USING "SOX" TO PREVENT FEDERAL COURTS' COLD FEET ABOUT DODD-FRANK'S WHISTLEBLOWER PROVISIONS

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INTRODUCTION

A recent case from the Federal Court of Appeals for the Second Circuit, *Berman v. Neo@Ogilvy, LLC*,[1] entrenched a perceived consensus among a great number of federal circuit courts: internal whistleblowers, who report securities violations to their company, shall be granted the same retaliation protections and bounty capabilities as external whistleblowers, those who report securities violations to the SEC.[2] The question in *Berman* arose out of a supposed ambiguity in the language of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[3] This ambiguity primarily exists because of the conflict between Dodd-Frank's whistleblower provisions and the Securities and Exchange Commission's ("SEC") interpretation and application of those provisions.[4] Courts have attempted to resolve the disparity between the SEC's interpretation and the language of Dodd-Frank.[5] However, these attempts have caused even greater confusion[6]—a confusion that has led scholars to speculate that a grant of Supreme Court certiorari may be imminent on this question.[7]

Where Dodd-Frank and the SEC diverge relates to the definition of the term "whistleblower" in the statute. Dodd-Frank's Section 922 defines a "whistleblower" as a person who reports any violation of securities law "to

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1 801 F.3d 145 (2d Cir. 2015).

2 *See id.* at 155.

3 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 STAT. 1841 (2010) (codified at 15 U.S.C. § 78u-6(h) (2012)) [hereinafter Dodd-Frank]; *Berman*, 801 F.3d at 155; Caroline Keen, *Clarifying What is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 215–16 (2015).

4 *See* Dodd-Frank § 922; Keen, *supra* note 3, at 216.

5 *See* Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 722–23 (2014).

6 *See id.* at 761.

7 *See* Jason Halper et. al, *SEC Guidance Supports Its Position That Internal Whistleblowers Are Protected Under Dodd-Frank*, ORRICK BLOG (Aug. 10, 2015), http://blogs.orrick.com/employment/2015/08/06/sec-guidance-supports-its-position-that-internal-whistleblowers-are-protected-under-dodd-frank/.

the Commission."[8] By the statute's text, Congress granted anti-retaliation protections to "whistleblowers" explicitly.[9] Without contradictory SEC guidelines on Dodd-Frank's Section 922 whistleblower provisions, the natural reading of the statute is that anti-retaliation protections apply exclusively to external whistleblowers.[10] However, the SEC has issued rules,[11] guidelines[12], and several amicus briefs[13] contrary to the natural reading of the statute.[14]

The SEC intends for Dodd-Frank afford the same anti-retaliation provisions to both internal and external whistleblowers: "The SEC's . . . guidance has announced its position that there are two definitions of whistleblower for purposes of section 21F: one that applies to Dodd-Frank's bounty protections, and another that applies to Dodd-Frank's antiretaliation provision."[15] The SEC has given many reasons to justify its interpretation of the language of the statute, including the vital sustainment of corporations' internal compliance structures.[16]

Prior to the passage of Dodd-Frank, the Sarbanes-Oxley Act of 2002 ("SOX"), and several other federal laws that included whistleblower provisions, handled the treatment of whistleblowers in cases of securities violations.[17] SOX, rather than using and defining the term "whistleblower" like Dodd-Frank, used the word "employee" to describe whom their provisions

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8 Dodd-Frank § 922(21F)(a)(6); Asadi v. G.E. Energy U.S., LLC, 720 F.3d 620, 623 (5th Cir. 2013).

9 *See* Dodd-Frank § 922(21F)(a)(6).

10 *See* Berman v. Neo@Ogilvy, LLC, 801 F.3d 145, 156 (2d Cir. 2015) (Jacobs, J., dissenting) (noting that the most natural reading of the statute would grant the anti-retaliation protections only to external whistleblowers).

11 *See* 17 C.F.R. § 240.21F-2 (2015); Lonnie E. Griffith, Jr., *Construction and Application of Whistleblower Provisions of Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank Act), 15 U.S.C.A. § 78u-6(h)(1)*, 77 A.L.R. FED. 2D 275, 287 (2013).

12 *See* U.S. SEC. & EXCH. COMM'N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 20 (2015), https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf.

13 *See* Brief for SEC as Amicus Curiae Supporting Appellant, Berman v. Neo@Oligvy, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626) [hereinafter *Berman* Amicus Brief]; Brief for SEC as Amicus Curiae Supporting Appellant, Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014) (No. 13-4385) [hereinafter *Meng-Lin* Amicus Brief].

14 *See* Halper et. al, *supra* note 7; Jason M. Halper et. al., *Orrick Discusses SEC's Guidance Supporting Its Position that Internal Whistleblowers Are Protected Under Dodd-Frank*, CLS BLUE SKY BLOG (Aug. 20, 2015), http://clsbluesky.law.columbia.edu/2015/08/20/orrick-discusses-secs-guidance-supporting-its-position-that-internal-whistleblowers-are-protected-under-dodd-frank/.

15 *See* Halper et. al, *supra* note 7.

16 *See Berman* Amicus Brief, *supra* note 13, at 10–11; Halper et. al, *supra* note 7.

17 *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 STAT. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.) [hereinafter Sarbanes-Oxley]; Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 3 (2012).

would protect.[18] The language of this SOX provision clearly and unambiguously includes internal whistleblowers.[19]

This Comment maintains that Dodd-Frank's anti-retaliation protections should be given their most natural reading and should apply solely to external whistleblowers. This inheres that courts should employ SOX's whistleblower protections with respect to internal whistleblowers, rather than those in Dodd-Frank, to provide any necessary anti-retaliation protection. Part I offers the pertinent background information for understanding the posture of the federal case law on this issue by discussing the relevant sections of and legislative history behind Dodd-Frank and SOX; Part I also discusses the SEC's interpretation of and guidelines for Dodd-Frank, the steps of the *Chevron* analysis that must be applied, and the two distinct sides of the circuit split regarding internal whistleblowers. Part II analyzes the application of the Dodd-Frank whistleblower provisions by: (1) applying *Chevron* analysis, (2) specifying that courts should give the text its most natural reading, (3) providing the practical accounts and effects on internal whistleblowers and internal compliance, (4) discussing the SEC's capability to over-incentivize, and (5) recommending a resolution for the Circuit split. Part III concludes with the most natural solution that Dodd-Frank should be read narrowly to comply with its textual restraints, but SOX whistleblower provisions can prevent undesired results for internal whistleblowers.

