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## A Novel Approach to Defining "Whistleblower" in Dodd-Frank

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# A NOVEL APPROACH TO DEFINING “WHISTLEBLOWER” IN DODD-FRANK

*Ian A. Engoron\**

## ABSTRACT

Following the Financial Crisis of 2008, trust in the financial industry was at an all-time low as the American taxpayer was forced to bailout the very same institutions responsible for their suffering. In response, Congress passed Dodd-Frank in 2010 to ensure another crisis like 2008 never happen again. Section 78u-6 of the Act provides incentives and protections for whistleblowers who report violations of securities laws. In recent years there has been a divide among circuit courts over the question of whether employees who report violations internally to their bosses—and not directly to the SEC—are protected by the Act. Currently, the Second, Fifth, and Ninth Circuits, have all adopted a different answer to this question. In analyzing this issue, courts have so far agreed there is only one definition of whistleblowers according to Dodd-Frank: those individuals who report directly to the Commission. The circuit split, however, is focused on whether, despite the single definition of “whistleblower” provided for by Dodd-Frank, its anti-retaliation provision nonetheless protects individuals who report internally and not directly to the SEC. This Note proposes that under a proper reading of the Act, Congress has granted the SEC broad authority to determine who is a whistleblower and has not narrowly defined a whistleblower to mean only those who report directly to the Commission.

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## INTRODUCTION

In recent decades, corporate whistleblowers have become one of the many tools in a financial regulator’s arsenal in the fight to protect the American public from securities fraud. The Securities and Exchange Commission (the SEC or the Commission) announced in August 2016

that whistleblower award payouts had reached over \$100 million.<sup>1</sup> Specifically, the Commission has awarded thirty-four whistleblowers over \$111 million dollars for providing information that led to successful enforcement actions.<sup>2</sup> Jane Norberg, Chief of the Office of the Whistleblower, stated, “the total award amount demonstrates the invaluable information and assistance whistleblowers have provided to the agency and underscores the program’s extraordinary impact on the agency’s enforcement initiatives.”<sup>3</sup>

In addition to paying out whistleblower awards, the SEC returned \$584 million dollars to investors because of the cooperation of the whistleblowers; this underscores the “transformative effect the SEC’s whistleblower program has had on the agency’s enforcement program.”<sup>4</sup> Of the whistleblowers who were previously employed by the offending company, sixty-five percent of whistleblowers initially reported their complaints internally rather than directly to the SEC.<sup>5</sup> Given the crucial and vital role that whistleblowers play in enforcing securities laws, “strong enforcement of the anti-retaliation protections is a critical component of the SEC’s whistleblower program.”<sup>6</sup> As the SEC has stated, “if individuals are not assured that they will be protected from retaliation when they report internally, they will be less likely to report internally, which could undermine the important role that internal compliance programs play in helping the Commission prevent, detect, and stop securities law violations.”<sup>7</sup> With that in mind, the SEC brought a “first-of-its-kind” enforcement action by filing a stand-alone whistleblower retaliation case against a casino for firing an employee who reported securities violations to his superiors.<sup>8</sup> Regardless of the SEC’s desire to protect internal whistleblowers, circuit courts are split<sup>9</sup> on whether Congress intended to extend protection to internal reporters under the

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1. U.S. SEC. & EXCH. COMM’N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2016), <https://www.sec.gov/files/owb-annual-report-2016.pdf> [<https://perma.cc/7246-LEJH>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 18.

6. *Id.* at 2.

7. *Id.* at 22.

8. *Id.* at 2.

9. *See infra* Part II.A.

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or the Act).<sup>10</sup>

The rise of corporate whistleblowers in recent years is largely due to a provision under the Sarbanes-Oxley Act of 2002 (SOX), which, among other things, protects employees of publicly traded companies from retaliation for their whistleblowing efforts by providing employees who bring a successful retaliation claim under the Act with a number of remedies.<sup>11</sup> Congress passed SOX in the wake of the Enron scandal<sup>12</sup>—followed by the WorldCom scandal<sup>13</sup>—which ultimately led to the dissolution of Arthur Andersen.<sup>14</sup> SOX sought to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws”<sup>15</sup> and required companies that issue public securities to adopt a number of extensive accounting and auditing procedures.<sup>16</sup> To ensure companies complied with SOX, the statute provides a private right of action to employees who are subject to retaliation by their company after reporting securities law violations internally.<sup>17</sup> After all, the Enron scandal was uncovered largely because of the efforts of internal whistleblowers.<sup>18</sup>

SOX was heralded by both politicians and scholars as the most important piece of legislative financial reform since the Securities Act of 1933<sup>19</sup> and the Securities Exchange Act of 1934<sup>20</sup> (the “Exchange Act”).<sup>21</sup> Whistleblower advocates also praised SOX for the extensive protections

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10. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

11. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, § 806, 116 Stat. 745, 802–04 (2002) (codified at 18 U.S.C. § 1514A (2012)).

12. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1544 (2005).

13. Ken Belson, *WorldCom’s Audacious Failure and Its Toll on an Industry*, N.Y. TIMES (Jan. 18, 2005), <http://www.nytimes.com/2005/01/18/business/worldcoms-audacious-failure-and-its-toll-on-an-industry.html> [<https://perma.cc/T7XM-R6BE>].

14. *Arthur Andersen Goes Out of Business*, ABC NEWS (Aug. 31, 2002), <http://abcnews.go.com/Business/Decade/arthur-andersen-business/story?id=9279255> [<https://perma.cc/4W3H-HWVJ>].

15. Sarbanes-Oxley Act, Pub. L. No. 107–204, 116 Stat. 745, 745.

16. *Id.*

17. 18 U.S.C. § 1514A (2012).

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

19. Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified at 15 U.S.C. § 77a (2012)).

20. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a (2012)).

21. Moberly, *supra* note 18, at 68, 68 nn.8–10.

offered to corporate whistleblowers, internal and external alike.<sup>22</sup> However, SOX turned out to be underwhelming in at least two significant ways: (1) it failed to protect whistleblowers;<sup>23</sup> and (2) the measures mandated by SOX failed to address the corporate governance and auditing issues that led to Enron's collapse.<sup>24</sup> In the first three years after SOX was passed, of the 361 whistleblower claims decided at the agency level, only thirteen were found in favor of the whistleblower, and of the ninety-three claims decided on appeal, only six were found in favor of the whistleblower.<sup>25</sup>

Just eight years after the enactment of SOX and two years after the Financial Crisis of 2008—and SOX's inadequate performance as a tool for proper corporate governance—Congress passed Dodd-Frank.<sup>26</sup> The Act's purpose is to promote “the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices.”<sup>27</sup> To aid in accomplishing this purpose, Congress included a robust whistleblower program in Dodd-Frank to be administered by the SEC.<sup>28</sup>

Unfortunately for many whistleblowers, some courts have found that two provisions of the whistleblower section conflict, and the tension has caused significant confusion. Section 78u-6(a)(6) (section (a)(6)) states that a “whistleblower” is an individual who provides information regarding securities violations “to the Commission, in a manner established . . . by the Commission.”<sup>29</sup> However, section 78u-6(h)(1)(A)(iii) (subsection (iii)) states that an employer may not retaliate against a whistleblower for making disclosures protected under SOX.<sup>30</sup> SOX protects employees who report internally rather than directly to the

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22. *Id.* at 68.

23. *Id.* at 69–70.

24. *See Romano, supra* note 12.

25. Moberly, *supra* note 18, at 67.

26. Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121 (2014); *see also Romano, supra* note 12.

27. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

28. *Id.* § 922, 124 Stat. 1841–49 (codified at 15 U.S.C. § 78u-6 (2012)); Leifer, *supra* note 26, at 130–31.

29. 15 U.S.C. § 78u-6(a)(6) (2012).

30. *Id.* § 78u-6(h)(1)(A)(iii).

Commission.<sup>31</sup> Therefore, subsection (iii) expands the definition of a whistleblower to include internal reporters, which contradicts the definition found in section (a)(6). Circuit courts are split on what role subsection (iii) plays in relation to section (a)(6). Does subsection (iii) merely explain section (a)(6), in which case there is no tension, or does it expand it, in which case there may be tension, or is the statute's meaning ambiguous enough to warrant *Chevron*<sup>32</sup> deference to the SEC interpretation? In other words, given these two potentially competing provisions of Dodd-Frank, is there only one category of whistleblowers, those who report directly to the SEC, does the Act include a second category, those who report internally, or alternatively, is the Act ambiguous?

This Note resolves that conflict by proposing an alternative reading of the statute. This Note, unlike other scholarship that has addressed this issue, claims neither that Dodd-Frank's definition of whistleblower should be read to explicitly include those who report internally pursuant to subsection (iii), nor that subsection (iii) causes tension with section (a)(6).<sup>33</sup> Rather, this Note argues that the current reading of section (a)(6) overlooks a key portion of the statute. Section (a)(6) should not be read narrowly to limit the definition of whistleblower to those who report directly to the SEC. Instead, section (a)(6) should be read as a broad grant of authority by Congress to the SEC to establish the manner in which an individual provides information to the SEC and becomes a

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31. 18 U.S.C. § 1514A (2012).

32. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

33. See generally Kristin Goodchild, Note, *Securities/Administrative Law—Internal Reporters Who Blow the Whistle: Are They Protected Under the Dodd-Frank Act's Anti-Retaliation Provision?*, 38 W. NEW ENG. L. REV. 1 (2016) (arguing that courts facing this issue in the future follow the Second Circuit's interpretation that Dodd-Frank's whistleblower provisions provide protection to internal reporters pursuant to the SEC's reasonable interpretation of the Act); Leifer, *supra* note 26 (arguing that a "remedial" statute such as Dodd-Frank should be interpreted broadly to accomplish its goals and as such the Act's whistleblower provisions should be interpreted broadly to allow for internal reporting, or in the alternative, courts unable to find a clear meaning within the statute should defer to the SEC); Jeff Vogt, Note, *Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank*, 67 OKLA. L. REV. 353, 366 (2015) (arguing that the definition of the term "whistleblower" stated in section (a)(6) should not be applied to the term "whistleblower" in section (h) pursuant to canons of statutory construction).



whistleblower.<sup>34</sup> In other words, this Note argues that Congress has not explicitly defined what a whistleblower is in section (a)(6). Congress has authorized the SEC to “establish[, by rule or regulation” the definition of “whistleblower.”<sup>35</sup> Therefore, it is permissible for the SEC to establish that reporting violations through “internal company channels”<sup>36</sup> is a “manner” in which an individual may provide information to the SEC and thereby become a whistleblower.<sup>37</sup>

Part I.A of this Note discusses a brief history of the circumstances that led to the passing of SOX and Dodd-Frank, states the relevant texts of the respective statutes, and provides the relevant parts of the SEC Rule 21F interpreting Dodd-Frank. Part I.B provides examples of three different employees who reported violations of securities laws under the SEC’s jurisdiction to their superiors rather than directly to the SEC. Part II.A outlines the three circuit court cases addressing this issue and examines some of the related secondary literature. Part II.B discusses other statutes and cases that contain and analyze the language “in a manner established,” the same language found in section (a)(6).<sup>38</sup> The analysis strongly suggests that this language is a broad grant of authority to the recipient to administer their duties at their own prerogative. Part III argues for a novel reading of Dodd-Frank under the framework provided for in Part II.B. This reading of section (a)(6) suggests that Congress conferred broad statutory authority on the Commission to determine the way an individual becomes a whistleblower, rather than limit the definition of a whistleblower to only those who report violations directly to the SEC. This Note concludes by arguing that courts should adopt this new framework when examining whether an individual is a whistleblower under Dodd-Frank.

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34. 15 U.S.C. § 78u-6(a)(6) (2012); *see also* Vogt, *supra* note 33, at 380 (briefly discussing a similar reading of section (a)(6)).

35. 15 U.S.C § 78u-6(a)(6) (2012).

36. Vogt, *supra* note 33, at 380.

37. 15 U.S.C § 78u-6(a)(6) (2012).

38. *Id.*

**I. WHAT IS A WHISTLEBLOWER AND WHY DO WE CARE ABOUT THEM  
SO MUCH?****A. THE CIRCUMSTANCES LEADING UP TO THE PASSAGE OF SOX AND  
DODD-FRANK***1. Enron and the Crash of 2002*

In 2002, Enron filed for what was then the largest Chapter 11 bankruptcy in American history.<sup>39</sup> At its height, each of Enron's shares, considered a blue-chip stock,<sup>40</sup> were worth around \$90, but plummeted to under \$1 at the end of 2001.<sup>41</sup> Enron engaged in fraudulent accounting practices by improperly recognizing revenues, using mark-to-market accounting methods, and hiding its debt in hundreds of special purpose entities or shell companies.<sup>42</sup> These practices allowed Enron to manipulate its balance sheet and misrepresent its true financial position to both investors and regulators.<sup>43</sup> In order to maximize their compensation, Enron's executives made increasingly riskier decisions regarding investments and failed to conduct adequate due diligence.<sup>44</sup> As Enron lost on these risky bets it hid its debt in special purpose entities to conceal its losses, which encouraged even riskier behavior in order to

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39. Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES (Dec. 3, 2001), <http://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html?mcubz=0> [https://perma.cc/QBJ6-J9A6]. Surpassed by WorldCom later in 2002. Louisa Beltran, *WorldCom Files Largest Bankruptcy Ever*, CNN MONEY (July 22, 2002, 10:35 AM), [http://money.cnn.com/2002/07/19/news/worldcom\\_bankruptcy/](http://money.cnn.com/2002/07/19/news/worldcom_bankruptcy/) [https://perma.cc/XC5B-B6TW].

40. "A blue-chip stock is the stock of a large, well-established and financially sound company that has operated for many years. A blue-chip stock typically has a market capitalization in the billions [and] is generally the market leader or among the top three companies in its sector." *Blue-Chip Stock*, INVESTOPEdia, <http://www.investopedia.com/terms/b/bluechipstock.asp> [https://perma.cc/FBS8-FBDR] (last visited Oct. 24, 2017).

41. Douglas O. Linder, *Enron Historical Stock Price*, FAMOUS TRIALS, <http://www.famous-trials.com/images/ftrials/Enron/documents/enronstockchart.pdf> [https://perma.cc/FRT8-Z4X8] (last visited Oct. 24, 2017).

42. Bala G. Dharan & William R. Bufkins, *Red Flags in Enron's Reporting of Revenues and Key Financial Measures*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 97 (Nancy B. Rapaport & Bala G. Dharan eds., 2004); Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP., Spring 2003, at 10–11.

43. Healy & Palepu, *supra* note 42, at 11.

44. *Id.* at 13.

recoup the losses.<sup>45</sup> Finally, there was a significant conflict of interest between Enron and its auditor, Arthur Anderson, one of the fifth largest accounting firms in the world at the time.<sup>46</sup> In return for looking the other way and ignoring indications of Enron's fraudulent practices, Anderson earned enormously high fees, and actively helped Enron engage in fraudulent corporate conduct.<sup>47</sup> As a result, Arthur Anderson was dissolved for its part in the larger Enron scandal.<sup>48</sup>

## 2. *The Rise of Whistleblowers and the Enactment of SOX*

Soon after Enron and WorldCom collapsed, and in response to the stock market crash of the early 2000's, Congress passed SOX.<sup>49</sup> One of the ways SOX seeks to combat corporate fraud is through an increased reliance on whistleblowers.<sup>50</sup> After all, it was whistleblowers who were largely responsible for uncovering the abuses at Enron.<sup>51</sup> SOX provides a private right of action for whistleblowers who have been retaliated against for making disclosures required by SOX.<sup>52</sup> This means that individuals who report their employ's fraudulent activity may bring a lawsuit against the company, if the company retaliates against the individual for disclosing the unlawful activity. Section 1514A(a)(1)(C) states:

No [publicly traded] company . . . or any . . . agent of such company . . . may . . . discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—to provide information, cause information to be provided, or otherwise assist in an investigation regarding [a violation of federal securities laws], when the information or assistance is provided to or the investigation is conducted by—a person with supervisory authority over the employee (or such other person working for the

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45. *Id.*

46. *Id.* at 15.

47. *Id.*

48. *Arthur Andersen Goes Out of Business*, *supra* note 14.

49. Leifer, *supra* note 26, at 126.

50. *Id.*

51. *Id.* at 127.

52. 18 U.S.C. § 1514A (2012) (entitles “[c]ivil action to protect against retaliation in fraud cases”).

employer who has the authority to investigate, discover, or terminate misconduct).<sup>53</sup>

No employer may discriminate against an employee reporting a potential securities fraud internally. If an employee thinks they have been unlawfully retaliated against, they may file a complaint with the Secretary of Labor, or if the Secretary takes more than 180 days to decide whether or not to pursue the claim, bring a complaint in federal district court.<sup>54</sup> If the appropriate authority determines an employee was indeed unlawfully retaliated against, the employee is "entitled to all relief necessary to make the employee whole."<sup>55</sup> Making the employee whole includes, but is not limited to: "(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."<sup>56</sup>

### 3. *The Financial Crisis of 2008 and Recommitment to Whistleblowers in Dodd-Frank*

SOX did not live up to its promises, however,<sup>57</sup> and, just six years later, the world saw the Financial Crisis of 2008, the largest since the Great Depression. In the wake of the 2008 crisis and SOX's shortcomings as a tool for proper corporate governance, Congress passed a "near-comprehensive" statute: Dodd-Frank.<sup>58</sup> The Act was enacted to promote "the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices."<sup>59</sup> Recognizing both the significant role that whistleblowers can play in a financial regulatory scheme, but also SOX's inadequacy in that regard, Congress sought to increase whistleblower engagement with Dodd-Frank.<sup>60</sup> Thus, Dodd-

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53. *Id.* § 1514A(a)(1).

54. *Id.* § 1514A(b)(1).

55. *Id.* § 1514A(c)(1).

56. *Id.* § 1514A(c)(2).

57. Moberly, *supra* note 18, at 69–70.

58. Leifer, *supra* note 26.

59. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

60. Leifer, *supra* note 26, at 131.

Frank provides for “[s]ecurities whistleblower incentives and protection.”<sup>61</sup> This codified Congress’s renewed intent to rely on whistleblowers as an integral tool in the fight against securities fraud.<sup>62</sup>

#### a. The Definition of a Whistleblower

Section 78u-6 begins by defining a number of terms, including “whistleblower”: “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”<sup>63</sup>

#### b. Whistleblower Awards

Section (b), the awards section, provides the “incentives” for whistleblowers by declaring that the SEC will pay an award to whistleblowers who provide information to the Commission in accordance with the Act.<sup>64</sup>

#### c. Award Amount Determination

In addition, the Act provides that “the determination of the amount of an award made under [ ]section (b) shall be in the discretion of the Commission.”<sup>65</sup> When determining how much of an award to give the whistleblower, the Commission should consider:

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers

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61. 15 U.S.C. § 78u-6 (2012).

