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2017]

IF THERE'S SOMETHING STRANGE IN YOUR WORKPLACE,
WHO YA GONNA CALL? THE SECOND CIRCUIT
EXPANDS WHISTLEBLOWER PROTECTION
IN *BERMAN v. NEO@OGILVY LLC*

JOHN K. MICKLES*

“[O]ur obligation is to apply congressional statutes as written
But the SEC and the majority perceive a hole in coverage,
or an insufficiency of remedy, and are patching.”¹

I. SARBANES-OXLEY BECOMES A GHOST: AN INTRODUCTION TO
DODD-FRANK AND ITS IMPACT ON FUTURE WHISTLEBLOWERS

Imagine that you are a director of finance for a publicly-traded company in 2015.² Your expertise allowed you to identify wrongdoing in your employer's accounting practices.³ Unfamiliar with the federal whistleblower protection programs, you directly report your suspicions to your employer, rather than to the U.S. Securities and Exchange Commission (SEC).⁴ Because you reported your discoveries internally, your em-

* J.D. Candidate, 2018, Villanova University Charles Widger School of Law; B.S., 2012, Drexel University. This Note is dedicated to my mother, Leslie Mickles, father, Dennis Mickles, sister, Megan Levan, girlfriend, Sarah Burke, dog, Chloe Mickles, and friends who continue to support me throughout all my endeavors. I am especially grateful to everyone who provided feedback and input in writing this Note. Finally, I would also like to thank everyone on the *Villanova Law Review* for their assistance in the publication of this Note. The inspiration for this title comes from the song *Ghostbusters*, by Ray Parker, Jr. See RAY PARKER, JR., *Ghostbusters*, on GHOSTBUSTERS (Arista Records, Inc. 1984).

1. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155–56 (2d Cir. 2015) (Jacobs, J., dissenting) (emphasizing court's role is to interpret and read statutes strictly). For a further discussion of the *Berman* dissent, see *infra* notes 142–51 and accompanying text.

2. See, e.g., *Berman*, 801 F.3d at 148–49 (describing employee's relationship with employer); 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, 2–5 (2016) (illustrating hypothetical comparable to *Banko v. Apple, Inc.* (citing 20 F. Supp. 3d 749, 752–53 (N.D. Cal. 2013))). The author acknowledges that Goodchild's article assisted in generating the idea to illustrate a whistleblower scenario in this Note. See *id.* (illustrating whistleblower hypothetical). However, the hypothetical presented in this Note is based on the facts of *Berman*.

3. See *Berman*, 801 F.3d at 149 (describing wrongdoing identified by defendant's finance director).

4. See *id.* (noting defendant's financial director “did not report any allegedly unlawful activities to the SEC”).

ployment is subsequently terminated.⁵ You are left puzzled that you are unprotected from your employer's retaliatory actions.⁶

The Second and Fifth Circuits' differing interpretations of whistleblower protection programs have left many employees wondering whether they will receive employer retaliation protection if they report suspected wrongdoing to their employers.⁷ This uncertainty comes from conflicting whistleblower protection provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)⁸ and its reference to the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).⁹ Under Dodd-Frank, a whistleblower is any individual or group of individuals "who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]."¹⁰ Additionally, under § 78u-6(h)(1)(A) of Dodd-Frank, titled "Protection of [W]histleblowers," employers are prohibited from retaliating against whistleblowers in three circumstances, including those who disclose information according to Sarbanes-Oxley.¹¹ In contrast, Sarbanes-Oxley's

5. *See id.* (attributing termination of defendant's finance director to "whistleblower activities").

6. *See id.* (noting defendant's finance director was fired after "[a] senior officer . . . became angry with him" for internally reporting discoveries).

7. *Compare id.* at 155 (holding Dodd-Frank grants protection to whistleblowers who report wrongdoing to their employers), *with* *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623, 628 (5th Cir. 2013) (holding Dodd-Frank protects only whistleblowers "who provide information relating to a violation of the securities laws to the SEC"). The Fifth Circuit concluded that only Sarbanes-Oxley, and not Dodd-Frank, protects whistleblowers who report wrongdoing internally to their employers. *See Asadi*, 720 F.3d at 623, 625 (holding Dodd-Frank does not protect internal reporting whistleblower).

8. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in sections of 7, 12, 15, 18, 22, 31, and 42 of U.S. Code); Christina Pellino, Comment, *Don't Whistle While You Work—Unless You Whistle to the SEC*, 46 SETON HALL L. REV. 911, 913–14 (2016) (describing Dodd-Frank's conflicting sections that have created ambiguity in whistleblower protection).

9. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended at 18 U.S.C. § 1514A (2012)) (enacting Sarbanes-Oxley's whistleblower protection program).

10. *See* 15 U.S.C. § 78u-6(a)(6) (2012); *see also* *Whistleblower*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining whistleblower as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency"); Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 548 (2004) ("Whistleblowing" . . . may be defined as an attempt by an employee of a corporation or business firm to disclose what he or she believes to be wrongdoing in or by the organization."); *What is a Whistleblower?*, GOV'T ACCOUNTABILITY PROJECT (2016), <https://www.whistleblower.org/what-whistleblower> [<https://perma.cc/Q9RJ-8GCH>] (last visited Mar. 10, 2017) (defining whistleblower as "[a]n employee who discloses information that s/he reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, [or] general wrongdoing").

11. *See id.* § 78u-6(h)(1)(A)(i)–(iii) (explaining Dodd-Frank's anti-retaliation protections for whistleblowers who comply with Sarbanes-Oxley).

whistleblower program protects employees who internally report wrongdoing to their supervisors.¹² Because of Dodd-Frank's reference to Sarbanes-Oxley, the Second and Fifth Circuits are split on whether Dodd-Frank's anti-retaliation provisions extend beyond its statutory definition of whistleblowers to include employees who report suspected wrongdoing internally, a protection of Sarbanes-Oxley.¹³ However, the Second Circuit's broad interpretation renders Sarbanes-Oxley's whistleblower protection obsolete because future whistleblowers are more likely to file a claim under Dodd-Frank due to its greater financial incentives and more streamlined requirements.¹⁴

In *Berman v. Neo@Ogilvy LLC*,¹⁵ the Second Circuit addressed the issue of whether an employee who internally reported alleged wrongdoing was protected from retaliation under Dodd-Frank or Sarbanes-Oxley.¹⁶ The

12. See 18 U.S.C. § 1514A(a)(1)(C) (defining whistleblowers as individuals who report suspected violations to their employers). Sarbanes-Oxley states: No [publicly traded] company . . . or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of any lawful act done by the employee—to provide information . . . or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation . . . when the information or assistance is provided to or the investigation is conducted by—

(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)

Id.