I. BACKGROUND

The split in opinions between the circuit courts depends in large part upon the language of the Dodd-Frank whistleblower provisions, prior whistleblower statutes, SEC interpretations, and how courts have treated agency interpretations. Part A discusses the Dodd-Frank whistleblower provisions of Section 922, their language, and Congressional intent. Part B discusses the SOX whistleblower protections, their language, and their application. Part C discusses the actual statistics of how reporting has been affected by whistleblower protection statutes. Part D introduces the need to correctly apply a Chevron analysis to Dodd-Frank's whistleblower provisions. Finally, Part E discusses how the federal circuit courts have ruled in these types of cases and why they have split on their reasoning, with particular attention to the recently decided *Berman v. Neo@Ogilvy* and the oft-cited *Asadi v. G.E. Energy United States, LLC*.[20]

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18 *See* Sarbanes-Oxley § 806(a); Berman v. Neo@Ogilvy, LLC, 801 F.3d 145, 157–58 (2d Cir. 2015) (Jacobs, J., dissenting) (describing SOX whistleblower provisions as covering all employees).

19 *Berman*, 801 F.3d at 157–58 (Jacobs, J., dissenting).

20 720 F.3d 620 (5th Cir. 2013)

A. *Dodd-Frank, Section 922, Definitions, and Anti-retaliation Protections*

In 2010, Congress passed Dodd-Frank in an attempt to reform both financial institutions and consumer credit.[21] Congress intended Dodd-Frank to "promote the financial stability of the United States by improving accountability and transparency in the financial system."[22] In furtherance of these aims, Congress also included Section 922, which provides for extensive whistleblower protections, including the distribution of bounties to whistleblowers whose tips lead to an eventual SEC sanction.[23] Section 922 modified the Securities Exchange Act of 1934 and extended the SOX whistleblower provisions.[24] The statute plainly defines a whistleblower: "'[W]histleblower' means any individual who provides, or [two] 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."[25]

One provision in Section 922, often referred to as the "catch-all" provision,[26] has been read with the rest of Section 922 to indicate that the SEC has the authority to grant internal whistleblowers the same protections as external whistleblowers, so long as the reported violation is within the jurisdiction of the SEC:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.[27]

Some courts have used the catch-all provision to provide Dodd-Frank anti-retaliation protections to any person who reports a securities violation under the jurisdiction of the SEC—and not just those persons specified by the language in Dodd-Frank.[28] But courts do not always read the catch-all provision

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21 *See* Marianne M. Jennings, *Does Dodd-Frank Countermand Sarbanes-Oxley? On Whistleblowers and Internal Controls*, 16 CORP. FIN. REV. 41, 41 (2011).

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

23 *Id.* at § 922, 1842–43 (codified at 15 U.S.C. § 78u-6 (2012)).

24 Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 356 (2014).

25 15 U.S.C. § 78u-6(a)(6) (2012) (emphasis added).

26 *See* Griffith, *supra* note 11, at 286–87.

27 Dodd-Frank § 922 (codified at 15 U.S.C. § 78u-6(h)(1)(a) (2012)).

28 *See, e.g.*, Murray v. UBS Secs., LLC, No. 12 Civ. 5914, 2013 WL 2190084, at *7 (S.D.N.Y. 2013); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012).

this way, because it presents a more expansive interpretation than Congress may have intended.[29]

B. *The Sarbanes-Oxley Act and Whistleblower Protections*

Prior to the passage of Dodd-Frank, President Bush signed SOX into law in effort to combat corporate financial wrongdoings in the wake of several infamous securities violations in 2002.[30] Congressional intent pointed to an extension of whistleblower protections, particularly citing the egregious retaliation against Enron employee Sherron Watkins.[31] Watkins blew the whistle on Enron's improper accounting practices to Enron's Chairman, and later Enron's Chief Financial Officer, but she did not report to the SEC.[32] Despite Watkins' keeping her report within the company, the Chief Financial Officer made the work environment so tense for Watkins that she was forced to resign.[33] She went on to provide invaluable testimony in the case against Enron.[34]

With retaliations like this in mind, Congress passed the anti-retaliation protections contained in SOX that protect whistleblowers who are "employees" reporting both internally and externally.[35] These anti-retaliation provisions appear in Section 806 of SOX and provide that no company, or extension thereof (e.g., officer, employee, contractor) may retaliate against (e.g., harass, discriminate, suspend) any "*employee*" who reported the securities violations of the company in any way.[36]

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29 *See, e.g.*, Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 629 (5th Cir. 2013); Banko v. Apple Inc., 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013).

30 *See* MICHAEL DELIKAT & RENÉE PHILLIPS, CORPORATE WHISTLEBLOWING IN THE SARBANES-OXLEY/DODD-FRANK ERA § 1.1 (2d ed. 2012).

31 *See id.*

32 *See* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime after Sarbanes-Oxley*, 81 WASH. U. L. Q. 357, 361–62 (2003).

33 *See id.* at 363.

34 *See id.* at 362.

35 *See id.* at 365.

36 Sarbanes-Oxley § 806 (codified at 18 U.S.C. § 1514A(a) (2012)) ("No company . . . or *any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee*—(1) *to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . the Securities and Exchange Commission*, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or (2) *to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed* (with any knowledge

Congress wanted to address certain problems that they believed helped to cause retaliation against the employees who reported during the financial violations in the Enron and WorldCom debacles of the pre-SOX era.[37] The drafters of SOX included four key principles for a prima facie case of retaliation in an attempt to discern when employers were engaging in retaliation:[38]

> (1) The employee engaged in protected activity or conduct,
> (2) the employer knew or suspected that the employee engaged in the protected activity,
> (3) the employee suffered an adverse employment action, and
> (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.[39]

The language of SOX left open the question of whether its anti-retaliation protections extend to employees of private companies and contractors, as well as public companies.[40] In *Lawson v. FMR LLC*,[41] the Supreme Court extended protection to employees of private companies who contracted with public companies.[42] The Supreme Court reasoned that this extension of SOX was necessary to "ward off another Enron debacle" and to remain inclusive of the mutual fund industry.[43] The Supreme Court also stretched the initial breadth of SOX's whistleblower doctrine anticipating that public companies might outsource their terminations or retaliation to private companies.[44] A concurring opinion by Justice Scalia stated that the majority's reading "logically flows" from the text.[45] A final understanding of SOX that can be gleaned from the Supreme Court's interpretation is that its whistleblower provisions could cover all types of employees.

C. *Other Statutory Whistleblower Protections*

Congress found merit in necessitating the protection of whistleblowers in various contexts. Previous whistleblower protections have appeared under

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of the employer) relating to an alleged violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.") (emphasis added).

37 *See* Moberly, *supra* note 17, at 2–3.

38 *See id.* at 8.

39 Mary P. Hansen, *Special Issues Relating to Whistleblowers*, *in* SEC COMPLIANCE AND ENFORCEMENT ANSWER BOOK 2015 669, 676 (David M. Stuart ed., 2015).

40 *See* DELIKAT & PHILLIPS, *supra* note 30, § 2.2.

41 134 S. Ct. 1158 (2014).

42 *See id.* at 1161; *see* DELIKAT & PHILLIPS, *supra* note 30, § 2.5.3.