62. Leifer, *supra* note 26, at 131.

63. *Id.* § 78u-6(a)(6).

64. *Id.* § 78u-6(b)(1).

65. *Id.* § 78u-6(c)(1)(A).

who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation.<sup>66</sup>

However, the Commission may not pay an award:

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of [15 U.S.C. § 78j-1]; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.<sup>67</sup>

#### d. Whistleblower Protections

Section (h), or the anti-retaliation provision, of the Act provides the “protection” given to whistleblowers.<sup>68</sup> The anti-retaliation provision states that an employer may not discriminate against a whistleblower in the terms and conditions of employment because of a lawful act done by the whistleblower:

(i) in providing information to the Commission in accordance with [such] section;

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

(iii) in making disclosures that are required or protected under [SOX], this chapter, including [15 U.S.C. § 78j-1(m)], [18 U.S.C. § 1513(e)], and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>69</sup>

The Act provides for a private right of action for someone who claims they were retaliated against in violation of the anti-retaliation

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66. *Id.* § 78u-6(c)(1)(B).

67. *Id.* § 78u-6(c)(2).

68. *Id.* § 78u-6(h).

69. *Id.* § 78u-6(h)(1)(A).

provision.<sup>70</sup> Those individuals who win are entitled to: “(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.”<sup>71</sup>

#### 4. The SEC’s Rule Interpreting Dodd-Frank Whistleblower Provisions

In 2011, the SEC promulgated Rule 21F to “describe the whistleblower program that the Commission has established to implement the provisions of section 21F, and explain the procedures [that] will need to [be] follow[ed] in order to be eligible for an award.”<sup>72</sup> Rule 21F-2 sets forth the criteria for qualifying as a whistleblower.<sup>73</sup> Section (a) defines whether an individual is 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 [17 C.F.R.] § 240.21F-9(a)], 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. . . .

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in [17 C.F.R.] §§ 240.21F-4, 240.21F-8, and 240.21F-9.<sup>74</sup>

#### Section (b) prohibits retaliation against whistleblowers:

(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:

(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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70. *Id.* § 78u-6(h)(1)(B)(i).

71. *Id.* § 78u-6(h)(1)(C).

72. 17 C.F.R. § 240.21F-1 (2012).

73. *Id.* § 240.21F-2.

74. *Id.* § 240.21F-2(a).

(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.<sup>75</sup>

Through Rule 21F-2, the SEC created two categories of whistleblowers: (1) those who report directly to the Commission and qualify for both an award and protection, and (2) those who report internally and not to the Commission, and only qualify for protection, but no reward.<sup>76</sup> However, the SEC's regulation is not dispositive unless Congress has explicitly given the agency the power and authority to make such a determination, or the statute is sufficiently ambiguous.<sup>77</sup>

## B. THE THREE WHISTLEBLOWERS

Three separate accounts of employees who were fired after reporting potential violations of securities fraud to their superiors are outlined below.

### 1. *Khaled Asadi*

Khaled Asadi claimed he was terminated from his position at GE Energy (GE) for informing his superiors that GE's practices constituted potential violations of the Foreign Corrupt Practices Act<sup>78</sup> (FCPA) as well as the company's policies.<sup>79</sup> From 2006 until 2011, Asadi worked as GE's Iraq Country Executive, a country he maintained dual citizenship with in addition to the United States.<sup>80</sup> At first, Asadi was able to work from the United States, but was eventually asked to relocate to another office in Amman, Jordan, and he willingly obliged.<sup>81</sup> As the Iraq Country Executive, Asadi was responsible for communicating with Iraq's

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75. *Id.* § 240.21F-2(b).

76. *Id.*

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

78. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified at 15 U.S.C. § 78a (2012)).

79. *Asadi v. G.E. Energy (USA), LLC*, Civil Action No. 4:12-345, 2012 WL 2522599, at \*1 (S.D. Tex. June 28, 2012), *aff'd sub nom.*, *Asadi v. G.E. Energy (USA)*, L.L.C., 720 F.3d 620 (5th Cir. 2013).

80. *Id.*

81. *Id.*



governing bodies in order to acquire and maintain energy service contracts for GE.<sup>82</sup> In June 2010, GE was in the middle of negotiations with the Iraqi government over a joint-venture.<sup>83</sup> These negotiations were particularly contentious because such agreements were not allowed under Iraqi contract law.<sup>84</sup>

Under the FCPA, it is illegal to bribe or curry special favor with foreign government officials.<sup>85</sup> During negotiations between GE and Iraq, the Iraqi Senior Deputy Minister of Electricity (the Deputy Minister) asked GE to hire Iman Mahmood, a woman with close personal ties to the Deputy Minister.<sup>86</sup> An Iraqi government insider came to Asadi because he was concerned GE hired Mahmood specifically to gain the Iraqi government and the Deputy Minister's favor while bargaining for this lucrative deal.<sup>87</sup> Worried that these actions might violate the FCPA and ruin the deal between GE and the Iraqi government, Asadi informed his superior, Joseph Anix, a Regional Executive for GE.<sup>88</sup> Asadi also took the extra step of disclosing this information to the ombudsperson<sup>89</sup> for GE, who subsequently interviewed Asadi about his report.<sup>90</sup>

Up until the interview with the ombudsperson for GE, Asadi claimed he had received ten consecutive positive performance reviews, but that shortly after the interview he received a surprisingly negative review.<sup>91</sup> In addition, the review did not mention the actual performance issues that caused Asadi to receive a negative review, nor did it give him the chance to alter whatever practice or behavior the company disapproved of.<sup>92</sup> Before the negative review, GE had extended Asadi's assignment for another two years.<sup>93</sup> However, after Asadi's internal report, interview with the ombudsperson, and negative review, the company's attitude

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82. *Id.*

83. *Id.*

84. *Id.*

85. 15 U.S.C. § 78dd-1 (2012).

86. *Asadi*, 2012 WL 2522599, at \*1.

87. *Id.*

88. *Id.*

89. "An official appointed to investigate individuals' complaints against a company or organization, especially a public authority." *Ombudsman*, OXFORD LIVING DICTIONARIES: ENG., <https://en.oxforddictionaries.com/definition/ombudsman> [<https://p.erna.cc/M5EW-RSCF>] (last visited Nov. 18, 2017).

90. *Asadi*, 2012 WL 2522599, at \*1.

91. *Id.* at \*2.

92. *Id.*

93. *Id.*

towards Asadi took a distinct negative turn.<sup>94</sup> Asadi claims he started to receive pressure to give up his position.<sup>95</sup> Anix pressured him to take on a new role with minimal responsibilities in the region.<sup>96</sup> What followed were allegedly frequent and intimidating severance negotiations from GE towards Asadi.<sup>97</sup> Ultimately, GE cut off all communication with Asadi and fired him.<sup>98</sup> Asadi filed a complaint in federal district court.<sup>99</sup>

## 2. Daniel Berman

Daniel Berman claimed he was terminated from his position at Neo@Ogilvy LLC (Neo) for informing his superiors that Neo's practices constituted accounting fraud and potential violations of generally accepted accounting principles (GAAP), SOX, and Dodd-Frank.<sup>100</sup> From October 2010 until April 2013, Berman was the finance director of Neo.<sup>101</sup> He handled Neo and its parent company's internal accounting procedures, as well as, Neo's financial reporting and compliance with GAAP.<sup>102</sup> During his tenure at Neo, Berman claims he uncovered material compliance failures, accounting irregularities, and accounting fraud.<sup>103</sup> Specifically, Berman alleged that four different actions taken by Neo were potential violations that he reported internally: "(1) delayed payments to media companies; (2) improperly recognized revenues; (3) reversed accounting reserves; and (4) lenient payment terms."<sup>104</sup>

As part of its business, Neo receives cash deposits from its clients and purchases advertisements on the client's behalf from third-party vendors.<sup>105</sup> A client places an order and Neo, on behalf of the client, uses

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Berman v. Neo@Ogilvy LLC, No. 14-CV-00523(GHW)(SN), 2014 WL 6865718, at \*1 (S.D.N.Y. Aug. 15, 2014), *report and recommendation adopted in part, rejected in part*, 72 F. Supp. 3d 404 (S.D.N.Y. 2014), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015), *report and recommendation adopted in part*, No. 1:14-CV-523-GHW-SN, 2016 WL 815158 (S.D.N.Y. Feb. 22, 2016).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at \*2.

the client's cash it has in reserve, to pay a vendor for advertising space.<sup>106</sup> In August 2012, however, Berman realized that the cash reserves held on behalf of Neo's clients were growing at a surprisingly fast rate.<sup>107</sup> After investigating, Berman discovered that Neo was temporarily withholding payments to the advertising vendors in order to improperly improve its own financial position.<sup>108</sup> In other words, Neo effectively took short-term, interest free loans from its clients without the clients' knowledge or consent.<sup>109</sup> The delayed payments largely affected the IBM account and were approved by, Bradley Rogers, a senior officer at Neo.<sup>110</sup> Berman worried that Neo's financial statements would mislead investors and took two actions: (1) he reported this activity to his superiors; (2) he caused Neo's parent company to review and correct the issues.<sup>111</sup> Because Berman's superiors reviewed his findings and subsequently remedied the situation, Rogers was upset with Berman, and sought to retaliate against him.<sup>112</sup>

In January and February 2013, Rogers also improperly recognized revenues to try and increase Neo's profits for his own benefit and personal gain, and tried to reverse Neo's accounting reserves to again increase Neo's profits.<sup>113</sup> Berman reported the January incident to his superiors, who rectified the potential violations, but Rogers was once again upset with Berman, and Berman did not report the February incident.<sup>114</sup> In March 2013, a client—with whom a senior level Neo executive had a personal relationship with—was provided unorthodox payment terms that did not comply with internal policies.<sup>115</sup> Berman tried to ensure, much to the chagrin of the senior level executive, that the transaction was properly reported on Neo's financial statements in accordance with GAAP practices and the parent company's policies.<sup>116</sup> As a result, the senior

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at \*3.

