the narrow interpretation by the fact that it "does not leave people who inform their employers of possible securities violations without a remedy if their employer retaliates against them").

90. *See infra* Part III.B.

91. *Banko*, 20 F. Supp. 3d at 756.

by analyzing the statutory text. While both the courts adopting the broad interpretation and those taking the narrow approach focused on the text of Section 922, they largely ignored analyzing the whistleblower provision in light of the broader statutory context.[92] Here, the economic and legislative history leading to the adoption of the Dodd-Frank Act, as well as the comprehensive changes to the Sarbanes-Oxley Act in accordance with the explicit goal of improving accountability and transparency, are instructive. They reveal that Dodd-Frank likely sought to protect both internal and external disclosures. At a minimum, they fail to demonstrate that Congress clearly and unambiguously intended to limit the anti-retaliation protection to external disclosures as required by *Chevron* for adopting the narrow interpretation without according deference to the SEC interpretation.

The economic crisis of 2008 came as a shock to many.[93] It marked the conclusion of an era that had praised the ability of financial markets unburdened by extensive governmental oversight to self-regulate through the forces of the Invisible Hand.[94] The market crash revealed an abundance of widely used business practices, ranging from imprudent to illegal, which resulted in the largest systemic economic failure since the Great Depression.[95] While the severity of the economic crisis of 2008 was of almost unprecedented magnitude, it was not the first time in recent history

92. By finding the whistleblower provision ambiguous in light of the statutory context, *Yang* is one of the exceptions to the stream of cases focusing entirely on the statutory text. 18 F. Supp. 3d at 534. The court in *Kramer* also considered the broad goal of the Dodd-Frank Act, "which was to 'improve the accountability and transparency of the financial system,' and create 'new incentives and protections for whistleblowers.'" 2012 U.S. Dist. WL 4444820, at *4.

93. *See* Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES (Sept. 2, 2009), *available at* http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html?pagewanted=all [perma.cc/V7ZF-DA2Z] (asserting that few economists predicted the market crash of 2008).

94. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Bantam Classics 2003) (1776) (first advancing the idea of the Invisible Hand: the idea that free markets naturally promote the interest of society through competition); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 38 (40th ed., 2002) (defending the efficiency of free markets, advancing the idea of minimal government involvement in economics, and attributing the Great Depression to "government mismanagement" rather than on an inherent instability of the free markets).

95. *See generally* SOROS, *supra* note 33 (characterizing the financial crisis of 2008 as the worst since the mid-30s, and examining the contributing factors); *see also Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 225 (2009) (statement of Richard C. Ferlauto) ("Under the disastrous sway of deregulation and lack of accountability, corporate boards and executives either caused or allowed corporations to undertake unreasonable risks in the pursuit of short-term financial goals that were devoid of real economic substance or any long-term benefits.").

that leading economists had been surprised by the imperfection of weakly regulated markets. The failures of Enron and WorldCom in 2000 similarly revealed a multitude of improper business practices including unparalleled accounting fraud that had gone undetected for years.[96]

Congress's response was the Sarbanes-Oxley Act, a major piece of remedial legislation aimed at strengthening governmental oversight and implementing comprehensive reporting incentives and structures that would prevent future systemic failures.[97] Its goal was to provide a comprehensive system of external and internal checks on potentially unlawful business practices. Its whistleblower provision was designed to achieve exactly that.[98] It forbade employers to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" who provided information or otherwise assisted in the uncovering of perceived securities violations.[99] The anti-retaliation protection applied regardless of whether the employee informed (1) a federal agency, (2) a member or committee of Congress, or (3) "a person with supervisory authority over the employee."[100] Thus, it covered both external and internal disclosures.

In spite of the government's attempt to prevent another economic crisis through the adoption of the Sarbanes-Oxley Act, the market crash of 2008 followed in less than a decade. It led Congress to once again come forward with a comprehensive piece of remedial legislation attempting to

96. *See* Richard A. Oppel Jr. & Kurt Eichenwald, *Enron's Collapse: The Overview; Arthur Andersen Fires an Executive for Enron Orders*, N.Y. TIMES (Jan. 16, 2002), http://www.nytimes.com/2002/01/16/business/enron-s-collapse-overview-arthur-andersen-fires-executive-for-enron-orders.html [perma.cc/3VQZ-8HGL] ("Enron was forced to acknowledge that improper accounting . . . had resulted in overstating its earnings by almost $600 million over five years."); Simon Romero & Floyd Norris, *New Disclosures From WorldCom May Add to Accounting Scandal*, N.Y. TIMES (July 2, 2002), http://www.nytimes.com/2002/07/02/business/new-disclosures-from-worldcom-may-add-to-accounting-scandal.html [perma.cc/A648-W5VC] (stating that WorldCom "had overstated pretax profits by $3.8 billion in 2001 and early [2002], and that WorldCom admitted it may have been tampering improperly with its reserve accounts for four years).