43 *Lawson*, 134 S. Ct. at 1169, 1171.

44 *See id.* at 1166–67.

45 *Id.* at 1176 (Scalia, J., concurring).

the Insider Trading and Securities Fraud Enforcement Act of 1988, the Internal Revenue Code, and the False Claims Act.[46] The False Claims Act protects whistleblowers from "retaliatory actions," which they partially defined as "discharging, demoting, suspending, harassing, or otherwise discriminating against the whistleblower."[47] The False Claims Act also included a bounty provision for whistleblowers, similar to the one that can be found in Dodd-Frank, which is contingent on the amount of proceeds the action is able to bring in.[48]

Similarly, the Internal Revenue Code also contains built-in whistleblower provisions.[49] These provisions also function as a bounty, allowing a whistleblower to receive 15-30 percent of the proceeds from a successful action against an employer.[50] However, this award is discretionary and applies only if the amount sanctioned exceeds 2 million dollars.[51] Additional whistleblowing legislation was passed as part of the Insider Trading and Securities Fraud Enforcement Act of 1988.[52] This legislation increased protections for whistleblowers who provided information about insider trading and contained bounty provisions for insider trading whistleblowers.[53] Many, but not all of these whistleblower provisions remain under the purview of the SEC.[54]

D. *The Securities and Exchange Commission's Guidelines*

The SEC issued a rule that interprets Section 922 of Dodd-Frank's whistleblower provisions to include internal whistleblowers.[55] The SEC then fully took the reins on these Dodd-Frank whistleblower provisions by creating the Office of the Whistleblower within the ranks of the SEC.[56] The SEC primar-

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46 Jenny Lee, Comment, *Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 BROOK. L. REV. 303, 307–09 (2011). *See also* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 STAT. 4677, 4679 (codified prior to amendment at 15 U.S.C. § 78u-1 (2006)); 26 U.S.C. § 7623 (2012) (Internal Revenue Code); 31 U.S.C. § 3730(h) (2006) (False Claims Act).

47 Lee, *supra* note 46, at 307–08; *see* 31 U.S.C. § 3730(h) (2012).

48 31 U.S.C. § 3730(d) (2012); *see* Lee, *supra* note 46, at 308–09.

49 26 U.S.C. § 7623(b)(1) (2012)

50 *Id.*

51 *Id.* at § 7623(b)(5).

52 Insider Trading Act and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 STAT. 4677 (codified at 15 U.S.C. 78(a) (1988)).

53 Lee, *supra* note 46, at 310.

54 *See* Halper et. al, *supra* note 7.

55 *See* 17 C.F.R. 240.21F-2(b)(iii) (2015); *see also* Halper et. al, *supra* note 7.

56 Press Release, U.S. Secs. & Exch. Comm'n, Sean McKessy Named Head of Whistleblower Office (Feb. 18, 2011), https://www.sec.gov/news/press/2011/2011-47.htm.

ily rationalized their decision to apply the whistleblower provisions to internal reporters with the assertion that allowing the internal reporters the same protections would incentivize whistleblowing.[57]

Section 806 of SOX protects employees who report securities violations within publicly traded companies to someone with "supervisory authority over the employee."[58] From this, the SEC determined that these disclosures under SOX, which are vaguely mentioned in Dodd-Frank,[59] must extend Dodd-Frank's superior whistleblower protection scheme to those individuals already covered under SOX. Opponents counter that, by invoking the statutorily-defined word "whistleblower,"[60] Dodd-Frank limits the protections to those "who provide information relating to a violation of the securities laws to the Commission."[61] The SEC interprets Dodd-Frank's employment retaliation provisions in its rule to "apply to three different categories of whistleblowers, and the third category [§ 78u-6(h)(1)(A)(iii)] includes individuals who report to persons or governmental authorities *other than the Commission.*"[62]

By interpreting the statute this way, the SEC attempts to ensure that maximum whistleblowing occurs—because this allows a greater chance that actual violations will be uncovered.[63] However, no limits have been established on this encouragement of whistleblowers, which creates a space where problems of over-incentivizing arise.[64] The SEC also claims that disallowing the anti-retaliation protections to be applied to internal whistleblowers will undermine internal compliance structures.[65] Because the language of Dodd-Frank is at odds with the SEC's interpretation, courts have to consider whether to defer to the SEC's interpretation by applying the *Chevron* test.

E. *Chevron Deference*

Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.[66] established the principle that a court shall defer to a government agency when:

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57 *Berman* Amicus Brief, *supra* note 13, at 9.

58 Sarbanes-Oxley § 806, 116 STAT. 745, 802–04 (codified at 18 U.S.C. § 1514A(a)(1)(C) (2012)).

59 *See* Dodd-Frank § 922, 124 STAT. 1376, 1841–49 (codified at 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012)).

60 *Id.* at § 78u-6(h)(1)(A).

61 *Id.* at § 78u-6(a)(6).

62 Tapas Agarwal, *Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank Following the Fifth Circuit's Decision in* Asadi, 46 ST. MARY'S L.J. 421, 424 (2014).

63 Justin Blount and Spencer Markel, *The End of the Internal Compliance World as We Know It, Or An Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1036 (2012).

64 See Lee, *supra* note 46, at 318–19.

65 *See Meng-Lin* Amicus Brief, *supra* note 13, at 29–30.

66 467 U.S. 837 (1984).

(1) Congress has not expressly or unambiguously addressed the issue, and (2) the agency's interpretation is a permissible construction of the statute.[67]

The main issue with *Chevron* deference is that many federal courts are altering statutory text to match agency determinations, when they should be doing the opposite.[68] First, courts should look to whether the agency has authority to interpret the statute.[69] Then, a court should determine whether the statute has specifically addressed the question before the court or determine that the statute is ambiguous.[70] If the statutory text has specifically addressed the question before the court, then the court must respect the language of the statute; *Chevron* deference does not permit the agency to reinterpret it.[71] If the statute is ambiguous, then the court can defer to the agency's interpretation, so long as it is reasonable.[72] This analysis has been applied to the Dodd-Frank whistleblower provisions by multiple courts, with varied results.[73]

Applying a textualist perspective to *Chevron* analysis may simplify and alleviate many of the issues the federal courts have found in the language of Dodd-Frank's Section 922. One of the main proponents of textualism, the late Justice Antonin Scalia[74], presents a truism applicable to the present Chevron analysis: "Ordinarily, judges apply text-specific definitions with rigor."[75] One of the tenants of *Chevron* deference is that the doctrine cannot apply if the statute in question is unambiguous.[76] Because the definition of "whistleblower" within Section 922 has created the bulk of the headache in interpreting the anti-retaliation protection for whistleblowers, using textualist tenants may be instructive.[77]

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67 *See id.* at 842–43.

68 *See id.*

69 *Chevron*, 467 U.S. at 842–43.

70 *Id.* at 843.