116. *Id.*

executive was upset with Berman, and shortly afterwards Berman's employment with Neo was terminated.<sup>117</sup>

Despite his contentious termination, Berman still tried to help Neo comply with the law.<sup>118</sup> He alerted the Chief Financial Officer of North America of Neo's parent company to what happened and also, through his lawyer, alerted the Chair of the audit Committee of Neo's parent company.<sup>119</sup> Even though the committee agreed to have an internal auditor interview Berman, the company denied any wrongdoing, refused to rectify the fraudulent activities reported by Berman, or rehire him.<sup>120</sup> In response, Berman filed a report with the SEC regarding Neo's potential securities violations and a complaint in federal district court.<sup>121</sup>

### 3. Paul Somers

Paul Somers claimed he was terminated from his position at Digital Realty for informing his superiors about company practices that constituted a potential SOX violation.<sup>122</sup> From July 2010 until April 2014 Somers was the Vice President of Portfolio Management at Digital Realty in Europe and then Singapore.<sup>123</sup> While in Singapore, Somers' supervisor was the Senior Vice President for the Asian Pacific Region, Kris Kumar.<sup>124</sup> While Somers was working under Kumar, Kumar took actions that eliminated internal control, allegedly in violation of SOX—which Somers subsequently reported to senior management.<sup>125</sup> Specifically, Kumar allegedly committed serious acts of misconduct, including failing to disclose seven million dollars of cost over run on a development.<sup>126</sup> Shortly after making his report, however, Somers was terminated, and subsequently filed a complaint in federal district court.<sup>127</sup>

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015), *aff'd*, 850 F.3d 1045 (9th Cir. 2017).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

## II. THE CURRENT READING OF “WHISTLEBLOWER” IN DODD-FRANK

### A. THE CIRCUIT SPLIT

The three whistleblowers described in Part I.B of this Note were, in fact, the three “whistleblowers” (or not, as well shall see) featured in the circuit court decisions in the Fifth, Second, and Ninth Circuits, respectively.<sup>128</sup> All three of courts faced the same issue—do Dodd-Frank’s whistleblower protections extended to employees who report alleged securities violations to their superiors, rather than to the SEC, and are then retaliated against? Or, alternatively, is the answer to that question sufficiently ambiguous to warrant *Chevron* deference to the SEC’s interpretation of the statute. The question has created a deep split among the circuits and all three offer different answers. But in order to arrive at their individual answers, all three circuits asked the same two questions: (1) do these employees’ actions fit the definition of whistleblower found in section (a)(6); and (2) does subsection (iii) expand the definition of a whistleblower to also include these employee’s actions?

#### *1. The Circuits Agree Section (a)(6) Defines “Whistleblower” as Solely Those Individuals who Provide Information to the Commission*

According to section (a)(6), “[t]he term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”<sup>129</sup> Despite their disagreements, the three courts all read section (a)(6) to mean the same thing—the only way to become a whistleblower is to provide information of alleged securities fraud *directly* to the SEC.<sup>130</sup> In other words, someone who reports alleged securities fraud to their superiors and not to the SEC fails to qualify as a whistleblower under section (a)(6). In *Asadi v. G.E. Energy (USA) L.L.C.*, the Fifth Circuit stated, “[section (a)(6)], standing alone, expressly and unambiguously requires that an individual provide information to the

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128. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015); *Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045 (9th Cir. 2017).

129. 15 U.S.C. § 78u-6(a)(6) (2012).

130. *Asadi*, 720 F.3d at 623; *Berman*, 801 F.3d at 150; *Somers*, 850 F.3d at 1048.

SEC to qualify as a “whistleblower” for purposes of § 78u-6.”<sup>131</sup> The court later reiterated its position by stating, “Under Dodd–Frank’s plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.”<sup>132</sup> In *Berman v. Neo@Ogilvy LLC*, the Second Circuit stated that the issue was not whether the language “‘provide . . . to the Commission’ . . . means something other than what it literally says.”<sup>133</sup> The court clarified that “[it] do[es] not doubt that ‘provide . . . to the Commission’ means ‘provide . . . to the Commission.’”<sup>134</sup> In *Somers v. Dig. Realty Tr. Inc.*, the Ninth Circuit stated, “[section (a)(6)] thus describes only those who report information to the SEC.”<sup>135</sup> Therefore, because none of the plaintiffs reported the respective alleged securities fraud directly to the SEC, but instead reported only to their internal superiors before being retaliated against, none of these plaintiffs are considered whistleblowers under section (a)(6).

## 2. *The Circuits Disagree About the Role Subsection (iii) Plays in Relation to Section (a)(6)*

All three courts disagree, however, regarding what role subsection (iii) plays in relation to section (a)(6), given that section (a)(6) limits the definition of a whistleblower to those who report to the SEC. In each case, the employee-claimant argues that, despite the language of section (a)(6), they are nonetheless entitled to the Act’s protections because of the language in subsection (iii). They contend that subsection (iii) expands the definition of a whistleblower and extends protections to also include employees who report alleged securities violations to their superiors rather than just to those who report to the SEC. The plaintiffs argue that such activity is protected because Congress intended to incorporate SOX’s internal disclosure protections into Dodd-Frank by making it unlawful for an employer to discriminate against an employee for “making disclosures that are required or protected under [SOX].”<sup>136</sup> At the very least, the employee-claimants asked the courts to find that the ambiguity caused by the tension between the two provisions was enough

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

132. *Id.* at 625.

133. *Berman*, 801 F.3d at 150 (first omission in original).

134. *Id.* at 150 n.4.

135. *Somers*, 850 F.3d at 1048.

136. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

to warrant deference to Rule 21F-2(b)(ii), which provides that employees who report internally are whistleblowers for purposes of Dodd-Frank's anti-retaliation section.<sup>137</sup>

a. Subsection (iii) Only Explains the Definition Found in Section (a)(6) and Does Not Expand that Definition According to the Fifth Circuit

In *Asadi*, a case of first impression, the Fifth Circuit held that the definition found in section (a)(6) was controlling.<sup>138</sup> Subsection (h)(1)(A) is neither an expansion of the definition of a whistleblower found in section (a)(6), nor is it an additional definition. Instead, subsection (h)(1)(A) is merely a description of the protections afforded to those who meet the definition of “whistleblower” found in section (a)(6).<sup>139</sup> As the court states, “the three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.”<sup>140</sup> In reaching that conclusion, the court reasoned that the language of subsection (A) unambiguously answered “two questions: (1) who is protected; and (2) what actions by protected individuals constitute protected activity.”<sup>141</sup> Who is protected? The answer is unambiguously “a whistleblower,” therefore the statute only protects a whistleblower who engages in protected conduct.<sup>142</sup> A “whistleblower” is an individual who satisfies the definition in section (a)(6).<sup>143</sup> What is protected activity? Protected activity is activity engaged in, only by someone who already qualifies as a whistleblower, that falls under one of the three provisions of subsection (h)(1)(A).<sup>144</sup>

In addition, the Fifth Circuit found that just because a person can engage in protected activity and yet not be considered a whistleblower, does not necessarily create conflict between these two provisions.<sup>145</sup> According to the Fifth Circuit, the use of the word “whistleblower” instead of “individual” or “employee” in the anti-retaliation section was

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137. 17 C.F.R. § 240.21F-2(b)(ii).

138. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 626.

clear evidence that Congress intended that only those who met the definition of whistleblower in section (a)(6) should receive the statutes' anti-retaliation protections.<sup>146</sup> Moreover, such a reading would not render subsection (iii) superfluous, but would serve a valid purpose.<sup>147</sup> The court offered the example of a mid-level manager or executive who learns of a securities law violation and simultaneously reports his findings to both the Chief Executive Officer (the CEO) and the SEC, but the CEO is unaware of the disclosure to the SEC.<sup>148</sup> The CEO then immediately fires the employee, but because the CEO was unaware of the manager's report to the SEC, the manager is not protected by either subsections (i) or (ii) of the statute.<sup>149</sup> The employee would, however, be protected under subsection (iii) because his disclosure to the CEO was protected by SOX, which is incorporated into the Act through subsection (iii).<sup>150</sup> Therefore, subsection (iii) protects individuals who make simultaneous disclosures both internally and to the SEC, and is not superfluous.<sup>151</sup>

Furthermore, the court found that reading subsection (iii) in a way that extends protections to those who reported internally rather than just to the SEC renders section 1514A of SOX obsolete and useless.<sup>152</sup> Dodd-Frank's whistleblower protections and reliefs are more generous than those found in SOX, so there would be no point in filing a claim under SOX.<sup>153</sup> Specifically, the amount of back pay, access to the courts, and the statute of limitations are far more generous for claimants in Dodd-Frank than SOX because the Act:<sup>154</sup> (1) grants two times back pay, while SOX only grants regular back pay; (2) permits a claim to be filed directly in federal court, while under SOX, a claim must first be filed with the Department of Labor (the DoL) before going to court; and (3) allows claims to be filed up to ten years after the violation, while SOX only allows claims to be filed between 180 days after the violation occurred and 180 days after the employee became aware of the violation.<sup>155</sup> If Asadi's reading of Dodd-Frank's anti-retaliation protections were true,

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146. *Id.*

147. *Id.* at 627.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 628.