97. Paul S. Atkins, Comm'r, U.S. Sec. and Exch. Comm'n, Speech by SEC Commissioner: The Sarbanes-Oxley Act of 2002: Goals, Content, and Status of Implementation (Feb. 5, 2003), *available at* http://www.sec.gov/news/speech/spch020503psa.htm [perma.cc/3V64-XANB] (listing "restoring investor confidence by strengthening corporate governance" as some of the goals of the Sarbanes-Oxley Act).

98. *See* Megan E. Mowrey, et al., *Does Sarbanes-Oxley Protect Whistleblowers? The Recent Experience of Companies and Whistleblowing Workers Under SOX*, 1 WM. & MARY BUS. L. REV. 431, 431 (2010) (stating that the Sarbanes-Oxley whistleblower provision was adopted pursuant to the broader Sarbanes-Oxley goals to "interrupt, check, and prevent illegal accounting practices").

99. 18 U.S.C. § 1514A(a) (2002).

100. *Id.* § 1514A(a)(1).

improve the regulatory system governing the functioning of financial markets.[101] Much like the Securities Exchange Act of 1934 sought to remedy the issues leading to the Great Depression, and the Sarbanes-Oxley Act of 2002 attempted to fix the practices resulting in the burst of the Dot-Com Bubble, the Dodd-Frank Act of 2010 was designed to remedy the systemic flaws of financial markets and prevent another catastrophic failure.[102] It sought to do that by strengthening and expanding the already existing law,[103] including through its "stronger and more expansive whistleblower measures" as compared to the Sarbanes-Oxley Act.[104]

There are several reasons why Congress may have deemed the Sarbanes-Oxley whistleblower provision inadequate. First, the protections may not have been strong enough to tip the cost-benefit scales in favor of disclosure. For an employee to consider disclosure viable, the high risk of losing his or her job and receiving no compensation would need to be offset by a sufficiently high probability and magnitude of protection and remuneration. This calculus likely influenced Congress in enhancing the reporting incentives of Sarbanes-Oxley in Dodd-Frank's whistleblower provision. The Sarbanes-Oxley Act compensatory damages include: "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."[105] While preserving the first and third subsections almost unaltered, Dodd-Frank doubles the back-pay

101. *See supra* note 3.

102. *Id.*; *see also Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 226-27 (2009) (statement of Richard C. Ferlauto) ("It is time for America to get back on the road of prudent financial regulatory oversight and increased corporate accountability."); BAIRD WEBEL, CONG. RESEARCH SERV., R41350, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: ISSUES AND SUMMARY (2010) ("Perhaps the major issue in financial reform has been how to address the systemic fragility that was revealed by the crisis.").

103. Leifer, *supra* note 6.

104. *Id.* at 123; *see also Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 226-27 (2009) (statement of Richard C. Ferlauto) ("In order to restore the confidence of investors in our capital markets, it is now necessary to take the following steps: . . . Protect whistleblowers and confidential sources who expose financial fraud and other corporate misconduct."); Pacella, *supra* note 75, at 746 (arguing that the Dodd-Frank Act sought to address the weaknesses of the Sarbanes-Oxley Act and grant whistleblowers better protections).