71 *Id.* at 842–43; Asadi v. G.E. Energy U.S., LLC, 720 F.3d 620, 622 (5th Cir. 2013).

72 *Chevron*, 467 U.S. at 843–44.

73 *See* Keen, *supra* note 3, at 216–17; *see also* Somers v. Digital Realty Trust, Inc., 119 F. Supp. 3d 1088, 1104–05 (N.D. Cal. 2015); Connolly v. Remkes, No. 5:14-cv-01344-LHK, 2014 WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014); Bussing v. CorClearing LLC, 20 F. Supp. 3d 719, 729 (D. Neb. 2014); Yang v. Navigators Grp., 18 F. Supp. 3d 519, 533 (S.D.N.Y. 2014); Khazin v. TD Ameritrade Holding Corp., No. 13-4149(SDW)(MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014); Ahmad v. Morgan Stanley & Co., 2 F. Supp. 3d 491, 496 n.5 (S.D.N.Y. 2014); Rosenblum v. Thomson Reuters (Mkts.) LLC, 984 F. Supp. 2d 141, 148 (S.D.N.Y. 2013); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45–46 (D. Mass. 2013); Murray v. UBS Secs., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3–7 (S.D.N.Y. May 21, 2013); Genberg v. Porter, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012).

74 *See generally* ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

75 *Id.* at 227.

76 *Chevron*, 467 U.S. at 842–43.

77 *See* SCALIA & GARNER, *supra* note 74, at 227; Keen, *supra* note 3, at 220.

F. *The Circuit Split and Recent Case Law*

The most recent case in the whistleblower protection domain is *Berman v. Neo@Ogilvy*. The court held that anti-retaliation protections should be granted to internal whistleblowers.[78] The majority's rationale centered mainly on an argument of *Chevron* deference, claiming that the statute was ambiguous and that the SEC should be able to determine the rule to be applied.[79] When making the determination that Congress wrote Section 922 of Dodd-Frank ambiguously, the Second Circuit deemed deference to the SEC appropriate, writing:

> [W]e need not definitively construe the statute, because, at a minimum, the tension between the definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) if it is subject to that definition renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute.[80]

The Second Circuit's rationale here aligns with the small majority of the courts who have interpreted this statute.[81] However, there are several minority circuits that have leaned the other way; they have stated that using the definitions from Dodd-Frank, applied as written, would remove any perceived ambiguity.[82]

The most contentious argument in this line of cases stemmed from the Fifth Circuit's holding in *Asadi v. G.E. Energy United States, LLC*. The court held that Dodd-Frank is not ambiguous, which means that the SEC cannot be given deference to decide whether internal whistleblowers should have the same anti-retaliation protections; therefore, it is clear that the statute does not provide the same protections for internal whistleblowers.[83] Federal courts in all Circuits have decided this question inconsistently and with variable considerations and rationales.[84] However, most of the federal courts have deferred to the SEC on this issue, despite the statute's plain text.[85]

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78 *Id.* at 155.

79 *Id.*

80 *Id.*

81 *See* Keen, *supra* note 3, at 217, 227.

82 *Id.* at 230–32.

83 *Asadi*, 720 F.3d at 630.

84 *See, e.g.*, *Berman*, 801 F.3d at 155–60 (Jacobs, J., dissenting); *see also* Pacella, *supra* note 5.

85 *See* Pacella, *supra* note 5, at 733.

1. The Fifth Circuit's Rationale in *Asadi v. G.E. Energy (USA), L.L.C.*

Asadi presents one of the strongest arguments in favor of applying the language of the statute as written, rather than deferring to the SEC.[86] In *Asadi*, the plaintiff employee claimed that his employer terminated him because he reported the company's violation of the Foreign Corrupt Practices Act internally.[87] Because a violation of the Foreign Corrupt Practices Act is a securities violation, the employee claimed that Dodd-Frank's anti-retaliation protections for whistleblowers should apply to him.[88]

The court held that Dodd-Frank did not provide anti-retaliation protections to the employee.[89] Specifically, the court explained: "Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision."[90] The court, in a relatively short but unanimous opinion, rejected the proposition that the language in Dodd-Frank could be read in a way that includes internal whistleblowers.[91] The court found that the statute cannot possibly be read in a way that means anything different from what is explicitly stated and that Dodd-Frank explicitly states the definition of "whistleblower."[92] The definition that must be used, according to the court, is the one given by Congress, which posits that a "whistleblower" is one who reports "to the Commission."[93] The court found that the SEC cannot create a rule that overturns the language of the statute and, therefore, the definition of "whistleblower" must stand: internal whistleblowers were not intended to receive anti-retaliation protections in this act.[94]

2. Other Cases Dealing with the Interpretation of Dodd-Frank's Whistleblower Provisions

Many of the federal courts interpreting Section 922 have determined that the SEC's broad interpretation of the whistleblower provisions should be followed. The First, Second, Third, Sixth, Eighth, and Ninth Circuits have each determined that Dodd-Frank's language is too ambiguous and that the

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86 *See* Mystica Alexander et. al., Asadi*: Renegade or Precursor of Who Is a Whistleblower Under the Dodd-Frank Act?*, 35 PACE L. REV. 887, 894 (2015).

87 *Asadi*, 720 F.3d at 621.

88 *Id.*

89 *Id.* at 630.

90 *Id.*

91 *Id.* at 629.

92 *Id.* at 630.

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

94 *Id.* at 629–30.

court must use the persuasive interpretation given by the SEC.[95] However, the Fifth, Seventh, Tenth, and Eleventh Circuits, which have also directly decided cases on this issue, came to the opposite conclusion, finding that Dodd-Frank unambiguously grants protection only to those defined as "whistleblowers" under Section 922.[96] The Fifth Circuit's aforementioned decision in *Asadi* presented the initial framework for the argument that the SEC interpretation should not be given deference; however, courts in other Circuits have agreed with the Fifth Circuit, using various rationales.[97] A federal court in the Seventh Circuit held that the text of Dodd-Frank was unambiguous, so the SEC could not be given deference and the employee could not be protected because he did not report to the SEC;[98] a federal court in the Tenth Circuit determined that expanding the whistleblower provisions under Dodd-Frank to internal whistleblowers would render SOX moot;[99] the Tenth Circuit determined that no person would sue under SOX's whistleblower provisions if Dodd-Frank could apply to internal whistleblowers, because SOX's provisions contain many more hoops for plaintiffs to jump through to obtain a favorable ruling;[100] a federal court in the Eleventh Circuit determined that Congress had the prerogative to define whistleblower in the way the drafters saw fit and, thus, determined that a whistleblower was a person who reported directly to the SEC.[101]

While a few scholars argue that the vast majority of cases on this topic deviate from the Fifth Circuit's reasoning in *Asadi*,[102] the case law suggests