13. See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 146–47 (2d Cir. 2015) (comparing § 78u-6(a)(6) with § 78u-6(h)(1)(A)(iii) and stating issue of case). The appeal to the Second Circuit concerned the tension arising between the definition of whistleblower in § 78u-6(a)(6) and the anti-retaliation protection in § 78u-6(h)(1)(A)(iii). See *id.* (explaining conflict between courts). More precisely, the issue was “whether the statutory provision applies to another provision of the statute.” See *id.* at 150 (presenting issue Second Circuit decided); see also Richard H. Kuhlman et al., *Who is a Whistleblower Now?*, BRYAN CAVE (Mar. 17, 2017), <https://www.bryancave.com/en/thought-leadership/who-is-a-whistleblower-now.html> [<https://perma.cc/43U4-S9BB>] (identifying where courts are split when comparing Dodd-Frank and Sarbanes-Oxley's anti-retaliation provisions). For a further discussion of the split between the Second and Fifth Circuits, see *infra* notes 75–151 and accompanying text.

14. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 628 (5th Cir. 2013) (“[C]onstruing the Dodd-Frank whistleblower-protection provision to extend beyond the statutory definition of ‘whistleblowers’ renders the [Sarbanes-Oxley] anti-retaliation provision . . . moot.”). The Fifth Circuit noted that it is unlikely for an employee to bring a claim under Sarbanes-Oxley compared to Dodd-Frank due to Dodd-Frank's benefits and incentives. See *id.* at 628–29 (explaining why plaintiffs may prefer Dodd-Frank to Sarbanes-Oxley); compare 18 U.S.C. §§ 1514A(b)(1)–(2), (c) (stating Sarbanes-Oxley's procedural requirements and financial incentives), with 15 U.S.C. §§ 78u-6(b)(1)(A)–(B), (h)(1)(C) (stating Dodd-Frank's procedural requirements and financial incentives). For a further discussion of the impact of the *Berman* holding, see *infra* notes 181–96 and accompanying text.

15. 801 F.3d 145 (2d Cir. 2015).

16. See *id.* at 149 (explaining issue on appeal before Second Circuit).

Berman majority reviewed both Dodd-Frank's definition of whistleblower and "Protection of [W]histleblowers" provision that refers to Sarbanes-Oxley.¹⁷ Despite the textual differences between the Dodd-Frank and Sarbanes-Oxley, the majority held that both statutes protect whistleblowers who report wrongdoing to their employers.¹⁸ The inclusion of whistleblower protection for internal reporters does not stem from the plain text of Dodd-Frank; rather, internal reporters are afforded these protections because the Second Circuit expanded Dodd-Frank's statutory reach in *Berman*, thereby rendering Sarbanes-Oxley moot.¹⁹ Consequently, until the Supreme Court resolves the issue, employers outside the Second, Fifth, and, most recently, Ninth Circuit will face uncertainty on how to address whistleblower actions to prevent future liability.²⁰

This Note argues that despite the need for increased whistleblower protection because of corporate scandals and market crises, the Second Circuit's holding that Dodd-Frank permitted internal whistleblowers to bring private actions superseded Sarbanes-Oxley, thereby rendering its whistleblower protection program obsolete.²¹ Part II of this Note high-

17. *See id.* at 146–47 (comparing Dodd-Frank's definition of whistleblower and protection provisions with those in Sarbanes-Oxley); *compare* 18 U.S.C. § 1514A(a)(1)(C) (defining whistleblowers under Sarbanes-Oxley), *with* 15 U.S.C. § 78u-6(a)(6) (defining whistleblowers under Dodd-Frank).

18. *See id.* at 155 (granting whistleblower retaliation protection under Dodd-Frank for internally reporting wrongdoing to employer).

19. *See id.* at 155 (Jacobs, J. dissenting) (declaring majority opinion interpreted Dodd-Frank to maximize whistleblower protection instead of following Dodd-Frank's strict reading). Judge Jacobs stated

No doubt, my colleagues in the majority, assisted by the SEC or not, could improve many federal statutes by tightening them or loosening them, or recasting or rewriting them But our obligation is to apply congressional statutes as written. In this instance, the alteration creates a circuit split, and places us firmly on the wrong side of it.

Id. (citing *Asadi*, 720 F.3d at 620).

20. *See* Nicole A. Baker & Meghan E. Flinn, *Second Circuit Filing Re-Ignites Debate over the Scope of the Dodd-Frank Whistleblower Protections*, K&L GATES LLP: LEGAL INSIGHT (Nov. 30, 2015), <http://www.klgates.com/second-circuit-filing-re-ignites-debate-over-the-scope-of-the-dodd-frank-whistleblower-protection-provisions-11-30-2015/> [<https://perma.cc/AT84-HU89>] (analyzing effect of *Berman* on future cases); Nicholas S. Goldin et al., *Second Circuit Holds That Dodd Frank's Whistleblower Protection Provisions Extend to Allegations Reported Internally Even If Not Reported to the SEC*, SIMPSON THACHER & BARTLETT LLP 3 (Sept. 22, 2015), http://www.stblaw.com/docs/default-source/memos/firmmemo_09_22_15.pdf [<https://perma.cc/94PY-ABNG>] (explaining implications of circuit split); William R. McLucas et al., *Second Circuit Allows Whistleblower Retaliation Protection Without Reporting to SEC*, WILMER CUTLER PICKERING HALE & DORR LLP (Sept. 15, 2015), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179879421> [<https://perma.cc/7BFL-EYVX>] (suggesting strategies for employers to limit whistleblower retaliation liability); *see also* Somers v. Dig. Realty Tr. Inc., No. 15-17352, 2017 WL 908245, at *1 (9th Cir. Mar. 8, 2017) (holding Dodd-Frank's protection includes "those who make internal disclosures").