105. 18 U.S.C. § 1514A(c)(2) (2002).

compensation, thus providing a stronger incentive to disclose a violation. The relief under Dodd-Frank includes "(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees."[106]

Additionally, Congress may have determined that the Sarbanes-Oxley 180-day statute of limitations[107] does not provide an adequate time window for whistleblowers to gather sufficient information, report the suspected violation, and commence an action seeking relief. Accordingly, Dodd-Frank extended the statute of limitations to six years from the moment the violation occurred or three years from the moment the employee became or should have become aware of the violation.[108]

Lastly, Congress likely considered the procedural hurdles of Sarbanes-Oxley to have a deterrent effect on disclosure. Under the Sarbanes-Oxley Act, a whistleblower may only bring a case to federal district court after having filed a complaint with the Secretary of Labor, and under the condition that the Secretary has not issued a final decision within 180 days.[109] Congress completely discarded that procedural requirement in the Dodd-Frank Act. Instead, a Dodd-Frank whistleblower claim may be filed directly in federal district court.[110] These changes, coupled with the broader goal of the Dodd-Frank Act to remedy the market failures that led to the crash of 2008,[111] have led many to conclude that the Dodd-Frank Act sought to strengthen the protections of the Sarbanes-Oxley Act.[112] Apart from the numerous statements based on legislative history that Dodd-Frank

106. 15 U.S.C. § 78u-6(h)(1)(C) (2010).

107. 18 U.S.C. § 1514A(b)(2)(D) (2002) (providing that a whistleblower may commence a lawsuit within 180 days of the moment the violation has occurred or the employee has learned of it).

108. 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I) (2010).

109. 18 U.S.C. § 1514A(b)(1) (2002).

110. 15 U.S.C. § 78u-6(h)(1)(B)(i) (2010).

111. *See* S. REP. No. 111-176, at 2 (2010) (asserting that the Dodd-Frank Act was "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008"); *see also Establishing a Framework for Systemic Risk Regulation: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 78 (2009) (statement of Daniel K. Tarullo, Member, Board of Governors of the Federal Reserve System) (arguing that "the over-arching goal [of the Dodd-Frank Act was that] of protecting the financial system and the broader economy").

112. *See Kramer*, 2012 U.S. Dist. WL 4444820, at *4 ("[T]he Dodd-Frank Act appears to have been intended to expand upon the protections of Sarbanes-Oxley."); *Murray*, 2013 U.S. Dist. WL 2190084, at *6 (acknowledging "the congressional intent to expand on the protections of Sarbanes-Oxley"); *Bussing*, 20 F. Supp. 3d at 730 (asserting that Congress aimed at "protecting a very broad range of disclosures, including many to persons or entities other than the SEC").

generally sought to expand Sarbanes-Oxley, there are arguments that the whistleblower protection was no exception.[113] The court in *Bussing* advanced several reasons for protecting internal disclosures, arguing that Congress most likely did not intend to "encourage an across-the-board departure from the general practice of first making an internal report."[114]

In light of the market crash of 2008, the explicit goal to "promote the financial stability of the United States by improving accountability and transparency in the financial system,"[115] and the marked boost of disclosure incentives under Dodd-Frank in accordance with that goal,[116] Congress likely sought to build upon, strengthen and expand Sarbanes-Oxley. Consequently, a court may not reasonably infer that Congress clearly and unambiguously sought to limit the anti-retaliation protection to external disclosures. Rather, the broad interpretation of the anti-retaliation provision is consistent with the goal of Section 922 "to motivate as many whistleblowers as possible to come forward with information pertaining to law violations."[117] Thus, a court facing the issue of internal reporting may not "impose its own construction on the statute," but must adopt the SEC's interpretation as long as it is reasonable.[118]

C. *The SEC Interpretation Is Reasonable*

Because the Dodd-Frank whistleblower provision is ambiguous, a court must grant deference to the SEC interpretation under *Chevron* unless it is "arbitrary, capricious, or manifestly contrary to the statute."[119] The SEC rule must be granted controlling weight pursuant to *Chevron*, because it provides a compelling interpretation of the Dodd-Frank whistleblower protection that reconciles the inherent ambiguity of Section 922.

As discussed in Part II, the SEC did not invalidate the narrow

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113. *See* Pacella, *supra* note 75, at 727 ("In addition to reforms aimed at financial regulation, Dodd-Frank created vast developments to incentivize and protect whistleblowers to come forward with information regarding possible securities law violations."); *see also Establishing a Framework for Systemic Risk Regulation: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 49 (2009) (statement of Paul Schott Stevens, President and CEO, Investment Company Institute) ("[T]he goal of systemic risk regulation should be to prevent or contain fires before they consume our financial system.").

114. *Bussing*, 20 F. Supp. 3d at 733 (asserting that internal disclosure allows companies to remedy violations early on, facilitates internal compliance programs, and helps vet tips to the SEC).

115. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

116. *See supra* text accompanying notes 106-110.