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95 *See* Keen, *supra* note 3, at 216; *see also* Connolly v. Remkes, No. 5:14-cv-01344-LHK, 2014 WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014); Bussing v. COR Clearing, LLC 20 F. Supp. 3d 719, 729 (D. Neb. 2014) (finding that courts should use an everyday application of the word "whistleblower" and give broad interpretation to its meaning); Khazin v. TD Ameritrade Holding Corp, No. 13-4149 (SDW)(MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014) (holding that Dodd-Frank is ambiguous and courts should defer to the SEC); Rosenblum v. Thomas Reuters, LLC, 984 F. Supp. 2d 141, 147 (S.D.N.Y. 2013) (applying the *Chevron* test and determining that the court should defer to the SEC's interpretation); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (holding that the SEC construction is persuasive and Section 922 should be used to protect internal whistleblowers); Murray v. UBS Secs., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *5 (S.D.N.Y. May 21, 2013) (finding that the Dodd-Frank Act is inherently ambiguous and the courts should defer to the SEC); Kramer v. Trans-Lux Corp., No. 3:11cv1424, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012) (holding that the court should protect whistleblowers by deferring to the SEC).

96 *See* Keen, *supra* note 3, at 239; *see also* Verfuerth v. Orion Energy Sys., 65 F. Supp. 3d 640, 644 (E.D. Wis. 2014); Englehart v. Career Educ. Corp, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *7 (M.D. Fla. May 12, 2014); Wagner v. Bank of Am. Corp., No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4 (D. Colo. July 19, 2013).

97 *See* Keen, *supra* note 3, at 239–41.

98 *Verfuerth*, 65 F. Supp. 3d at 644.

99 *Wagner*, 2013 WL 3786643, at *4 (D. Colo. July 10, 2013).

100 *Id.* at *6 ("For the same reason, if subsection (iii) were interpreted to permit a non-whistleblower to sue under Dodd–Frank, then Sarbanes–Oxley's anti-retaliation provisions would be moot; no one would ever sue directly under that statute.").

101 *Englehart*, 2014 WL 2619501, at *7.

102 *See, e.g.*, Agarwal, *supra* note 27, at 430; Keen, *supra* note 3, at 227.

that the rationales are nearly evenly split among judges within different federal circuits and districts.[103]

II. FUSING THE CIRCUIT SPLIT

To thoroughly assess Dodd-Frank's whistleblower provisions, the resulting circuit split, and the way in which courts should resolve this split, both legal and practical considerations must be examined. To come to the conclusion that the Dodd-Frank whistleblower provisions should be read to include solely external whistleblowers, a multifaceted analysis must be applied. The methodology for the purposes of this Comment will include: (1) a proper application of the *Chevron* doctrine to the text of Dodd-Frank; (2) a textualist analysis of the language and definitions from Section 922, with an emphasis on the most natural reading; (3) a discussion of various whistleblower protections and their applicability to those whistleblowers lacking protection under Dodd-Frank; (4) a discussion addressing concerns that reading protections for internal reporters out of Dodd-Frank will endanger the use and effectiveness of internal compliance structures; (5) a discussion in regards to how the lack of protections for internal whistleblowers under Dodd-Frank would affect employees who choose to internally report; (6) an analysis of the incentives facing whistleblowers, possibly to the detriment of legitimate claims; and (7) a resolution for the problematic circuit split.

A. *Application of Chevron Deference*

The Fifth Circuit's decision in *Asadi* correctly applied the *Chevron* doctrine to Section 922 of Dodd-Frank, concluding that the text is unambiguous and therefore the SEC's interpretation receives no deference.[104] *Chevron* deference should not be given when a statute unambiguously provides terms and definitions, as in the case of Section 922 of Dodd-Frank. The statute has a natural reading that comports with congressional intent. The statute can—and should—be read unambiguously. The only ambiguity resulted from the SEC's incongruent rule.

When applying *Chevron* to the whistleblower provisions within Dodd-Frank, the first step is to determine whether the SEC has the power to interpret the statute.[105] From the language of Dodd-Frank and from the language

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103 *Compare* Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (holding that the SEC construction is persuasive and Section 922 should be used to protect internal whistleblowers), *with* Asadi v. G.E. Energy (USA), L.L.C., 720 F. 3d 620, 630 (5th Cir. 2013); *Verfuerth*, 65 F. Supp. 3d at 645; *Englehart*, 2014 WL 2619501, at *9.

104 *Asadi*, 720 F.3d at 630.

105 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

of the Securities and Exchange Act of 1934, the SEC has clearly been delegated authority to make rules relating to whistleblowers of securities violations.[106] Many courts have read the SEC's rulemaking power in this context as determinative of whether that court may allow for the SEC's protection of internal whistleblowers.[107] However, these courts have failed to apply the second, dispositive component of the *Chevron* analysis: whether the statute directly answers the interpretive question.[108]

The question that courts need to answer in these cases is, who is given anti-retaliation protection under Section 922 of Dodd-Frank? The answer, that the statute clearly provides, is whistleblowers.[109] The next question, then, is, who counts as a whistleblower? The statute also clearly provides an answer for that—by giving a definition of "whistleblowers."[110] A "whistleblower" is a person who reports securities violations "to the Commission," namely the SEC.[111] Following this logical succession provides the most simple and natural reading of the statute.

If the text of Dodd-Frank's whistleblower provisions were properly "run through the ringer" of textualism,[112] the only permissible conclusion under a *Chevron* analysis is that internal whistleblowers shall not be granted protections. Under a textualist reading, judges must apply definitions in statutes "with rigor."[113] Applying the definition of "whistleblower" from Section 922 with "rigor" removes all ambiguity from the statute because the ambiguity arose from a perceived lack of clarity regarding who will be granted protections. Because whistleblowers are the only persons who may receive anti-retaliation protection—and whistleblowers are defined as those who report "to the Commission"[114]—there can be no ambiguity. Without that essential component of ambiguity, *Chevron* deference cannot be given, and the court must follow the text.[115] If the federal courts that decided against the natural reading had read Dodd-Frank's definitions in a way that applied them with "rigor," then they would be unable to claim that Dodd-Frank is ambiguous.

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106 Dodd-Frank § 922 (codified at 15 U.S.C. § 78u-6 (2012)); Securities and Exchange Act of 1934, Pub. L. No. 73-291, § 2, 48 Stat. 881, 881–82 (codified at 15 U.S.C. § 78b (2012)).

107 Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) (holding that the court should protect whistleblowers by deferring to the SEC).

108 *Chevron*, 467 U.S. at 842–43.

109 Dodd-Frank § 922 (codified at 15 U.S.C. § 78u-6 (2012)).

110 *Id.*

111 *Id.*

112 *See* discussion *supra* Section I.E.

113 *See* SCALIA & GARNER, *supra* note 74, at 227.

114 Dodd-Frank § 922, (codified at 15 U.S.C. § 78u-6(a)(6) (2012)).

115 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 827, 842–43 (1984).