21. For a further discussion of the need for courts to separate Sarbanes-Oxley's and Dodd-Frank's respective whistleblower reporting programs, *see infra* notes 152–96 and accompanying text.

lights the background of the financial industry's whistleblower regulations and their impact before *Berman*.²² Part III describes the facts, procedural history, holding, and dissent in *Berman*.²³ Part IV analyzes the *Berman* majority's reasoning and disagrees with the Second Circuit's holding because the three categories of anti-retaliation in Subdivisions (i)–(iii) do not define whistleblowers under Dodd-Frank, but rather represent protected activity and are subordinate to the express and unambiguous definition of whistleblowers.²⁴ Lastly, Part V examines the impact of *Berman* and recommends how attorneys should advise clients in similar situations until the Supreme Court addresses this issue.²⁵

II. GHOST OF WHISTLEBLOWERS PAST: A HISTORY OF WHISTLEBLOWER PROTECTION

Federal courts across the United States have been called on to determine the parameters of the whistleblower protections conferred by Sarbanes-Oxley and Dodd-Frank.²⁶ Although the whistleblower protec-

22. For a further discussion of the development of whistleblower protection, see *infra* notes 26–94 and accompanying text.

23. For a further discussion of the facts, procedural history, and reasoning in *Berman*, see *infra* notes 95–152 and accompanying text.

24. For a critical analysis of the Second Circuit's reasoning in *Berman*, see *infra* notes 153–81 and accompanying text.

25. For a further discussion of the impact of *Berman*, see *infra* notes 182–97 and accompanying text.

26. See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015) (holding Dodd-Frank sufficiently ambiguous to warrant *Chevron* deference to SEC's opinion); *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015) (applying *Chevron* to defer to SEC's interpretation of Dodd-Frank), *aff'd*, No. 15-17352, 2017 WL 908245 (9th Cir. Mar. 8, 2017); *Wiggins v. ING U.S., Inc.*, Civil Case No. 3:14-CV-01089(JCH), 2015 WL 8779559, *1–2 (D. Conn. Dec. 15, 2015) (granting motion for reconsideration in light of *Berman*), *appeal dismissed*, No. 15-2262 (2d Cir. Sept. 19, 2016); *Lutzeier v. Citigroup Inc.*, Case No. 4:14CV183 RLW, 2015 WL 7306443, at *2–3 (E.D. Mo. Nov. 19, 2015) (finding Dodd-Frank ambiguous based on SEC's interpretation and *Berman*); *Azim v. Tortoise Capital Advisors, LLC*, No. 13-2267, 2014 WL 707235, at *2–3 (D. Kan. Feb. 24, 2014) (rejecting defendant's *Asadi* argument that would prevent plaintiff from receiving whistleblower protection under Dodd-Frank); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW) (MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014) (holding Dodd-Frank's whistleblower definition is ambiguous), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 499 n.5 (S.D.N.Y. 2014) (finding Dodd-Frank ambiguous and deferring to SEC's interpretation); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 533–34 (S.D.N.Y. 2014) (finding SEC's interpretation resolves Dodd-Frank's ambiguity); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013) (finding plaintiff qualified under Dodd-Frank's whistleblower definition even though plaintiff did not externally report to SEC); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 44–46 (D. Mass. 2013) (adopting SEC's interpretation of Dodd-Frank); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 147–49 (S.D.N.Y. 2013) (holding Dodd-Frank's whistleblower definition is ambiguous); *Murray v. UBS Sec., LLC*, No. 12 Civ.5914 (JMF), 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013) (deferring to SEC's interpretation of Dodd-Frank); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) (follow-

tions in these two acts have textual differences, some courts have begun to extend Dodd-Frank's whistleblower protection beyond external reporters of wrongdoing to include internal reporters, as well.²⁷ As a result, Sarbanes-Oxley's whistleblower protection program is becoming obsolete because plaintiffs may now be more inclined to bring claims under Dodd-Frank due to its additional protections, financial incentives, and whistleblower-friendly procedural requirements.²⁸

A. *Paranormal Activity in the Business World: Financial Industry's Influence on Whistleblowers*

In response to growing changes in the business world, Congress has consistently implemented statutes to protect individuals from future financial crises.²⁹ Since 1934, the SEC has been tasked with protecting the securities market and investors.³⁰ In furtherance of the SEC's efforts to protect and encourage whistleblowers, Congress passed Sarbanes-Oxley

ing SEC's interpretation of Dodd-Frank); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994–95 (M.D. Tenn. 2012) (finding Dodd-Frank whistleblower protection for those who report information to actors other than SEC); *cf. Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 628 (5th Cir. 2013) (holding Dodd-Frank's whistleblower is clear and does not warrant *Chevron* deference to SEC's opinion); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015) (finding Dodd-Frank unambiguous), *aff'd*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017); *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 664–65 (E.D. Va. 2015) (concluding *Asadi* decision is persuasive); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014) (holding Dodd-Frank's statutory language is unambiguous); *Verfueth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 644–46 (E.D. Wis. 2014) (adopting *Asadi* reasoning); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756–57 (N.D. Cal. 2013) (denying deferral to SEC's interpretation because Dodd-Frank's definition of whistleblower is not ambiguous); *Wagner v. Bank of Am. Corp.*, Civil Action No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4–6 (D. Colo. July 19, 2013) (interpreting Dodd-Frank's statutory language as unambiguous), *aff'd*, 571 F. App'x 698 (10th Cir. 2014).

27. For a further discussion of the split between courts, see *infra* notes 76–94 and accompanying text.

28. See *Asadi*, 720 F.3d at 628–29 (explaining why future plaintiffs prefer Dodd-Frank to Sarbanes-Oxley). For a further discussion of differences between Dodd-Frank and Sarbanes-Oxley, see *infra* notes 40–63 and accompanying text.