153. *Id.* at 628–29.

154. *Id.* at 629.

155. *Id.*



the court found that the Act's whistleblower provisions would be rendered moot because it is unlikely that a claim under SOX would be filed.<sup>156</sup>

Finally, the court found that deference to Rule 21F—interpreting Dodd-Frank's whistleblower provision's to extend protection to employees who reported internally—was unwarranted.<sup>157</sup> Deference to the SEC's rule is only called for if Congress explicitly provided for such deference, or if Congress's intentions are ambiguous enough to warrant it.<sup>158</sup> Here, however, Congress already answered the question by explicitly defining a whistleblower as one who provides information to the Commission in section (a)(6), and therefore the SEC deserved no deference under *Chevron*.<sup>159</sup>

b. It Is Unclear What Role Subsection (iii) Plays and Therefore the SEC Rule Deserves *Chevron* Deference According to the Second Circuit

In *Berman*, the Second Circuit held that the conflicting language of section (a)(6) and subsection (iii) was sufficiently ambiguous to defer to the SEC's interpretation of Dodd-Frank.<sup>160</sup> The Second Circuit agreed with the Fifth Circuit that, given the example of an employee simultaneously complaining to both their employer and the SEC, under a very narrow reading of the statute there is no "absolute conflict" between section (a)(6) and subsection (iii).<sup>161</sup> However, the court found that such a reading would leave subsection (iii) with an "extremely limited scope."<sup>162</sup>

First, few employees may engage in simultaneous reporting.<sup>163</sup> The court reasoned that many employees would probably conclude that by reporting the matter solely to their employer it would be handled appropriately with little chance of retaliation.<sup>164</sup> However, from the employee's perspective, "reporting to a government agency creates a substantial risk of retaliation."<sup>165</sup> Second, the Fifth Circuit's reading

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156. *Id.*

157. *Id.* at 630.

158. *Id.*

159. *Id.*

160. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

161. *Id.* at 150.

162. *Id.* at 151.

163. *Id.*

164. *Id.*

165. *Id.*

would exclude, the whistleblowers who are required by law to report internally first before reporting to a government agency, namely auditors and lawyers.<sup>166</sup>

Under subsection 78j-1 of the Exchange Act—a provision of SOX explicitly referenced in subsection (iii)—auditors of public companies are required in some instances to report illegal activity to internal management.<sup>167</sup> Moreover, SOX requires an auditor to report to the Board of Directors (the Board) of the company if the activity in the auditor's initial report is not remedied.<sup>168</sup> Finally, auditors are only permitted to contact the SEC if both the Board and management ignore the auditor's reports.<sup>169</sup> Therefore, if the Fifth Circuit's reading of subsection (iii) were correct, then an auditor would have "almost no Dodd-Frank protection" because the retaliation would likely precede any report to the Commission while the auditor awaits a response from the company.<sup>170</sup> Attorneys are also subject to similar requirements under SOX and the SEC's Standards of Professional Conduct for Attorneys ("Attorney Standards").<sup>171</sup> Under 15 U.S.C. § 7245(1), attorneys of public companies are required to disclose illegal securities activity to the Chief Legal Counsel or CEO.<sup>172</sup> In addition, 15 U.S.C. § 7245(2) requires an attorney to disclose the illegal activity to the appropriate committee of the Board if the CEO or Chief Legal Counsel do not respond to the attorney.<sup>173</sup> Further, Rule 3 of the SEC's Attorney Standards also encourages attorneys to report internally before going to the SEC.<sup>174</sup>

Unfortunately, an inquiry into the legislative history of Dodd-Frank did not shed any light on Congress's intent for subsection (iii) and whether or not Congress intended for the Act to have such a narrow scope.<sup>175</sup> Subsection (iii) only came to be during conference after it was passed by both the House and the Senate, and is not mentioned in any legislative materials.<sup>176</sup> In light of "the realities of the legislative process,"

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166. *Id.*

167. *Id.* (citing 15 U.S.C. § 78j-1(b)(1)(B) (2012)).

168. *Id.* (citing 15 U.S.C. § 78j-1(b)(2) (2012)).

169. *Id.* (citing 15 U.S.C. § 78j-1(b)(3)(B) (2012)).

170. *Id.*

171. *Id.* at 151–52 (citing 17 C.F.R. § 205.1 (2012)).

172. *Id.* at 152.

173. *Id.*

174. *Id.* (citing 17 C.F.R. § 205.3(d)(2) (2012)).

175. *Id.*

176. *Id.* at 153.

the court is not surprised that the tension between section (a)(6) and subsection (iii) went unnoticed at such a late stage of the process.<sup>177</sup> When Congress passed the final bill there was no indication of whether they intended subsection (iii) to be limited by section (a)(6), and as the court has demonstrated, the text of the statute does not offer a definitive answer.<sup>178</sup>

In the end, the court decided it did not need to figure out exactly what the scope of subsection (iii) was or its relationship to section (a)(6).<sup>179</sup> According to the court, the tension between section (a)(6) and subsection (iii) produces sufficient ambiguity to warrant granting *Chevron* deference to the SEC if it has a reasonable interpretation of the statute.<sup>180</sup> The court found SEC Rule 21F-2(b)(1) reasonably interprets the statute to allow employees who report internally a right of private action in court under Dodd-Frank.<sup>181</sup> Therefore, those employees, including Berman, may file a claim in federal court.<sup>182</sup>

c. Section (a)(6) and Section (h)(1)(a) Define Two Distinct Categories of “Whistleblower” and Are Not in Conflict with Each Other According to the Ninth Circuit

In *Somers*, the Ninth Circuit went a step beyond the Second Circuit and held that the text of the Act’s anti-retaliation provisions explicitly extends protection to both those who report to the SEC and to those who report internally.<sup>183</sup> According to the court, subsection (iii)’s “language illuminates congressional intent.”<sup>184</sup> By sweeping in SOX’s whistleblower provisions, retaliation by a publicly traded employer against an employee who makes an internal report to a supervisor is definitively barred by Dodd-Frank.<sup>185</sup> As previously noted, SOX dictates that both auditors and attorneys go through various stages of internal reporting before disclosing anything to the SEC, and would be left with little to no Dodd-Frank protections because they would undoubtedly be

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177. *Id.* at 154.

178. *Id.* at 154–55.

179. *Id.* at 155.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045, 1049 (9th Cir. 2017).

184. *Id.*

185. *Id.*

fired before getting the opportunity to inform the SEC.<sup>186</sup> Therefore, the definition of “whistleblower” found in section (a)(6) should not control the definition of “whistleblower” found in subsection (h)(1)(A).<sup>187</sup>

Moreover, the court held that section (a)(6) and subsection (iii) were not in conflict with each other. According to the court, depending on the context, “whistleblower” can mean two different things in two different parts of a statute, or as the court states, “terms can have different operative consequences in different contexts.”<sup>188</sup> That the statute includes a definitional section is not dispositive of the issue: “[Statutory d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.”<sup>189</sup> With that in mind, the court held that the text of Dodd-Frank’s anti-retaliation section explicitly extends protection in either scenario; both to those who report to the SEC or to those who report internally.<sup>190</sup>

Interpreting the statute to the contrary would not only defy congressional intent, but would also reduce subsection (iii) to the point of absurdity.<sup>191</sup> Only those employees who made simultaneous reports internally and to the Commission, who were then fired only for making the internal report would fall under its protection, and as the Second Circuit has noted, that situation is an unlikely one.<sup>192</sup> Employees are more likely to report to only one of the two, and while reporting to the SEC has a better chance of rectifying the issue, it also has a better chance of subjecting the employee to retaliation.<sup>193</sup> On the other hand, while reporting internally may be less effective in addressing the problem, it is also less risky for the employee.<sup>194</sup> Using the section (a)(6) definition in subsection (iii) would do nothing to protect employees who are prohibited from reporting directly to the SEC from immediate retaliation.<sup>195</sup> Therefore, application of section (a)(6) to subsection (iii) would render

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186. *Id.*

187. *Id.*

188. *Id.* (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)).

189. *Id.* (alteration in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 228 (2012)).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1049–50.

194. *Id.* at 1050.