B. *Textual Analysis of Section 922 of Dodd-Frank*

When analyzing the text of a statute, some scholars and judges adhere to the principle that a court should read the text using the most natural reading possible.[116] The dissenting judge in *Berman v. Neo@Ogilvy* makes a compelling textual argument that comports with this principle. In addressing the majority's claim that Section 922 includes internal whistleblowers because it references SOX disclosures, he writes:

> "[W]histleblower" is a defined term. So subdivision (iii) only protects someone who (1) makes a protected disclosure under Sarbanes-Oxley, and (2) also satisfies Dodd-Frank's definition of "whistleblower." If the statute used the word "employee," Berman might have a claim. He does not because the phrasing is a coinage of the majority.[117]

He also states, that "[t]he majority hardly disputes that my reading (and the reading given in *Asadi*) is the more natural reading of the statute."[118] If the most natural reading of the statute provides that only external whistleblowers receive anti-retaliation protections, the only plausible explanation for a court ruling against the natural reading is to attempt to change the law in favor of an agency interpretation. This is an impermissible role for the judicial branch of the government to take, because it inheres legislating from the bench. As noted in *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."[119]

Congress used specific and particularized language in all of the provisions involving whistleblowers; for example, whistleblowers who receive protection have to give information that is both "unique" and "unknown," as well as a slew of other requirements.[120] If Congress is capable of carefully drafting the language to give such specific and unambiguous requirements for protection, then they must have also been capable of carefully drafting the section in which they define who constitutes a whistleblower under the statute. To imply that the language in Dodd-Frank means something other than what is stated in the text is to suggest that Congress is incapable of drafting the statute properly.

After years of working with and applying the language in SOX, the Securities and Exchange Act of 1934, and various other whistleblower statutes,

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116 *See*, SCALIA & GARNER, *supra* note 74 at 34 (quoting Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. REV. 538, 51 (1934) ("[A]n objective basis for interpretation... can be attained only [] by a faithful reliance upon the *natural or reasonable meanings* of the language...") (emphasis added)) (advocating for the "fair reading" method of statutory interpretation).

117 Berman v. Neo@Ogilvy LLC, 801 J.3d 145, 157 (Jacobs, J., dissenting) (citations omitted).

118 *Id.* (citations omitted).

119 *Chevron*, 467 U.S. at 842–43.

120 *See* Jennings, *supra* note 21, at 41.

Congress knew how to draft a proper Section 922 that would have included the desired provisions. It is inconsequential that the SEC believes that these textually provided protections are inadequate. The drafters crafted the statute carefully, and an administrative body should not alter their efforts, even if that administrative body has been allotted rule-making power under the statute. Courts do and should allow agencies to make rules, particularly when they are given rulemaking power under the statute, as here;[121] but that does not mean that they can make rules that buck against the text of the statute. Statutory language that has survived the institutional and intentional arduousness of the legislative process is language that should remain protected.[122]

Consistent application of both SOX and Dodd-Frank must be employed in order to respect the purposes of each statute. Scholars have argued that the anti-retaliation provisions, in conjunction with the catch-all provision in Dodd-Frank stand for the proposition that all persons protected under SOX are also protected under Dodd-Frank.[123] However, that assertion does not comport with the purposes of each statute because it renders SOX's whistleblower provisions moot.[124] As pointed out by the United States District Court for the District of Colorado, no one would ever employ the SOX provisions because SOX "requires a complaint to the Secretary of Labor as a prerequisite, has a short statute of limitations, and does not provide for double damages."[125] Congress did not repeal SOX's whistleblower provisions and did not intend to repeal SOX's whistleblower provisions with the passage of Dodd-Frank. In fact, it is clear that SOX has not been repealed because Congress specifically addresses its provisions in Dodd-Frank.[126]

Another problem arises in claiming that Dodd-Frank contains all of the protections guaranteed by SOX. This problem rears its head in the judicial system, where, more than just rendering SOX moot, reading Dodd-Frank as providing protections for internal whistleblowers has created a redundancy that muddles the protections under the two acts. Plaintiffs regularly plead that they are a whistleblower with respect to both Dodd-Frank and SOX.[127] Certainly, plaintiffs are entitled to plead in the alternative for determining their status as a whistleblower; however, a claim that the Dodd-Frank provisions covers all "employees" (as in SOX), just to ensure internal whistleblowers are protected might cause judicial confusion of the distinction clearly written into the text between the two statutes. The cure for these ills is to simply apply SOX and Dodd-Frank as written to those whom these Acts specifically

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121 *Chevron*, 467 U.S. at 842–43.

122 *See* THE FEDERALIST NO. 51 (James Madison).

123 *See generally* Keen, *supra* note 3.

124 *See* Wagner v. Bank of Am., No. 12-cv-00381-RBJ, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013).

125 *Id.* at *6.

126 *See* Dodd-Frank § 922 (codified at 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012)).

127 *See, e.g.*, Connolly v. Remkes, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at *3 (N.D. Cal. Oct. 28, 2014).

and unambiguously protect, rather than expand and contract the provisions ad infinitum.

C. *Whistleblowing, Empirically*

The SEC has also defended its interpretation of the whistleblower provisions by claiming that its interpretation best incentivizes whistleblowing.[128] Research reports have indicated that the passage of both the SOX and Dodd-Frank whistleblowing provisions has significantly affected the amount of reporting of violations that occurs:

> The Ethics Resource Center (ERC) has conducted a survey of private-sector employees regularly since 1994. In 2011, the ERC reported that 65% of the employees who claimed they observed misconduct also asserted that they reported it. This result marked the highest disclosure rate in the seventeen-year history of the survey, an increase of twelve percentage points from a record low of 53% in 2005. Interestingly, however, in 2003, the ERC reported that 64% of employees disclosed misconduct they observed.[129]

The worry that emerged from these reports was that the provisions in SOX caused a decline in the amount of reporting, despite Congress' intentions to increase the reporting.[130] Congress attempted to solve some of those issues in Dodd-Frank by upping the ante: providing both bounties and additional protections to whistleblowers.[131] Some scholars have suggested that Dodd-Frank helped to cure the ills of the SOX provisions.[132] This argument suggests that Dodd-Frank did what the SEC desires it to do—incentivize and increase whistleblowing to allow for a greater number of reported securities violations.[133]

However, no understanding of the data truly indicates that either SOX or Dodd-Frank has made a difference with respect to the amount of reporting:

> Thus, the statistical evidence presents an incomplete and somewhat inconsistent picture. On the one hand, the ERC survey and the hypothetical experiments indicate that Sarbanes-Oxley-influenced compliance systems may be encouraging employees to report misconduct more frequently. On the other hand, employees seemingly have not increased as a source of reporting fraudulent conduct relative to other sources over the last decade. None of these studies provide the precise answer to the

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128 *See Berman* Amicus Brief, *supra* note 13, at 3.