29. See 15 U.S.C. § 78u-6(a)(6) (2012) (describing whistleblower protection for employees who directly report wrongdoing to SEC); 18 U.S.C. § 1514A(a)(1)(C) (2012) (implementing whistleblower protection for employees who internally provide information to employers). For a further discussion of Congress's and the SEC's efforts to protect individuals from future financial crises, see *supra* notes 29–31 and accompanying text.

30. See *What We Do*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about/whatwedo.shtml> [<https://perma.cc/5TEC-SUHQ>] (last modified June 10, 2013) (detailing SEC's history). For a further discussion of the purpose of the SEC, see *infra* notes 32–34 and accompanying text.

and Dodd-Frank and included provisions protecting whistleblowers in each Act.³¹

1. *Ghostbusters Headquarters: The Creation of the SEC*

There was little interest in federal regulation of the securities markets prior to the creation of the SEC in 1934.³² However, the Great Depression prompted Congress to pass the Securities Act of 1933 (Securities Act) to restore the public's confidence in markets.³³ In conjunction with the Securities Act, the Securities and Exchange Act of 1934 (Exchange Act) established the SEC with a mission to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”³⁴ The Ex-

31. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (explaining purpose of Sarbanes-Oxley is “to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws”); S. REP. NO. 111-176, at 250–51 (2009) (“In the aftermath of the economic crisis of 2008, we believe that it is the responsibility of Congress to take action to prevent such a crisis from occurring again.”); Mary Jo White, *Statement on the Anniversary of the Dodd-Frank Act*, U.S. SEC. & EXCH. COMM’N (July 16, 2015), <https://www.sec.gov/news/statement/statement-on-the-anniversary-of-the-dodd-frank-act.html> [<https://perma.cc/38AU-SPAN>] (“While the worst of the financial crisis is behind us, the [SEC] intensively continues its critical work beyond the Dodd-Frank Act to fulfill our obligation to protect investors, enhance market stability, and promote capital formation.”); see also Kuhlman et al., *supra* note 13 (explaining purpose of Dodd-Frank and Sarbanes Oxley). Sarbanes Oxley implemented internal protections to employee who report wrongdoing, particularly to address fraudulent accounting practices. See *id.* (describing purpose Sarbanes Oxley). In addition, Dodd-Frank was established to prohibit retaliation against whistleblower for reporting to the SEC fraudulent “conduct potentially detrimental to the financial system.” See *id.* (describing purpose of Dodd-Frank). For a further discussion of Sarbanes-Oxley, see *infra* notes 40–47 and accompanying text. For a further discussion of Dodd-Frank, see *infra* notes 48–63 and accompanying text.

32. See *What We Do*, *supra* note 30 (detailing SEC’s history).

33. See *id.* (explaining SEC’s history); see also *Fast Answers*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/about/laws.shtml> [<https://perma.cc/6ZWK-C5KX>] (last modified Oct. 1, 2013) (“[T]he Securities Act of 1933 has two basic objectives: [(1)] require that investors receive financial and other significant information concerning securities being offered for public sale; and [(2)] prohibit deceit, misrepresentations, and other fraud in the sale of securities.”).

34. See *What We Do*, *supra* note 30. The purposes of Securities Act of 1933 and the Securities Exchange Act of 1934 can be summarized with respect to two areas: “[(1)] [c]ompanies publicly offering securities . . . must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing [; and (2)] [p]eople who sell and trade securities . . . must treat investors fairly and honestly, putting investors’ interests first.” *Id.* The SEC identified four strategic goals and objectives in the its Strategic Plan for Fiscal Years 2014–2018: (1) “[e]stablish and maintain an effective regulatory environment[.]” (2) “foster and enforce compliance with the federal securities laws[.]” (3) “facilitate access to the information investors need to make informed investment decisions[.]” and (4) “[e]nhance the [SEC]’s performance through effective alignment and management of human, information and financial capital[.]” U.S. SEC. & EXCH. COMM’N, *Strategic Plan Fiscal Years 2014–2018: Draft for Comment 2* (2014), <https://www.sec.gov/about/sec-strategic-plan-2014-2018-draft.pdf> [<https://perma.cc/5Q2E-D75F>].

change Act provided the SEC with discretion to award relatively small payments for whistleblowers who disclosed information about insider-trading violations.³⁵ However, whistleblowers were not motivated to disclose information partly because of the small financial awards and the SEC's reluctance in awarding such discretionary payments.³⁶

To assist in its purpose and objectives, the SEC has been afforded "broad authority to shape the regulatory framework for the securities industry[.]" including the enforcement of securities laws.³⁷ Accordingly, the SEC wields "disciplinary powers over regulated entities and persons associated with them" in order to "identif[y] and prohibit[] certain types of conduct in the markets."³⁸ As Congress passed additional statutes to assist in the SEC's objectives, the agency's enforcement authority expanded to include whistleblower programs under Sarbanes-Oxley and Dodd-Frank.³⁹

35. See Sarah Johnson, *Paid to Whistle*, CFO (July 23, 2010), <http://ww2.cfo.com/risk-compliance/2010/07/paid-to-whistle/> [https://perma.cc/4DQW-745U] (explaining SEC's discretion to award whistleblower payments before Dodd-Frank). "[T]he SEC could reward only whistle-blowers involved in insider-trading cases" and "has paid out only \$159,537 to five claimants." *Id.* (explaining history of SEC's whistleblower payments). Previously, whistleblowers were not incentivized to report wrongdoing. See *id.* (explaining whistleblowers' lack of incentives for reporting wrongdoing).

36. See Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of "Greedy," the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1281-82 (2011) ("[T]he the SEC has complete discretionary authority over whether to provide the whistleblower with an award, if at all." (citing 15 U.S.C. § 78u-1(e) (2012))); Johnson, *supra* note 35 (explaining SEC's discretion to award whistleblower payments before Dodd-Frank).