195. *Id.*

subsection (iii) moot, conflicting with the canons of statutory construction.<sup>196</sup>

The court acknowledged the Fifth Circuit's argument that reading subsection (iii) to allow internal reporting would make SOX moot or superfluous, however, the court disagreed.<sup>197</sup> Two important distinctions exist between the protection afforded to whistleblowers in SOX and Dodd-Frank as noted in an amicus brief submitted by the SEC:<sup>198</sup> (1) SOX dictates that the DoL make the claim for the whistleblower and handle the case throughout the administrative review and all the way through appeal,<sup>199</sup> while filing a complaint under Dodd-Frank requires the claimant to go to federal court, which can be costly and stressful;<sup>200</sup> and (2) SOX allows an employee to recover for special damages related to the retaliation including emotional distress, while Dodd-Frank only provides for awards of double back pay.<sup>201</sup> If an employee has suffered more than just financial harm, then a SOX claim is better suited for their situation.<sup>202</sup> SOX is therefore not superfluous if subsection (iii) is read to include employees who report internally.<sup>203</sup>

The court concluded that subsection (iii) grants protection to internal whistleblowers and SEC reporters alike and therefore the Ninth Circuit's holding was in direct conflict with the Fifth Circuit's holding.<sup>204</sup> The Fifth Circuit claims there is only one category of whistleblower, those who reported to the Commission, and those individuals were entitled to the incentives and protections of the Act. On the other hand, the Ninth Circuit maintains there can be more than one category of whistleblower depending on the context of the word, and that such context determines who receives Dodd-Frank's protections. Finally, if, as the Second Circuit has found, there exists sufficient ambiguity or tension between section (a)(6) and subsection (iii), then the court should defer to the SEC.<sup>205</sup> The SEC has passed a reasonable regulation stating internal whistleblowers

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

are protected under subsection (iii), resolving the ambiguity, so the matter is settled.<sup>206</sup>

d. The Supreme Court and Sixth Circuit Briefly Weigh in

The Supreme Court never directly addressed the issue, but in deciding a case about the language of SOX, it did touch on the topic of internal reporters under Dodd-Frank.<sup>207</sup> In *Lawson v. FMR LLC*, the Supreme Court granted certiorari to determine if protections under SOX extend only to employees of the company committing the violations, or also to employees of contractors and subcontractors who work for the company.<sup>208</sup> The Court held “based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.”<sup>209</sup> The defendant-company claimed the passage of Dodd–Frank was evidence that Congress did not wish to extend SOX protections to contractor employees because they were already covered by Dodd-Frank.<sup>210</sup> The Supreme Court dismissed that argument and commented on the purview of Dodd-Frank.<sup>211</sup> The Court stated, Dodd-Frank “prohibit[s] any employer from retaliating against ‘a whistleblower’ for providing information to the SEC, participating in an SEC proceeding, or making disclosures required or protected under Sarbanes–Oxley and certain other securities laws.”<sup>212</sup> Further, “Section 1514A’s protections include employees who provide information to ‘any person with supervisory authority over the employee.’”<sup>213</sup> “Dodd–Frank’s whistleblower provision, however, focuses primarily on reporting to federal authorities.”<sup>214</sup> Fortunately for whistleblowers, the Court ultimately stated, “[i]f anything relevant to our inquiry can be gleaned from Dodd–Frank, it is that Congress apparently

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206. *Id.* at 1051.

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

208. *Id.* (such as investment advisers, law firms, and accounting firms).

209. *Id.*

210. *Id.* at 1174.

211. *Id.*

212. *Id.*

213. *Id.* at 1175 (quoting 18 U.S.C. § 1514A(a)(1)(C) (2012)).

214. *Id.*

does not share FMR's concerns about extending protection comprehensively to corporate whistleblowers."<sup>215</sup>

The Sixth Circuit briefly noted that before Dodd-Frank was enacted, an employee who alleged unlawful retaliation for reporting suspected securities fraud was forced to file a complaint with the DoL rather than being able to go directly to district court.<sup>216</sup> However, when Dodd-Frank was passed whistleblowers had another option because the Act "created a private right of action allowing employees who believe they have been retaliated against for engaging in protected activity under § 1514A to file suit directly in federal court."<sup>217</sup>

#### B. WHAT ROLE DOES THE LANGUAGE "IN A MANNER ESTABLISHED" FULFILL?

The Fifth, Second, and Ninth Circuits all considered whether subsection (iii) conflicts with section (a)(6), but neglected to examine the entire definition of "whistleblower" in section (a)(6). As the Fifth Circuit stated, the language "'to the Commission,' . . . expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u-6."<sup>218</sup> However, this reading of section (a)(6) overlooks that the information provided to the SEC must be provided "in a manner established, by rule or regulation, by the Commission."<sup>219</sup> Therefore, none of the circuits gave effect to the entire definition of "whistleblower" in section (a)(6).

##### 1. The Role of "in a Manner Established" According to the Second Circuit

In *Stryker v. SEC*, the Second Circuit considered the meaning of "in a manner established."<sup>220</sup> The court considered the definition of "original information" and whether a plaintiff may bring a claim for a Dodd-Frank Act whistleblower award even though the information was submitted

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215. *Id.*

216. *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 804 (6th Cir. 2015).

217. *Id.* at 805.

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

219. 15 U.S.C. § 78u-6(a)(6) (2012).

220. *Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

before the Act was passed.<sup>221</sup> In recognizing that Congress left the definition of original information vague, the court found that Congress intended for the whistleblower to “provide the requisite information in the form and manner required by the SEC’s rules and regulations,” and cited to section (a)(6).<sup>222</sup> This suggests that Congress included the language “in a manner established” to be used as a tool by the SEC to dictate such administrative things as: when an individual may provide information, the form or document information should be provided on, and whether the information should be provided over the phone or online.

*2. Other Courts Have Analyzed “in a manner established” in Other Statutes and Found the Language Should be Read as a Broad Grant of Power*

a. Northern District of California and *Litmon*

In *Litmon v. Brown*, a federal magistrate judge reviewed the language, “in a manner established.”<sup>223</sup> California law dictates that certain individuals, those deemed as sexually violent predators pursuant to § 6600 of the California Welfare and Institutions Code, must verify their address every ninety days “in a manner established by the Department of Justice.”<sup>224</sup> The California Department of Justice (DOJ) had established that these individuals must verify their address in person at a police station.<sup>225</sup> The plaintiff alleged that a rule requiring sex offenders to register in person was *ultra vires*.<sup>226</sup> The court disagreed and found that the DOJ acted pursuant to the authority given to it by the statute.<sup>227</sup> The language “in a manner established” found in the statute, “explicitly delegates to the DOJ determination of the ‘manner’ in which those adjudicated as [sexually violent predators] must verify their residence and employment.”<sup>228</sup> Therefore, the DOJ rule is consistent with the text of the

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221. *Id.* at 164–65.

222. *Id.* at 166.

223. *Litmon v. Brown*, No. C-10-3894 EMC, 2011 WL 873162 (N.D. Cal. Mar. 14, 2011).

224. *Id.* at \*1 (citing CAL. PENAL CODE § 290.012(b) (West 2017)).

225. *Id.*

226. *Id.* at \*3.

227. *Id.*

228. *Id.*



statute; “in-person registration is a ‘manner’ by which [a sexually violent] individual may be made to verify their residence.”<sup>229</sup>

### b. The Supreme Court

The Supreme Court had the opportunity to analyze the phrase “in such manner as”<sup>230</sup> as early as 1892.<sup>231</sup> In *McPherson v. Blacker*, the Court interpreted Article 3, Section 1, Clause 2 of the Constitution which reads: “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”<sup>232</sup> The Court held, “the insertion of [‘in such manner as,’] while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.”<sup>233</sup> In other words, the phrase “in such manner as” limits the ability of the State to circumscribe the legislative power, but does limit the legislative power itself.<sup>234</sup>

The Supreme Court has analyzed the words “in such manner as” in two other cases: *Wisconsin v. City of New York*<sup>235</sup> and *Utah v. Evans*.<sup>236</sup> In these cases the Court reviewed the Census Clause of the Constitution which requires, “the actual Enumeration” of each State’s population “within three Years after the first Meeting of the Congress . . . in such Manner as they shall by Law direct.”<sup>237</sup> In *Wisconsin v. City of New York*, the Supreme Court held, “[t]he Constitution’s text vests Congress with virtually unlimited discretion in conducting the ‘actual Enumeration,’ see Art. I, § 2, cl. 3 (Congress may conduct the census ‘in such Manner as they shall by Law direct’), and there is no basis for thinking that such discretion is more limited than that text provides.”<sup>238</sup> In *Utah*, the Supreme Court held, “[t]he final part of the sentence says that the ‘actual Enumeration’ shall take place ‘in such Manner as’ Congress itself ‘shall

229. *Id.*

230. “In a manner established” is synonymous with “in such manner as.”

231. *McPherson v. Blacker*, 146 U.S. 1 (1892).

232. *Id.* at 24 (citing U.S. CONST. art. II, § 1, cl. 2).

233. *Id.* at 25.

234. *Id.*

235. *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

236. *Utah v. Evans*, 536 U.S. 452 (2002).

237. U.S. CONST. art. I, § 2, cl. 3.

238. *Wisconsin*, 517 U.S. at 2.

by Law direct,' thereby suggesting the breadth of congressional methodological authority, rather than its limitation."<sup>239</sup>

These Supreme Court cases strongly support the argument that the language "in a manner established" and "in such manner as" grant broad discretion and authority to the recipient to determine how to best accomplish its goals.

### III. CONGRESS INTENDED FOR THE EXPERTS AT THE SEC TO USE THEIR EXPERTISE TO DECIDE WHAT A WHISTLEBLOWER IS

#### A. SECTION (A)(6) SHOULD BE READ AS A BROAD GRANT OF AUTHORITY TO THE SEC TO DETERMINE THE WAY AN INDIVIDUAL BECOMES A WHISTLEBLOWER

The three circuit courts to address the question of whether or not an employee who reports internally rather than to the SEC have all focused narrowly on the role that subsection (iii) plays.<sup>240</sup> However, giving effect to the entirety of section (a)(6) provides a better framework under which to analyze this issue.<sup>241</sup> The plain meaning of the language, "provides . . . information . . . to the Commission, *in a manner established, by rule or regulation, by the Commission,*" is an explicit grant of statutory authority by Congress to the SEC to "establish" the "manner" in which an individual provides information to the SEC and becomes a whistleblower.<sup>242</sup> Therefore, the SEC has the statutory authority and prerogative to "establish" that an employee who reports internally is a "manner" by which the employee may qualify as a whistleblower for purposes of Dodd-Frank's protections.<sup>243</sup> Not only does this reading of the Act harmonize this section with the rest of the statute, but any other reading would put section (a)(6) in direct conflict with other sections. In addition, this reading is in line with congressional intent and the background against which Dodd-Frank was passed.