129 *See* Moberly, *supra* note 17, at 34.

130 *Id.* at 24 (citations omitted).

131 Dodd-Frank § 922, (codified at 15 U.S.C. §§ 78u-6(b), (g) (2012).

132 *See* Moberly, *supra* note 17, at 16.

133 *Id.* at 11.

> question of whether the Act itself encouraged more or less reporting of misconduct.[134]

Because of this, arguments that undercut SOX's whistleblower provisions and glorify the SEC's interpretation of Dodd-Frank's provisions cannot stand firmly on the ground that the SEC's goal of incentivizing has actually improved reporting statistics. The SEC strongly relies on its determination that their interpretation of Dodd-Frank best incentivizes whistleblowers.[135] The defensibility of the SEC's interpretation is seriously weakened if the rates of reporting do not improve with the expansion of protection to internal whistleblowers. If empirical evidence suggests that the SEC's interpretation may not better incentivize whistleblowing, the SEC can only rely on its grant of rulemaking power for rationalizing why its interpretation should win out over the text.

D. *SOX Picks Up Dodd-Frank's Slack*

Despite the inclusion of the defined term "whistleblower" and the uncertain nature of the incentives, the SEC still seeks to assert that internal whistleblowers are incentivized and that this whistleblowing helps to prevent disaster securities fraud scenarios like Enron and WorldCom.[136] The simplest rebuttal to the SEC's assertions that internal whistleblowers must be protected under Dodd-Frank is that internal whistleblowers are already protected under SOX. The reason internal whistleblowers are protected under SOX (and not under Dodd-Frank) is because SOX uses the term "employees" when referencing who receives protection.[137] Following the logic of the dissenting judge in *Berman*, who first iterated this point, if the drafters had intended for all employees, not just "whistleblowers" as defined in the statute, Dodd-Frank would have used the word "employees."[138] However, Congress did not use this language.

Internal whistleblowers are not left in the cold by SOX. The language of SOX provides:

> [A]ny officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee [who reports securities violations].[139]

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134 *Id.* at 26.

135 *See Berman* Amicus Brief, *supra* note 17, at 9–13.

136 *See id.*; *Meng-Lin* Amicus Brief, *supra* note 13, at 9–13.

137 18 U.S.C. § 1514A (2012).

138 *See* Berman v. Neo@Oligvy, 801 F.3d 145, 157 (2d Cir. 2015) (Jacobs, J., dissenting).

139 18 U.S.C. § 1514A (2012).

This language intends to provide anti-retaliation protections to all reporting employees, including internal reporters. The multiple other whistleblower provisions from the myriad of other statutes that protect them, in conjunction with the SOX provisions, are adequate enough protection and incentive. Legislation has thus far provided protections for whistleblowers from publicly traded companies who report both internally and externally, whistleblowers who report to the government about violations of the False Claims Act, who report tax violations to the government, who report insider trading violations to the government, and, under Dodd Frank's text, whistleblowers who report securities violations to the SEC.[140] All of these protections ensure that the people who most need protection from retaliation will receive that protection. For this reason, if an internal whistleblower desires governmental protection, his best course of action is to employ the SOX provisions—this will ensure his protection when the Dodd-Frank protections are read properly to include only external whistleblowers.

E. *Internal Compliance Will Remain in Tact*

Corporation's internal compliance structures are not in danger of failing because internal whistleblowers are denied protection by Dodd-Frank. Other legislative and administrative protections have been put in place that prevent these internal whistleblowers from being completely left to the wolves.[141] One of these safeguards is required under SOX: national securities exchanges forbid a corporation to list their securities on their exchange if the corporation fails to set up an internal compliance structure.[142] Another safeguard is through criminal sentencing guidelines, which allow less severe criminal penalties for companies with internal compliance structures.[143] To reduce criminal penalties under the Sentencing Guidelines, the corporation's board of directors has to familiarize itself with the companies' compliance program and should install at least one employee who monitors the compliance program.[144] These are just two of several legal safeguards in place to ensure that

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140 26 U.S.C. § 7623(b)(1) (2012) (Internal Revenue Code); 31 U.S.C. § 3730 (2012) (False Claims Act); Insider Trading Act and Securities Fraud Enforcement Act of 1988 § 3 Pub. L. No. 100-704, 102 STAT. 4677, 4677–78 (1988); *see also* Lee, *supra* note 46, at 314–15.

141 Shannon Kay Quigley, Comment, *Whistleblower Tug-of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 262–63 (2012).

142 *Id.*

143 *Id* at 263. ("[S]everal amendments to the United States Organizational Sentencing Guidelines—which govern the imposition of sentences by Federal Judges on organizational defendants—encourage ethical conduct and conformity, by reducing federal criminal penalties for violations if the corporation took reasonable steps to ensure an effective, publicized compliance program.").

144 *Id.*

internal compliance structures will remain undisturbed in the wake of a decision against the application of protection for internal whistleblowers under Dodd-Frank.[145]

However, corporations can manufacture their own internal compliance safeguards. Studies show that employees will not circumvent internal compliance structures when they perceive upper management as concerned with ethical and lawful dealings.[146] People who circumvent do so because they already perceive themselves as working in an unethical environment.[147] Notably, these are precisely the types of corporations that Dodd-Frank intends to capture and the types of employees that Dodd-Frank intends to protect.[148] This indicates that protecting internal whistleblowers would not yield the results that the SEC intends, even if it were a part of the statute. Even further, it indicates that the SEC should not fight for the protection of internal whistleblowers, because the SEC can weed out the more serious violations from the less ethical companies.

Other evidence leads to the conclusion that SOX effectively and sufficiently encouraged internal compliance. As can be expected, companies altered their internal compliance mechanisms and reporting procedures in response to Congress' passage of SOX.[149] Publicly traded companies strove for an internal compliance structure fully in line with the requirements of SOX but would still incentivize employees to come to company officials before reporting to government agencies.[150] Most internal compliance mechanisms that follow certain protocols meet the SOX requirements and will also be effective and will incentivize internal compliance.[151] Scholars suggest that "effective communication with employees about the importance of internal procedures, anonymous reporting, and reduction of the disadvantages of whistleblowing" comprise a solid internal compliance vehicle.[152] Scholars also suggest that corporations should "persuade dedicated, loyal employees to report internally" by "hir[ing] private parties that specialize in constructing anonymous hotlines for whistleblowers concerned about their anonymity."[153]

Because SOX, as well as a myriad of other statutes have caused a spike in the creation and effectiveness of internal compliance within corporations, the Dodd-Frank whistleblower provisions excluding internal whistleblowers cannot undercut internal compliance for corporations as a whole. The non-application of Dodd-Frank's specific brand of anti-retaliation protections

145 *See* Blount & Markel, *supra* note 63, at 1056–57.
146 *Id.* at 1050.
147 *Id.*
148 *Id.*
149 Quigley, *supra* note 141, at 264.
150 *Id.* at 257, 264.
151 *Id.* at 262–63.
152 *Id.* at 264.
153 *Id.*

cannot reduce internal compliance markedly, because too many other safeguards for internal compliance structures exist.