37. See *Strategic Plan: Fiscal Years 2014-2018: Draft for Comment*, *supra* note 34, at 1-2, 6 (establishing SEC's mission, vision, and values); see also *What We Do*, *supra* note 30 (stating SEC has authority to enforce securities laws through civil actions). The SEC recognizes it is its responsibility to:

- [(1)] interpret and enforce federal securities laws;
- [(2)] issue new rules and amend existing rules;
- [(3)] oversee the inspection of securities firms, brokers, investment advisers, and ratings agencies;
- [(4)] oversee private regulatory organizations in the securities, accounting, and auditing fields; and
- [(5)] coordinate U.S. securities regulation with federal, state, and foreign authorities.

Id.

38. *Fast Answers*, *supra* note 33 (explaining SEC's authority under Exchange Act).

39. See *id.* (explaining SEC's governing laws). Along with the Securities Act and the Exchange Act, SEC enforcement and securities laws are also governed by the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Jumpstart Our Business Startups Act of 2012. See *id.* (identifying other laws enforced by SEC).

2. *Come Out, Come Out, Wherever You Are: Sarbanes-Oxley Uncovers Whistleblower Protection*

During the late 1990s and early 2000s, the United States witnessed multiple corporate scandals, such as Enron, Arthur Anderson, and WorldCom, that left the financial system broken and public confidence shattered.⁴⁰ On July 30, 2002, Congress passed Sarbanes-Oxley to improve the protection of investors and the financial system in light of recent corporate scandals.⁴¹ Sarbanes-Oxley was known as one of the broadest financial reforms since the creation of the SEC following Great Depression.⁴² For example, Congress was particularly concerned that de-

40. See Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875, 880 (2002) (explaining events leading to Enron's bankruptcy); Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 357-73 (2003) (describing corporate scandals leading up to enactment of Sarbanes-Oxley). In October 2001, auditors announced that Enron's third quarter losses "[were] potentially misleading and illegal." See Baynes, *supra*, at 880 (quoting Robert Schlesinger, *Enron Chief Executive Lay Resigns*, BOS. GLOBE, Jan. 24, 2002, at A2) (explaining Enron's corporate scandal). "In early November [2001], Enron announced that, since 1997, it had overstated its earnings by \$586 million." *Id.* (citing Schlesinger, *supra*, at A2). Enron filed for bankruptcy at the start of December 2001. See *id.* (citing Schlesinger, *supra*, at A2). Other corporate scandals, including Arthur Andersen, Tyco, Global Crossing, and WorldCom were influential in passing Sarbanes-Oxley. See Allison Fass, *One Year Later, the Impact of Sarbanes-Oxley*, FORBES (July 22, 2003, 7:00 AM), http://www.forbes.com/2003/07/22/cz_af_0722sarbanes.html [<https://perma.cc/3E8C-7DLJ>] (discussing other corporate scandals that occurred prior to passing Sarbanes-Oxley). At the time of Enron's corporate scandal, the company "was one of the biggest and, it was thought, one of the most financially sound companies in the U.S." See Rosemary Peavler, *Sarbanes-Oxley Act and the Enron Scandal—Why Are They Important?*, BALANCE, <https://www.thebalance.com/sarbanes-oxley-act-and-the-enron-scandal-393497> [<https://perma.cc/9VKR-8E4P>] (last updated Oct. 18, 2016) (discussing Enron's corporate scandal and Sarbanes-Oxley's protective measures).

41. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("[Sarbanes-Oxley is] [a]n Act to protect investors . . ."); S. REP. NO. 107-146, at 2 ("[Sarbanes-Oxley] aims to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions."); see also *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) ("The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Anderson LLP, had systematically destroyed potentially incriminating documents."); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014) ("To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted [Sarbanes-Oxley]." (citing S. REP. NO. 107-146, at 2-11)); Peavler, *supra* note 40 ("The intent of [Sarbanes-Oxley] was to protect investors by improving the accuracy and reliability of corporate disclosures . . ."). Sarbanes-Oxley includes provisions to "strengthen[] whistle-blower protections and compliance monitoring." See Peavler, *supra* note 40.

42. See *Fast Answers*, *supra* note 33 (explaining influence of Sarbanes-Oxley on financial reforms). President Bush claimed Sarbanes-Oxley was "[one of] the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt." *Id.* (quoting President George W. Bush) (emphasizing breadth of reform under Sarbanes-Oxley); see also Fass, *supra* note 40 (claiming Sarbanes-

spite clear evidence of fraud, Enron's "corporate code of silence" highly discouraged external and internal reporting.⁴³

In addition to other reforms, Sarbanes-Oxley implemented a whistleblower program that aimed to prevent publicly traded companies from retaliating against employees who report suspected violations internally.⁴⁴ In the event an employee seeks whistleblower protection under Sarbanes-Oxley after termination, the employee must follow specific administrative procedures before filing suit, such as first filing a claim with the Occupational Safety and Health Administration.⁴⁵ In addition, under the applicable statute of limitations, a Sarbanes-Oxley whistleblower protection violation complaint must be filed "not later than 180 days after the date on which the [alleged] violation occurs, or after the date on which the employee became aware of the violation."⁴⁶ In an effort to incentivize

Oxley was one of "the broadest-sweeping legislation to affect corporations . . . since the 1933 and 1934 securities acts").

43. See *Lawson*, 134 S. Ct at 1162 (quoting S. REP. NO. 107-146, at 2) (2014)) ("Of particular concern to Congress was abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part to a 'corporate code of silence'; that code, Congress found, 'discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally.'" (alteration in original) (quoting S. REP. NO. 107-146, at 4–5)). Justice Ginsburg opined:

When employees of Enron and its accounting firm, Arthur Andersen, attempted to report corporate misconduct, Congress learned, they faced retaliation, including discharge. As outside counsel advised company officials at the time, Enron's efforts to "quiet" whistleblowers generally were noted proscribed under then-existing law. Congress identified the lack of whistleblower protection as "a significant deficiency" in the law, for in complex securities fraud investigations, employees "are [often] the only firsthand witnesses to the fraud."