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239. *Utah*, 536 U.S. at 474.

240. *See supra* Part II.A.

241. 15 U.S.C. § 78u-6(a)(6) (2012).

242. *Id.* (emphasis added); *see also* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)).

243. 15 U.S.C. § 78u-6(a)(6) (2012).

1. *The Language “in A Manner Established” in Dodd-Frank Should Be Read the Same Way as it Was in Litmon*

The court in *Litmon* adopts this reading of the words “in a manner established” to interpret the statute at issue in that case.<sup>244</sup> Therefore, in *Litmon*, the statute authorized the DOJ to “establish” the “manner” that an individual verifies their address, and requiring in person registration at a police station was in line with that mandate.<sup>245</sup> In the same way, according to the Dodd-Frank statute, the SEC is to “establish” the “manner” by which an employee provides information to the Commission and becomes a whistleblower.<sup>246</sup> For purposes of the anti-retaliation section, allowing employees to report internally would be in line with that mandate.<sup>247</sup>

This reading does not contradict the Second Circuit’s interpretation of the language. In *Stryker*, the Second Circuit found that the language “in a manner established, by rule or regulation, by the Commission” is Congressional authorization for the SEC to clarify the vague definition of “original information.”<sup>248</sup> The court found that the SEC could dictate the “form and manner” in which the information is provided.<sup>249</sup> From its context, “form and manner” is likely limited to certain administrative functions.<sup>250</sup> The alternative reading proposed here would expand the Second Circuit’s reading: the statute allows the SEC to establish more than just the technical criteria of the way a whistleblower provides information, but the substantive criteria as well. If the SEC provides by rule or regulation that, for the purposes of the anti-retaliation provisions, whistleblowers may report to their employers, then that is a proper “manner” for the whistleblower to do so.<sup>251</sup> Congress has authorized the SEC to create different categories of whistleblowers.

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244. See *supra* Part II.B.2.a.

245. *Litmon v. Brown*, No. C-10-3894 EMC, 2011 WL 873162, at \*3 (N.D. Cal. Mar. 14, 2011).

246. 15 U.S.C. § 78u-6(a)(6) (2012).

247. *Id.* The distinction between the California statute and Dodd-Frank is that the California statute does not contain the equivalent language of “to the Commission” found in Dodd-Frank. The California statute just says individuals must verify their address in a manner established by the DOJ, not verify their address “to the DOJ” in a manner established by the DOJ.

248. *Stryker v. SEC*, 780 F.3d 163, 166 (2d Cir. 2015).

249. *Id.* at 166.

250. See *supra* Part II.B.1.

251. 15 U.S.C. § 78u-6(a)(6) (2012).

*2. Reading Section (a)(6) as a Limit on the Definition of Whistleblower  
Would Put Section (a)(6) in Conflict With Other Provisions of the  
Statute, While Reading Section (a)(6) as a Broad Grant of Authority to  
the SEC Would Not*

This reading harmonizes section (a)(6) with the rest of the statute, while the circuit courts' reading creates tension with parts of section (c)(2), which provides for the denial of award in certain situations.<sup>252</sup> Not only does the text in section (c)(2) clearly envision more than one category of whistleblower—despite the circuit courts' claim that section (a)(6) only allows for one category—but the courts' reading of section (a)(6) would also render section (c)(2) superfluous, which would violate a canon of statutory interpretation.<sup>253</sup>

Section (c)(2), which provides for the denial of an award in situations, clearly envisions the importance of internal reporting.<sup>254</sup> Subsection (C) states that no award shall be made "to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of [15 U.S.C. 78j-1]." <sup>255</sup> Section 78j-1(b) provides the "[r]equired response to audit discoveries" by auditors of publicly traded companies who uncover illegal or potentially illegal activity.<sup>256</sup> The statute requires that auditors "inform the appropriate level of management of the issuer and assure that the audit committee of the issuer . . . is adequately informed with respect to the illegal acts that have been detected."<sup>257</sup> If nothing is done to remedy the situation the auditor is then required to make a report directly to the Board.<sup>258</sup> The issuer is then required to inform the SEC of the situation

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252. *Id.* § 78u-6(a)(6), (c)(2).

253. *Id.*; TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted))).

254. 15 U.S.C. § 78u-6(c)(2) (2012).

255. *Id.* § 78u-6(c)(2)(C).

256. *Id.* § 78j-1(b).

257. *Id.* § 78j-1(b)(1)(B).

258. *Id.* § 78j-1(b)(2).

and provide the auditor with a copy of its disclosure to the Commission.<sup>259</sup> The auditor may then go to the Commission and file a report.<sup>260</sup>

Therefore, the auditor-whistleblower must inform the issuer at least twice and then give the issuer an additional day to contact the Commission before the auditor itself may provide information to the Commission.<sup>261</sup> If the auditor deviates from this route and alerts the Commission ahead of time, it will be denied a whistleblower award pursuant to subsection (c)(2)(C) of Dodd-Frank.<sup>262</sup> Despite denying them a reward, auditors are still whistleblowers under Dodd-Frank.<sup>263</sup> This reading suggests that there are at least two types of whistleblowers: those who qualify for an award and those who do not. If there is a category of whistleblowers who do not receive an award, they should also be a recipient of the Act's protection. Therefore, Subsection (C) suggests there is a category of whistleblowers who are entitled to an award and the Act's protections, and a category of whistleblowers who are entitled to the Act's protections, but not an award.<sup>264</sup> Reading section (a)(6) to grant authority to the SEC does not conflict with subsection (c)(2)(C).<sup>265</sup> Rather, Congress prefers to reward auditors who report internally, while still authorizing the SEC to protect auditors from retaliation when the information is reported to the Commission.<sup>266</sup>

Subsection (c)(2)(D) also shows that the Act recognizes more than one type of whistleblower.<sup>267</sup> According to the circuit courts, to be a whistleblower under section (a)(6), a person must report directly to the Commission, in the form and manner required by Commission.<sup>268</sup> However, subsection (D) states that no award shall be made to "any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require."<sup>269</sup> It follows that there are

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259. *Id.* § 78j-1(b)(3).

260. *Id.* § 78j-1(b)(4).

261. *Id.* § 78j-1(b).

262. *Id.* § 78u-6(c)(2)(C).

263. *Id.*

264. *Id.*

265. *Id.* § 78u-6(a)(6), (c)(2)(C).

266. In this situation the auditor still complies with the mandate to report "to the Commission," but this scenario exemplifies that the Act recognizes more than one category of whistleblower.

267. 15 U.S.C. § 78u-6(c)(2)(D) (2012).

268. *Id.* § 78u-6(a)(6); *see supra* Part II.A.1.

269. 15 U.S.C. § 78u-6(c)(2)(D) (2012).

multiple categories of whistleblowers: (1) those who submit information in the form required and thereby qualifies for an award and the Act's protections; and (2) those who do not submit information in the form required to qualify for an award, but are nonetheless whistleblowers entitled to the Act's protections. Subsection (D) would also still serve a purpose under a framework where section (a)(6) grants broad authority to the SEC.<sup>270</sup> The Act would protect those whistleblowers who took the leap of reaching out and providing information to the SEC in a manner they prescribed,<sup>271</sup> but subsection (D) ensures that only those who provide useful information to the SEC are awarded.<sup>272</sup> According to this reading, section (a)(6) and subsection (D) of the statute are not in conflict, but instead complement each other to further serve Congress's intent to protect all whistleblowers report, but only award those who provide useful information.<sup>273</sup>

a. The Current Reading of Section (a)(6) Conflicts with Subsections (C) and (D)

The Supreme Court has held that statutory conflict should be avoided when possible.<sup>274</sup> According to the Fifth Circuit, with which the Second and Ninth Circuits agreed,<sup>275</sup> section (a)(6) describes only one category of whistleblower, those who report to the SEC, and presumably that category of whistleblower is entitled to both protections and awards. However, subsections (c)(2)(C) and (D) make reference to two categories of whistleblowers: (1) whistleblowers who are entitled to both rewards and protections; and (2) whistleblowers not entitled to an award, yet still entitled to protection.<sup>276</sup> While it is not explicitly said, if a whistleblower is not entitled to an award, they must be entitled to the Act's protections. It would be absurd for a person to be considered a whistleblower under

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270. *Id.* § 78u-6(a)(6), (c)(2)(D).

271. *Id.* § 78u-6(a)(6).

272. *Id.* § 78u-6(c)(2)(D).

273. *Id.* § 78u-6(a)(6), (c)(2)(D).

274. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute as 'a symmetrical and coherent regulatory scheme,'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)), "and fit, if possible, all parts into an harmonious whole" (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959))).

275. *See supra* Part II.A.

276. *See supra* Part III.A.2.

the Act if they were entitled to neither the incentives nor the protections offered by the Act.<sup>277</sup> Congress authorized the SEC to determine who qualifies as a whistleblower, including, whether there is more than one type of whistleblower.