117. *See* Pacella, *supra* note 75, at 748.

118. *Chevron*, 467 U.S. at 843.

119. *Id.* at 844.

whistleblower definition of §78u-6(a)(6).[120] A whistleblower seeking a monetary award under the bounty program must still report to the SEC to be eligible.[121] However, the SEC clarified that a public company employee seeking protection from retaliation qualifies as a whistleblower upon meeting one of the three conditions under §78u-6(h)(1)(A).[122] Therefore, the SEC defined three categories of whistleblowers for purposes of the anti-retaliation provision, including public company employees who report a violation to a supervisor.[123] The rule is in this way consistent with the interpretation adopted by some district courts, namely, that §78u-6(h)(1)(A)(iii) is a "narrow exception" to the whistleblower definition of §78u-6(a)(6).[124] It also avoids rendering any clause of the statute superfluous, in conformity with the surplusage cannon of construction espoused by *TRW*.[125]

The *Asadi* court attacked the SEC interpretation on several fronts. Part III.A challenged most of them. First, the suggestion that the SEC interpretation renders the language "to the Commission" in §78u-6(a)(6) meaningless was shown to be unpersuasive in light of the fact that §78u-6(a)(6) continues to hold in full force outside of the anti-retaliation provision. Second, the concern that the SEC interpretation would obviate the need to sue under Sarbanes-Oxley was relieved by evidence that in enacting Dodd-Frank Congress intended to expand the Sarbanes-Oxley protections.

In addition to asserting that Section 922 is clear and unambiguous, the *Asadi* court maintained that the SEC interpretation is unreasonable and should be rejected because parts of the rule are inconsistent with each other.[126] In support of that contention, the court compared the anti-retaliation provision[127] with the provision governing the procedures for reporting a violation to the SEC.[128] According to the *Asadi* court, it is inconsistent to first define the term whistleblower as one who has provided

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120. *See supra* notes 41-45 and accompanying text.

121. 76 Fed. Reg. 34300-01, 34363 ("To be eligible for an award, you must submit original information to the Commission . . . .").

122. *Id*. at 34304 (defining three categories of whistleblowers protected from retaliation in accordance with §78u-6(h)(1)(A)).

123. *Id*. (incorporating the Sarbanes-Oxley whistleblower provision covering internal disclosures in the Dodd-Frank anti-retaliation provision).

124. *Yang*, 18 F. Supp. 3d at 532; *Genberg*, 935 F.2d at 1106; *Murray*, 2013 WL 2190084, at *5; *Kramer*, 2012 WL 4444820, at *5; *Egan*, 2011 WL 1672066, at *5.

125. 534 U.S. at 31.

126. *See Asadi*, 720 F.3d at 630 ("[T]he SEC's regulations concerning the Dodd-Frank whistleblower-protection provision are inconsistent.").

127. 17 C.F.R. § 240.21F-2(b)(1).

128. 17 C.F.R. § 240.21F-9; *see also* Asadi, 720 F.3d at 630 (discussing inconsistencies in the Dodd-Frank whistleblower provision).

information to the SEC *or* to a supervisor, and then to provide procedural requirements for submitting information *to the SEC*.[129] The court's argument is unpersuasive as there is no inconsistency between the two sections. The anti-retaliation section defines the categories of whistleblowers, including both internal and external whistleblowers,[130] while the procedures section provides the methods for making an external disclosure.[131] To be eligible for an award, a whistleblower must meet the requirements laid out in the procedures section.[132] However, to be eligible for anti-retaliation protection, a whistleblower may—but need not—satisfy the procedural requirements for award eligibility.[133]

Finally, as described in Part III.A, the *Asadi* court was able to come up with an alternative way to reconcile the ambiguity of Section 922.[134] However, pursuant to *Chevron*, where the statute is ambiguous and the agency has provided a reasonable interpretation, the court may not substitute its own interpretation for that of the agency.[135] Step two of *Chevron* is not a way for the court to use its discretion and balance the perceived reasonableness of the agency's interpretation against that of the court. The agency's construction must be given controlling weight unless it is arbitrary or capricious.[136] Since the SEC rule provided a reasonable interpretation of the Dodd-Frank whistleblower provision that reconciled the internal textual ambiguity, it must be granted deference and be adopted as the controlling interpretation on the issue.