Id. at 1162–63 (alteration in original) (citations omitted) (citing S. REP. NO. 107-146, at 10).

44. See 18 U.S.C. § 1514A(a)(1)(C) (2012) (defining whistleblowers under Sarbanes-Oxley). Included within Sarbanes-Oxley were provisions to increase whistleblower protection and compliance programs. See Peavler, *supra* note 40 ("[T]he intent of [Sarbanes-Oxley] was to protect investors by improving the accuracy and reliability of corporate disclosures . . .").

45. See 18 U.S.C. §§ 1514A(b)(1)(A)–(B) (explaining procedural process to bring claims under Sarbanes-Oxley's whistleblower program).

A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

filing a complaint with the Secretary of Labor; or

if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de non review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

Id.

46. See *id.* § 1514A(b)(2)(D) (explaining statute of limitations).

Sarbanes-Oxley's whistleblower program, a successful action may grant an employee back pay and other compensation.⁴⁷

3. *Got Ghosts? Dodd-Frank Reveals Whistleblower Protection*

At the conclusion of 2008, the United States had witnessed a combination of events, such as the subprime mortgage bubble, that triggered the worst financial collapse since the Great Depression, and the housing market was at an all-time low.⁴⁸ On July 21, 2010, President Obama signed

47. *See id.* § 1514A(c) (stating Sarbanes-Oxley's remedies for whistleblowers). In general—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

Compensatory Damages—Relief for any action under paragraph (1) shall include—

Reinstatement with the same seniority status that the employee would have had, but for the discrimination;

The amount of back pay, with interest; and

Compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

Id. For a comparative discussion of the financial incentives and procedures of Dodd-Frank, see *infra* notes 56–63 and accompanying text.

48. *See generally* Edmund L. Andrews et al., *Fed's \$85 Billion Loan Rescues Insurer*, N.Y. TIMES (Sept. 16, 2008), <http://www.nytimes.com/2008/09/17/business/17insure.html> [<https://perma.cc/K3AL-GALQ>] (explaining Federal Reserve's action to agree to bail out AIG); *The Origins of the Financial Crisis: Crash Course*, ECONOMIST (Sept. 7, 2013), <http://www.economist.com/news/schools-brief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article> [<https://perma.cc/NKN7-763K>] (discussing financial market collapse in 2008). First, the U.S. government loaned \$85 billion to American International Group (AIG) as part of what is referred to as a "bailout." *See* Andrews et al., *supra* (explaining AIG's bailout). The Federal Reserve stepped in to bail out AIG "after A.I.G. failed to get a bank loan to avoid bankruptcy" because the Federal Reserve was concerned that the financial markets would not survive if the company went bankrupt. *See id.* (explaining reason for providing loan to AIG). Additionally, in taking over Fannie Mae and Freddie Mac, the United States took "charge of [two] twin mortgage giants and the \$5 trillion in home loans they back[ed]." *See generally* David Ellis, *U.S. Seizes Fannie & Freddie*, CNN MONEY (Sept. 7, 2008, 8:28 PM), http://money.cnn.com/2008/09/07/news/companies/fannie_freddie/ [<https://perma.cc/2W7Q-ZSUR>] (reporting U.S. government's takeover of Fannie Mae and Freddie Mac). This move was one of the U.S. government's most drastic attempts to repair the nation's housing market. *See id.* (explaining extent of Fannie Mae and Freddie Mac takeover). Treasury Secretary Henry Paulson noted that at the time "a failure [of Fannie and Freddie] would affect the ability of Americans to get home loans, auto loans and other consumer credit and business finance . . . [which] would be harmful to economic growth and job creation." *Id.* (alteration in original) (quoting Treasury Secretary Henry Paulson) (internal quotation marks omitted). Further, Merrill Lynch succumbed to selling its company below market price to Bank of America in an attempt to save its business. *See generally* Matthew Karnitschnig et al., *Bank of America to Buy Merrill*, WALL ST. J. (Sept. 15, 2008, 12:01 AM), <http://www.wsj.com/articles/SB122142278543033525> [<https://perma.cc/M2K7-94JZ>] (explaining Bank of America's deal to buy Merrill Lynch was undervalued). Bank of America bought Merrill Lynch for \$50 billion, which was about two-thirds of Merrill Lynch's value on the stock market a year before the deal was finalized. *See*

Dodd-Frank into law to promote financial stability in response to the financial crisis.⁴⁹ Among other reforms, Dodd-Frank implemented a “[s]ecurities whistleblower incentives and protection” program to encourage employees to report potential violations.⁵⁰ Dodd-Frank accomplishes its purpose in two ways: (1) whistleblowers are allowed to bring a private cause of action to protect themselves from an employer’s anti-retaliation actions and (2) the SEC incentivizes individuals for reporting whistleblower tips that lead to successful enforcement actions.⁵¹

id. (explaining Bank of America’s buyout of Merrill Lynch). Moreover, Lehman Brothers filed for bankruptcy after it failed to recover from the financial crisis and could not locate a potential buyer. See Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES (Sept. 14, 2008), http://www.nytimes.com/2008/09/15/business/15lehman.html?_r=0 [<https://perma.cc/29FH-L97J>] (explaining Lehman Brothers filing for bankruptcy). Lehman’s bankruptcy was “the largest failure of an investment bank since the collapse of Drexel Burnham Lambert 18 years ago.” *Id.* The U.S. government refused to bail out Lehman Brothers. See *id.* (explaining collapse of Lehman Brothers). Further, “[t]he massive fraud perpetrated by [Bernie] Madoff through a Ponzi scheme cost investors a tremendous amount of money and went undetected through failures in SEC exams and investigations.” S. REP. NO. 111-176, at 137. The failure of the SEC to detect Madoff’s fraud had “seriously damaged investor confidence in the effectiveness and competence of regulators.” See *id.* (explaining Madoff’s fraudulent activity). This is partially because the SEC received ample evidence that such fraudulent activity was occurring. See *id.* at 137–38 (describing information received by SEC during Madoff Ponzi scheme and detailing SEC Enforcement inaction during relevant period). In addition, during the 2008 market crisis, “[t]housands of Americans had lost their jobs, watched their savings dwindle, and were forced out of their homes.” See White, *supra* note 31 (“[T]he Dodd-Frank Act was signed into law to address critical issues that triggered the worst financial crisis since the Great Depression.”).

49. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat 1376 (2010) (“[The purpose of Dodd-Frank is] [t]o 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.”); see also S. REP. NO. 111-176, at 110–12 (recognizing that role of whistleblower in uncovering Madoff’s Ponzi scheme illustrated usefulness of whistleblower protection).

50. See 15 U.S.C. § 78u-6 (2012) (implementing “Securities whistleblower incentives and protection” program); see also S. REP. NO. 111-176, at 110 (2010) (“The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.”).

51. See 15 U.S.C. § 78u-6(b) (describing how Dodd-Frank’s whistleblower program encourages disclosures). Without protection, whistleblowers may be discouraged from reporting due to the fear of being viewed negatively and the possibility of facing retaliation from their employers. See Frances J. Milliken et al., *An Exploratory Study of Employee Silence: Issues That Employees Don’t Communicate Upward and Why*, N.Y.U. 12–15 (Nov. 4, 2003), <http://w4.stern.nyu.edu/emplibrary/Milliken.Frances.pdf> [<https://perma.cc/2QJW-D76X>] (illustrating employees face multiple reasons for not feeling comfortable in reporting concerns); Pellino, *supra* note 8, at 913–14 (explaining consequences employees facing that deters them from reporting violations). Whistleblowers may submit tips via the SEC’s online portal or by mailing or faxing their tip. See U.S. SEC. & EXCH. COMM’N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 21

Under Dodd-Frank, an individual must report a violation of a federal securities law to the SEC to qualify as a whistleblower.⁵² If an employee qualifies as a whistleblower, Dodd-Frank articulates three areas of anti-retaliation protection.⁵³ Procedurally, in contrast to Sarbanes-Oxley, a plaintiff may bring a private cause of action directly to courts under Dodd-Frank.⁵⁴ In addition, a whistleblower action under Dodd-Frank may be brought within six to ten years.⁵⁵

(2015), <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf> [<https://perma.cc/7RT8-N54Y>] [hereinafter 2015 ANNUAL REPORT] (describing whistleblower tip submission process). Any tip received by the SEC is evaluated by the SEC's Office of Market Intelligence to identify those with high quality information. *See id.* at 21, 25 (explaining SEC's evaluation of whistleblower tips). Once tips are received, the SEC evaluates information and tips to determine violations of securities law. *See Information for You Before You Submit a Tip or Complaint to the Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/complaint/info_tipscomplaint.shtml [<https://perma.cc/5ZWB-KCVH>] (last modified Oct. 16, 2014) (explaining what happens when tips are submitted). Types of whistleblowers tips include Ponzi schemes, theft of funds or securities, corporate disclosure and financials, offering fraud, false or misleading statements, and insider trading. *See Enforcement Tips and Complaints*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/complaint/tipscomplaint.shtml> [<https://perma.cc/2A48-M2ER>] (last modified Oct. 16, 2014) (describing types of submitted tips).

52. *See id.* § 78u-6(a)(6) (defining whistleblower).

53. *See* 15 U.S.C. §§ 78u-6(h)(1)(A)(i)–(iii) (explaining whistleblower protection under Dodd-Frank). Under Dodd-Frank, a whistleblower is granted retaliation protection in three areas:

(A) In general[—]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 [SEC] in accordance with this section;

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

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002

Id. Reading § 78u-6(h)(1)(A)(iii) alone would indicate that anti-retaliation protection is granted to internal reporters, but a previous subsection of Dodd-Frank defines a whistleblower as an individual who provides information to the SEC. *See id.* §§ 78u-6(h)(1)(A)(i)–(ii); *see also* Linda Shen, *Courts Continue to Be Divided over the Scope of Dodd-Frank's Anti-Retaliation Protections*, WEIL, GOTSHAL & MANGES LLP 1 (July 2014), http://www.weil.com/~media/files/pdfs/employer_update_july_2014.pdf [<https://perma.cc/DL8J-L9YA>] (explaining Dodd-Frank's definition of whistleblower applies to § 78u-6(h)(1)(A)(iii) anti-retaliation protection).

54. *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (“An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States . . .”).

55. *See id.* §§ 78u-6(h)(1)(B)(iii)(I)–(II) (stating Dodd-Frank's whistleblower program's statute of limitations requirements).

(I) An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

Dodd-Frank's incentives for whistleblowers exceed those of Sarbanes-Oxley.⁵⁶ Dodd-Frank's whistleblower bounty program encourages reporting of violations of federal securities laws by financially awarding to individuals whose tips lead to successful enforcement actions.⁵⁷ Both the bounty program and Dodd-Frank's financial incentives are achievable because both are backed by a \$400 million investor protection fund.⁵⁸ First, a successful whistleblower claim will result in an award of ten to thirty percent of the employer's sanction.⁵⁹ Second, Dodd-Frank grants double

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

Id.

56. See Kevin B. Leblang & Robert N. Holtzman, *Whistleblower Claims Under SOX & Dodd-Frank: Recent Developments*, KRAMER LEVIN NAFTALIS & FRANKEL LLP 3 (Dec. 8, 2015), <http://www.mondaq.com/unitedstates/x/450168/Whistleblowing/Whistleblower+Claims+Under+SOX+And+DoddFrank+Recent+Developments> [<https://perma.cc/FA6E-PHNU>] (comparing incentives of Dodd-Frank to those of Sarbanes-Oxley). First, Dodd-Frank grants double back pay, while Sarbanes-Oxley grants only back pay. See *id.* Second, Dodd-Frank "allows whistleblowers to bring their claims directly in federal court," while claims under Sarbanes-Oxley must be filed with the Department of Labor first. See *id.* (comparing Dodd-Frank's procedural requirements to those of Sarbanes-Oxley). Third, Dodd-Frank provides a longer statute of limitation than Sarbanes-Oxley. See *id.* (comparing statutes' respective limitations periods). Unlike Sarbanes-Oxley, the Dodd-Frank bounty program is "backed by a \$450 million Investor Protection Fund, from which the SEC can make awards ranging from 10 to 30 percent of the monetary sanctions collected in a successful enforcement action, provided the sanctions exceed \$1 million." Shen, *supra* note 53, at 4 (illustrating differences in financial incentives and procedural requirements under Dodd-Frank and Sarbanes-Oxley). For a further discussion of Sarbanes-Oxley's whistleblower incentives, see *supra* notes 44–47 and accompanying text.