In addition, the circuit courts' reading of section (a)(6) renders subsection (D) superfluous.<sup>278</sup> According to the circuits, the only way to become a whistleblower is to meet the criteria of section (a)(6).<sup>279</sup> Part of that criteria is providing the information "in a manner established . . . by the Commission."<sup>280</sup> If you do not meet any of the criteria of section (a)(6), then you are not a whistleblower.<sup>281</sup> If an individual fails to provide the information "in a manner established" by the Commission, they would have failed part of the criteria of section (a)(6), and would not be a whistleblower under the Act.<sup>282</sup> Therefore the individual would not be entitled to any of the Act's awards.<sup>283</sup> It would be redundant for subsection (D) to provide that no award shall be made to "any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require."<sup>284</sup> A reading of section (a)(6) that grants broad authority to the SEC to determine more than just the technical "form," but the substantive "manner" in which one provides information to the SEC eliminates that conflict.<sup>285</sup> As stated above, under this new framework for section (a)(6), subsection (D) still plays an important role: someone can still be a whistleblower and receive the Act's protections, but fail to submit the information in a manner required, which renders them ineligible to receive an award.<sup>286</sup>

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277. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.").

278. The Supreme Court has cautioned against interpretations that render portions of a statute superfluous. *See, e.g., United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011).

279. 15 U.S.C. § 78u-6(a)(6) (2012).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* § 78u-6(b).

284. *Id.* § 78u-6(c)(2)(D).

285. *Id.*

286. *Id.*

b. The Proposed Reading of Section (a)(6) Does Not Contradict with  
Subsection (H)(1)(A)

A reading of section (a)(6) that grants authority to the SEC to “establish” the “manner” by which one may submit information to the Commission and become a whistleblower would resolve any conflict with subsection (iii).<sup>287</sup> The Act states:

No employer may . . . discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under [SOX], this chapter, including [15 U.S.C. § 78j-1(m)], [18 U.S.C. § 1513(e)], and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>288</sup>

Section (a)(6) authorizes the SEC to determine how an individual submits information to it and becomes a whistleblower under the Act.<sup>289</sup> This Note proposes that the SEC’s determination that an individual is a “whistleblower” under section (a)(6) should be definitive when determining whether that individual is protected by the other provisions in the Act, including subsection (iii). Therefore, an individual who provides information “required or protected under [SOX]”<sup>290</sup> “in a manner established, by rule or regulation, by the Commission”<sup>291</sup> is protected by the anti-retaliation provisions in subsection (iii). This interpretation—in contrast to the holdings of the Fifth, Second, and Ninth Circuits—gives effect to each portion of the statute and provides adequate protection to all whistleblowers.

Critics may argue, such as the Fifth Circuit did in *Asadi*, that reading subsection (iii) to incorporate SOX would render the whistleblower protections under SOX obsolete.<sup>292</sup> Dodd-Frank affords twice as much back pay to the whistleblower, allows the whistleblower to file a claim directly in federal court, and lets the whistleblower file a claim up to ten years after the violation.<sup>293</sup> In contrast, SOX affords only regular back pay, requires claims to be filed with the DoL, permits a claim to be filed

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287. *Id.* § 78u-6(a)(6), (h)(1)(A)(iii).

288. *Id.* § 78u-6 (h)(1)(A)(iii).

289. *Id.* § 78u-6(a)(6).

290. *Id.* § 78u-6(h)(1)(A)(iii).

291. *Id.* § 78u-6(a)(6).

292. *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 628–29 (5th Cir. 2013).

293. 15 U.S.C. § 78u-6(h)(1)(C)(i)–(iii).



in federal district court only if the DoL decides not to pursue the claim, and the claim needs to be made within 180 days.<sup>294</sup> Therefore, critics may reason that it is unlikely an individual would elect to file a SOX claim over a Dodd-Frank claim. However, as the Ninth Circuit found, if an individual files a SOX claim and the DoL decides to pursue it, the case will be handled by the DoL; the whistleblower will not have to expend the time and costs to pursue litigation.<sup>295</sup> Further, if the DoL decides to pursue an action, the whistleblower may feel more confident about the merits of their claim. Moreover, SOX allows a whistleblower to recover for special damages related to the retaliation including emotional distress.<sup>296</sup> Therefore, if the whistleblower has experienced harm other than financial harm, pursuing a Dodd-Frank claim is not the best option. These distinctions make filing a claim under SOX an attractive choice for a whistleblower.

The reading of section (a)(6) proposed by this Note aligns generally with the purpose of Dodd-Frank.<sup>297</sup> Congress tried to protect whistleblowers when it enacted SOX, however, it proved to be ineffective.<sup>298</sup> Despite its shortcomings, SOX's whistleblower provisions still had the potential to have some teeth. By incorporating SOX's whistleblower provisions into Dodd-Frank through subsection (iii), Congress gave SOX those teeth. Furthermore, Congress ensured that regardless of the SEC's decision on who else was a whistleblower and the awards and protections they get, SOX whistleblowers would at least benefit from protection in some aspect no matter what.<sup>299</sup> The SEC would still get to use all its agency expertise to decide the other ways that providing information to the Commission should be protected, but Congress wanted to at least protect the auditors and lawyers subject to SOX. Further, the Supreme Court has supported this interpretation of "in a manner established."<sup>300</sup>

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294. 18 U.S.C. § 1514A(c)(2)(A)–(C) (2012).

295. *Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045, 1050 (9th Cir. 2017).

296. 18 U.S.C. § 1514A(c)(1).

297. "An Act *To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.*" Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (emphasis added).

298. *See supra* Part I.A.

299. 15 U.S.C. § 78u-6(a)(6) (2012).

300. *See supra* Part II.B.2.b.

B. THE POLICY CONSIDERATIONS CONGRESS WAS ADDRESSING AT THE  
TIME IT PASSED DODD-FRANK ALSO SUGGEST A BROAD READING OF  
SECTION (A)(6)

Reading section (a)(6) as a broad grant of authority to the SEC, rather than a limit on the definition of a whistleblower, aligns with the general purpose of Dodd-Frank.<sup>301</sup> Dodd-Frank was enacted in the background of the worst financial crisis since the Great Depression, when trust in the financial industry was at an all-time low. Financial institutions had been allowed to run amuck by hiding behind complex investment tools like collateralized debt obligations in order to conceal their growing deficits from having invested in increasingly risky subprime mortgages. As Paul Krugman Stated:

[w]hat do you get when you cross a Mafia don with a bond salesman? A dealer in collateralized debt obligations (C.D.O.'s)—someone who makes you an offer you don't understand.

Seriously, it's starting to look as if C.D.O.'s were to this decade's housing bubble what Enron-style accounting was to the stock bubble of the 1990s. Both made investors think they were getting a much better deal than they really were. And the new scandal raises two obvious questions: Why were the bond-rating agencies taken in (again), and where were the regulators?<sup>302</sup>

Congress intended to give the SEC the broad power to use its expertise to determine how an individual becomes a whistleblower rather than to limit the agency to work with a narrow, predetermined definition. As the Supreme Court noted in *Lawson*, "[i]f anything relevant . . . can be gleaned from Dodd-Frank, it is that Congress apparently does not share [the business industries'] concerns about extending protection comprehensively to corporate whistleblowers."<sup>303</sup> This should be no different for section (a)(6) and its current interpretation comprehensively excludes a significant number of potential whistleblowers.

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301. 15 U.S.C. § 78u-6(h) (2012).

302. Dorit Samuel, *The Subprime Mortgage Crisis: Will New Regulations Help Avoid Future Financial Debacles?*, 2 ALBANY GOV'T L. REV. 217, 220 (2009) (quoting Paul Krugman, *Just Say AAA*, N.Y. TIMES, July 2, 2007, at A19).

303. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1175 (2014).

C. THE SEC'S RULE 21F DECLARING INTERNAL REPORTS ARE  
WHISTLEBLOWERS FOR PURPOSES OF DODD-FRANK'S ANTI-RETALIATION  
SECTION SHOULD BE ENTITLED TO DEFERENCE UNDER *CHEVRON*

Pursuant to its statutory authority, as proposed by this Note, the SEC has promulgated Rule 21F-2 which designates an employee who reports internally as a whistleblower for purposes of section (h).<sup>304</sup> “For purposes of the anti-retaliation protections . . . you are a whistleblower if . . . you provide . . . information in a manner described in [15 U.S.C. § 78u-6(h)(1)(A)].”<sup>305</sup> Congress has passed an Act expressly granting the SEC authority to “establish” the “manner” in which an employee may provide information to the Commission. The SEC has determined that for the purposes of section (h), reporting internally is one way in which an individual may provide information to the Commission. This agency interpretation should be given deference under *Chevron*.<sup>306</sup> This reading of section (a)(6) is a plausible reading. If a text is susceptible to more than one equally plausible reading, the ambiguity warrants *Chevron* deference.<sup>307</sup>

## CONCLUSION

When Congress enacted Dodd-Frank in the wake of the Financial Crisis of 2008 it was attempting to reign in the financial industry. Congress realized the integral position that whistleblowers have in financial regulation and therefore sought to incentivize and protect them with the whistleblower provisions of the Act. The various circuit court decisions interpreting the Act have read the Act through a narrow lens and unnecessarily limited the definition of a whistleblower to an individual who reports directly to the Commission. Congress likely intended for a much broader reading of the Act. It is clear that Congress meant to grant

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304. 17 C.F.R. § 240.21F-2(b)(1) (2012).

305. *Id.*

306. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

307. *Am. Airlines, Inc. v. United States*, 551 F.3d 1294, 1300 (Fed. Cir. 2008) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

broad authority to the SEC to “establish” the “manner” in which an individual becomes a whistleblower.