IV. THE NARROW INTERPRETATION RISKS ELIMINATING ALL INTERNAL WHISTLEBLOWING

Apart from the legal rationales for deferring to the SEC construction of Section 922, I argue that adopting the broad interpretation is more consistent with the goals Congress sought to achieve with the enactment of the Dodd-Frank Act. Limiting the protections of Section 922 exclusively to external disclosures risks discouraging all internal whistleblowing, thus stifling a goal of the Sarbanes-Oxley Act. In light of the evidence that Dodd-Frank sought to strengthen and expand the protections of Sarbanes-

129. *Asadi*, 720 F.3d at 630.
130. 17 C.F.R. § 240.21F-2(b)(1).
131. 17 C.F.R. § 240.21F-9.
132. 17 C.F.R. § 240.21F-2(a)(2).
133. 17 C.F.R. § 240.21F-2(b)(1)(iii).
134. *See Asadi*, 720 F.3d at 627 (presenting the hypothetical situation of an employee who reports internally and externally on the same day).
135. *Chevron*, 467 U.S. at 843.
136. *Id*. at 844.

Oxley,[137] espousing the narrow interpretation risks running against the intent of Congress in enacting the Dodd-Frank Act.

The Sarbanes-Oxley Act explicitly protects internal disclosures from retaliation. Congress's decision to include internal whistleblowers in the statute is arguably justified both in theory and in practice. First, as a matter of policy, Congress may have decided to alleviate some of the burden on the already financially strained Securities and Exchange Commission by encouraging employees to report suspected violations internally. Securities violations often occur as a result of weak managerial oversight rather than intentional law breaking by high-level management, especially in large companies where active involvement by top executives is impractical.[138] In such cases, protecting internal reporting may enhance the efficiency of the oversight system. Management would willingly investigate the reported activity and remedy the violations even in the absence of SEC intervention.[139] That would be impossible if employees had no protections because of the risk and consequences of retaliation they would face when reporting violations to their superiors. Whether management is actively involved in a suspected securities violation, and whether internal reporting would be fruitful, can only be determined in hindsight. Thus, employees that lack a sufficiently strong set of protections from retaliation would forgo all internal disclosure, including such that would lead to immediate and effective remedial action by management. Additionally, internal reporting may avoid wasting corporate and governmental resources in the instances where the whistleblower's suspicions are based on a misunderstanding rather than an actual violation.[140]

Moreover, protections for internal disclosures may be beneficial to SEC enforcement even where management is actively involved in the unlawful activity. Empirical evidence suggests that "internal reporting is

137. *See supra* text accompanying note 112.

138. *Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 233 (2009) (responses to written questions of Senator Bunning from John C. Coates IV) ("As firms grow in size in complexity, it may not be a practical goal to expect boards or even top management to always know everything is going on inside the firms they run, any more than it is practical for officials in the U.S. Government to know everything that is going on inside the organization they oversee.").

139. *See Bussing*, 20 F. Supp. 3d at 733 ("Internal reporting . . . allows companies to remedy improper conduct at an early stage, perhaps before it rises to the level of a violation."); *see also* Pacella, *supra* note 75, at 753 ("Internal reporting provides companies with a number of benefits, including investigating wrongdoing in the early stages, evaluating the merits of reported violations, correcting problems in a timely manner, and avoiding any negative publicity of problems that become known to the public.").

140. *Bussing*, 20 F. Supp. 3d at 733.

the most common type of initial whistleblowing."[141] Therefore, internal disclosure may often be an important first step to subsequent external disclosure to the SEC for many employees. Discouraging internal reporting does not necessarily mean that employees will be more willing to report directly to the SEC. There are differences in the level of formality and procedural hurdles between internal and external disclosure. Under the Dodd-Frank Act, for instance, to report to the SEC in the manner provided by the Commission, one must "either . . . submit the information online, through the Commission's website, or by mailing or faxing a Form TCR (Tip, Complaint or Referral)."[142] An employee may feel more confident and comfortable to share his or her suspicions with a superior, possibly in an informal conversation at work, rather than initiating the process of contacting a federal agency and following its strict procedural rules to report a perceived violation. Additionally, as the *Berman* court noted, some employees may feel that reporting a suspected violation to a government agency creates a greater risk of retaliation than reporting to management in a good-faith effort to elicit company action and right the wrong internally.[143] Thus, while an initial internal report may trigger additional involvement and disclosure to the SEC upon management's reluctance to remedy the issue, possibly coupled with adverse action against the whistleblower, an employee may simply lack the willingness and incentives to initially report directly to the SEC. Moreover, some categories of whistleblowers, such as auditors and attorneys, cannot report a suspected wrongdoing to the Commission until after they have reported it internally and awaited company response.[144] Since "any retaliation would almost always precede Commission reporting," such categories of whistleblowers would be left with virtually no Dodd-Frank protection in the absence of internal protections.[145] Finally, Congress may also have been influenced by the fact that the Enron violations were largely revealed by internal disclosures to the company CEO Ken Lay.[146] As described above, there are many reasons for protecting internal disclosure. Regardless of the justifications, however, Congress's intent in enacting the Sarbanes-Oxley whistleblower provision was clear: to protect both internal and external disclosures from retaliation.

141. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1760 (2007).

142. *Kramer*, 2012 U.S. Dist. WL 4444820, at *4.

143. *Berman*, 2015 WL 5254916, at *6.

144. *Id*.

145. *Id*.

146. *Text of Watkins' Letter to Lay After Departure of Chief Executive*, N.Y. TIMES, Jan. 16, 2002, http://www.nytimes.com/2002/01/16/business/16TEXT.html [perma.cc/2WLL-HSYS].

As discussed in more detail in Part III.B, The Dodd-Frank Act was enacted in response to the financial crisis of 2008, and sought to strengthen and expand prior law, including the Sarbanes-Oxley Act. Since Dodd-Frank has been the latest say on whistleblower protections enacted to cure the deficiencies of prior legislation and improve "accountability and transparency,"[147] potential whistleblowers are likely to presume that it provides the strongest set of protections. Additionally, as the most recent federal law on whistleblowing, Dodd-Frank is likely to be perceived as Congress's choice of policy on the issue. Adopting the narrow interpretation, therefore, may have an important impact on prospective whistleblowers' perceptions.

The awareness that internal disclosure is not protected under Dodd-Frank, coupled with the understanding that Dodd-Frank was designed to expand Sarbanes-Oxley and enhance transparency, may signal that internal disclosure is not protected at all. It may thus serve as a potent deterrent against internal reporting.[148] Research shows that fear of retaliation is among the most common disincentives to internal disclosure.[149] An understanding that the law provides no protections against retaliation will thus have a chilling effect on internal reporting. The inference, based on the timing, goal, and structure of Dodd-Frank, that internal disclosure is left with no protections against retaliation may not be strictly rational. However, it is likely. Influenced by cognitive biases combined with prevalent stimuli awakening those biases, even highly trained actors engage in intuitive emotional decision-making. Investors are often tricked into forgoing profitable investments due to loss aversion.[150] Judges are susceptible to making objectively unreasonable decisions as a result of rhetoric in legal advocacy.[151] Prospective whistleblowers are vulnerable to intuitive emotional decision-making as well. The disincentive to internal

147. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

148. *See* Pacella, *supra* note 75, at 750 (arguing that the decision in *Asadi* will likely have a negative impact on internal disclosure of violations as it leaves whistleblowers "without the assurance that they may take advantage of the robust protections from retaliation that have become available under Dodd-Frank when they make internal reports").

149. *Id*. at 755 ("[T]he two most common explanations for why employees do not report internally are fear of retaliation and feelings of futility if they choose to report . . . .").

150. *See* Shlomo Benartzi & Richard H. Thaler, *Myopic Loss Aversion and the Equity Premium Puzzle*, Q.J. ECON. 73, 74 (1995) (arguing that investors often value utility by defining it "over gains and losses relative to some neutral reference point, such as the status quo, as opposed to wealth as in expected utility theory").

151. *See* Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 310 (2010) (arguing that "[t]he early sections of a brief . . . can work as primes for the case as a whole").

disclosure often arises from *perceptions* rather than actuality.[152] Thus, the *perceived* likelihood of retaliation influenced by and coupled with the *perceived* lack of legal protections will negatively affect internal disclosure. Much like Sarbanes-Oxley,[153] Dodd-Frank has already been attacked for undermining internal reporting by providing monetary incentives to whistleblowers.[154] Driven by the possibility of receiving a hefty award, the argument goes, employees may choose to forgo internal compliance programs instituted to spot and remedy violations early on, and instead report directly to the SEC.[155] If the concerns are justified, the combination of the bounty program and the adoption of the narrow interpretation risks chilling all internal whistleblowing.