F. *A Practical Outlook for Internal Whistleblowers*

The whistleblower protections in SOX were passed into law to with an eye to employees like Enron's Sherron Watkins, who reported internally.[154] Congress had different types of employees and whistleblowers in mind when passing Dodd-Frank.[155] However, internal reporters, like Sherron Watkins, who are not protected under Dodd-Frank, may still be protected, so long as these internal reporters employ the SOX protections. In fact, SOX's whistleblower provisions were designed specifically to shield people who have reported to someone with supervisory authority who can further an investigation.[156] The language protecting internal whistleblowers in SOX is clear and explicit. To claim that that the drafters of Dodd-Frank intended to cover the same type of reporter as those covered in SOX would be incomprehensible because the drafters defined the term "whistleblower." If the intent of Dodd-Frank's drafters was to protect all of the same people protected by SOX, the drafters would have used the same language as SOX (i.e., "employee") and would not have narrowly defined the term "whistleblower".

Additionally, consider the consequences for those people whose internal reporting fails to get them the protections given to external whistleblowers in Dodd-Frank (i.e., the employee in *Asadi*, who was not protected by the whistleblower provisions of Dodd-Frank after internally reporting).[157] People who blow the whistle take an obvious reputational risk within their company, their occupation, and their field. However, following the text strictly requires judges to face the unavoidable and say that those who report internally at a private company cannot be properly afforded protections under Dodd-Frank, even despite the harsh effects. Based on the empirical compliance studies, it seems more likely than not that if a person truly needs protection from retaliation, they have uncovered a very serious securities violation at a company where they perceive a threat of retaliation, and they would choose to report to the SEC to get that protection.[158] In these types of eminent-retaliation situations, the best course is likely to report directly to the SEC regardless, because it is unlikely that an unethical company, like one where an employee fears retaliation, would handle violations as promptly or proportionately as the SEC.

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154 *See* Brickey, *supra* note 32, at 364–68.

155 Dodd-Frank § 922 (codified at 15 U.S.C. § 78u-6 (2012)); *see* DELIKAT & PHILLIPS, *supra* note 30, §§ 1-1, 2-1.

156 *See* DELIKAT & PHILLIPS, *supra* note 30, §§ 1-1, 2-1.

157 Asadi v. G.E. Energy U.S., LLC, 720 F.3d 620, 630 (5th Cir. 2013).

158 *See generally* Moberly, *supra* note 17.

While there are obvious advantages to incentivizing internal reporting, such as allowing for the corporation to handle issues internally and preventing economic and administrative waste through investigation, the reasons a person might report to their company, rather than the SEC, vary widely. One reason might be that the employee is loyal to the company, another might be that the employee doesn't believe that the violations are serious, or, the employee may believe their company is ethical enough to handle something that is internally reported.[159] However, preventing employees from reporting violations that they believe are minor to the SEC may actually be beneficial, because saving the investigative and administrative costs could outweigh the benefit of indictment for the SEC.[160]

G. *SEC Guidelines and Interpretation Over-Incentivize Whistleblowing*

The SEC may actually be over-incentivizing whistleblowing.[161] Even without the anti-retaliation provisions, anyone who reports a securities violation that validly comes to a fully-litigated and victorious end for the SEC can receive a 10 – 30 percent bounty of the winnings from the litigation.[162] This suggests that the SEC, who seeks to protect every type of whistleblower, may be taking an already over-incentivized group and further incentivizing them. Scholars argue that whistleblowers were not protected well enough under SOX, which lead to a reduction in whistleblowing altogether.[163] These scholars argue that SOX's insufficiencies are shown by the continued passage of legislative whistleblower protections.[164] This suggests that because Congress continued to pass legislation providing more protection to whistleblowers, the initial SOX provisions must not have sufficiently protected whistleblowers.[165] However, this fails to consider the wave of public policy interests that likely created the need for this legislation. In addition, the over-incentivizing of whistleblowers can create administrative burdens and cloud serious claims for violations with those claims of people seeking only the bounties that Dodd-Frank allows.[166] By disallowing the application of the Dodd-Frank whistleblower provisions to internal whistleblowers, courts could be incentivizing serious claims to come forward and disincentivizing frivolous claims of plaintiffs who only seek to reap the benefits of Dodd-Frank's gratuitous bounty provisions. [167]

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159 *See* Quigley, *supra* note 141, at 291.

160 *See, e.g.*, *id.* at 266.

161 *See* Lee, *supra* note 46, at 305.

162 *Id.* at 308–09.

163 *See* Moberly, *supra* note 17, at 4, 53–54.

164 *Id.* at 54.

165 *Id.*

166 *See* Lee, *supra* note 46, at 305.

167 *Id.*

H. *A Call for Supreme Court Intervention*

To truly resolve the tension between the SEC interpretation of Dodd-Frank and the text of Dodd-Frank, the Supreme Court would have to grant certiorari to a case similar to *Berman v. Neo@Ogilvy* and rule on this issue. Although, Congress *could* clarify the language of Dodd-Frank, the chances of Congress issuing this kind of amendment or clarification to is unlikely.[168] Therefore, in order to properly settle the issue, the best course of action would be for a Supreme Court decision to apply a textual analysis to the Dodd-Frank whistleblower provisions, thereby giving the legislation its most natural reading and determining that a "whistleblower" is a person who reports securities violations to the SEC. Once the Supreme Court has applied this analysis, the internal whistleblower could still be fully protected by SOX if that whistleblower is an employee of a publicly traded company or a private company that contracts with a public company. With that application of the law covering almost all whistleblowers, with particular attention to those whistleblowers who could expose the most serious securities violations, no real issue can arise with the SEC's need for incentivizing whistleblowers to improve reporting statistics.

CONCLUSION

Courts should look to the text of Dodd-Frank first and accomplish the most natural reading of a statute. The most natural reading of the statute, even looking at all of the provisions together, does not include internal whistleblowers under the anti-retaliation protections. However, the SOX provisions do allow a natural reading that offers protections to internal whistleblowers. The SOX provisions, if relied upon, do not leaving internal whistleblowers out in the cold or de-incentivizing internal compliance. For a proper, textual reading of the statute, courts should apply Dodd-Frank anti-retaliation provisions where they apply—to those who report directly to the SEC, but should use the SOX whistleblower provisions where they apply—to employees who have utilized internal compliance structures.

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168 *See* Bob Cohn, *Scalia: Our Political System Is 'Designed for Gridlock'*, THE ATLANTIC (Oct. 6, 2011), http://www.theatlantic.com/national/archive/2011/10/scalia-our-political-system-is-designed-for-gridlock/246257/.