Such an outcome would run contrary to the goals of both Dodd-Frank and Sarbanes-Oxley. First, it would directly interfere with the policy sought by Sarbanes-Oxley in adopting the whistleblower protections, namely, encouraging both internal and external disclosure. In light of loss aversion, any ambiguity as to whether internal disclosure is protected would be intuitively resolved in a way that avoids risk. The risk associated with reporting internally and being retaliated against will likely influence decision-makers to make no disclosure. By virtue of interfering with the functioning of Sarbanes-Oxley, adopting the narrow interpretation would also run contrary to the goal of Dodd-Frank "to address weaknesses that have been revealed in the years since SOX's enactment,"[156] thus "minimizing the fear of retaliation and motivating whistleblowers to come forward with information pertaining to securities laws violations."[157] Not only would adopting the narrow interpretation fail to strengthen and expand the protections of Sarbanes-Oxley; it would risk rendering part of it inoperative. As a result, the Sarbanes-Oxley whistleblower provision would be even less effective than before the adoption of Dodd-Frank, an outcome contrary to the goal of Dodd-Frank.

The dangers to the effectiveness of Dodd-Frank and Sarbanes-Oxley are amplified by several companies' recent attempts to use contractual provisions to prevent external disclosures. KBR has already agreed to pay a $130,000 penalty to the SEC for including non-disclosure agreements in

152. *See* Jamie Darin Prenkert et al., *Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action*, 91 N.C. L. REV. 889, 929 (2013) ("Perceptions of the likelihood of retribution are just as important as the reality, if not more so.").

153. Spivack, *supra* note 32.

154. Ben James, *Big Awards Pushing Compliance Pros To Be Whistleblowers*, LAW360, Apr. 23, 2015, 7:25 PM, http://www.law360.com/articles/646731/big-awards-pushing-compliance-pros-to-be-whistleblowers [perma.cc/HDE6-BUKB].

155. *Id.*

156. Pacella, *supra* note 75, at 741.

157. *Id.* at 751.

its employment contracts, prohibiting employees from reporting securities laws violations to the government without permission from the company's legal department.[158] While KBR did not admit and the SEC did not find that the contractual provisions had in fact prevented employees from reporting violations to the SEC, the existence of the non-disclosure agreements was found sufficiently injurious to the Dodd-Frank whistleblower provision to warrant an enforcement action.[159] The SEC is currently investigating a number of companies for similar violations.[160] The possibility that numerous companies may be using employment contracts and non-disclosure agreements to discourage employees from reporting externally, coupled with the possibility of adopting the narrow interpretation of Section 922, risks having a chilling effect on all whistleblowing activity. This is an outcome Congress surely did not intend to cause when it enacted the Dodd-Frank Act.

V. CONCLUSION

Limiting the protections of Section 922 to external disclosures jeopardizes Congress's goals in enacting both Sarbanes-Oxley and Dodd-Frank. First, it risks undermining the protections of the Sarbanes-Oxley Act and rendering its whistleblower provision less effective than prior to the adoption of the Dodd-Frank Act. Thus, it directly interferes with Sarbanes-Oxley's unambiguous intent to encourage internal reporting. As a result, it also runs contrary to the goal of Dodd-Frank to remedy the weaknesses of Sarbanes-Oxley and provide a stronger set of protections in order to incentivize the disclosure of securities violations. In light of the statutory ambiguity, the reasonable agency interpretation, and the potential of the narrow interpretation to undermine the goals of Sarbanes-Oxley and Dodd-Frank, courts should grant deference to the SEC reading, and decide in favor of protecting both internal and external disclosures from retaliation.

158. Brett Joshpe, *SEC Sends a Message About Whistleblower Treatment*, FORBES, Apr. 2, 2015, http://www.forbes.com/sites/brettjoshpe/2015/04/02/the-sec-sends-a-message-about-whistleblower-treatment/ [perma.cc/4H7X-WDVB].

159. *Id*.

160. Rachel Louise Ensign, *SEC Probes Companies' Treatment of Whistleblowers*, WALL ST. J., Feb. 25, 2015, http://www.wsj.com/articles/sec-probes-companies-treatment-of-whistleblowers-1424916002 [perma.cc/UWK8-G5EW].