57. See Kathleen L. Casey, *Adoption of Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, U.S. SEC. & EXCH. COMM'N (May 25, 2011), <https://www.sec.gov/news/speech/2011/spch052511kcli-item2.htm> [<https://perma.cc/5UNH-5GFC>] (recognizing whistleblower bounty program was created for "prevention, timely detection, and effective enforcement of securities law violations").

58. See 15 U.S.C. § 78u-6(b)(2) (stating whistleblower award payment "shall be paid from the [SEC Investor Protection Fund]"); see also Shen, *supra* note 53 at 3–4 (explaining Dodd-Frank's financial incentives and remedies). The Investor Protection Fund was established in order to ensure payment would be made to eligible whistleblowers. See 2015 ANNUAL REPORT, *supra* note 51, at 4 (explaining Dodd-Frank's bounty program). At the end of the 2015 fiscal year, the Investor Protection Fund had \$400,693,089.56 available to assist in awarding payments to whistleblowers and financing the SEC's whistleblower program's operations. See *id.* at 27 (reporting amount in Investment Protection Fund).

59. See 15 U.S.C. §§ 78u-6(b)(1)(A)–(B) (stating general awards granted to whistleblowers).

(1) In any [judicial or administrative action brought by the [SEC] under the securities laws that results in monetary sanctions exceeding \$1,000,000], the [SEC] . . . shall pay an award or awards to 1 or more

back pay for a successful action.⁶⁰ Since Dodd-Frank's inception, tip rates and financial awards for alleged violations have increased.⁶¹ With the in-

whistleblowers . . . [who] led to the successful enforcement of the covered judicial or administrative action . . . in an aggregate amount equal to—
 (A) not less than 10 percent, of what has been collected of the monetary sanctions imposed in the action or related actions; and
 (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

Id.

60. *See id.* §§ 78u-6(h)(1)(C)(i)–(iii) (stating relief granted to prevailing whistleblower's cause of action).

(C(C)) Relief for an individual prevailing in action under subparagraph (B) shall include—

- (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.

Id.

61. *See generally* 2015 ANNUAL REPORT, *supra* note 51, at 21 (“For each year that the whistleblower program has been in operation, the [SEC] has received an increasing number of whistleblower tips. Since August 2011, the [SEC] has received a total of 14,116 whistleblower tips, and in Fiscal Year 2015 alone, received almost 4,000 [tips].”). In addition, the SEC “has paid more than \$54 million to 22 whistleblowers since the [SEC]’s new whistleblowers went into effect in August 2011.” *Id.* Of the fourteen whistleblower awards issued up to and during 2014, nine were issued in 2014. *See generally* Pamela L. Johnston et al., *A Review of Recent Whistleblower Developments*, FOLEY & LARDNER LLP (Jan. 5, 2015), <https://www.foley.com/a-review-of-recent-whistleblower-developments-01-05-2015/> [<https://perma.cc/JU5R-MLYY>] (analyzing whistleblower awards under Dodd-Frank).

In 2015, the SEC’s annual report to Congress recorded 3,923 tips, an increase of eight percent from 2014 and a thirty-percent increase since the program’s first full year in 2012. *See* 2015 ANNUAL REPORT, *supra* note 51, at 21; *see also* Lisa M. Noller et al., *A Review of Recent Whistleblower Developments*, FOLEY & LARDNER LLP (Jan. 7, 2016), <https://www.foley.com/a-review-of-recent-whistleblower-developments-01-07-2016/> [<https://perma.cc/W943-4JX3>] (analyzing SEC’s 2015 annual report to Congress on Dodd-Frank’s whistleblower program). In comparison, the SEC’s 2014 annual report recorded 3,620 tips, which was an increase of twelve percent from 2013. *See id.* (reporting SEC’s recorded Dodd-Frank whistleblower tips in 2014). In the 2015 fiscal year alone, the SEC paid more than \$37 million to whistleblowers, including a \$30 million award announced in September 2014, the highest award to date. *See id.* (reporting payments to Dodd-Frank whistleblower’s in 2015). Additional awards in 2015 included: (1) a \$600,000 award in an anti-retaliation case, (2) over million dollars to a compliance professional, (3) over \$30 million award to a whistleblower, which was the third-largest whistleblower award in history, (4) a half-million dollar award to a former company officer, and (5) a \$325,000 award to a whistleblower. *See generally* 2015 ANNUAL REPORT, *supra* note 51, at 10–12 (reporting awards made under Dodd-Frank in 2015). Further, in 2016, the SEC’s total “awards to whistleblowers . . . surpassed the \$100 million mark[,]” with over \$57 million coming from 2016 only, including “[s]ix of the ten highest awards [ever].” *See generally* 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/EB48-BV98>] [hereinafter 2016 ANNUAL REPORT] (reporting Dodd-Frank’s whistleblower awards in 2016). Similar to 2015, the amount of tips in 2016 increased by more

crease in awards, employers are concerned that employees may be reporting suspected violations for a large payday, regardless of how far-fetched a tip may seem.⁶² Further, the financial payments awarded and whistleblower-friendly procedures afforded to individuals under Dodd-Frank are greater than those granted under Sarbanes-Oxley.⁶³

B. *Strange Noises in the Law: Interpretations of Sarbanes-Oxley and Dodd-Frank*

A new class of cases is appearing in courts tasked with interpreting the breadth of Dodd-Frank's whistleblower protections.⁶⁴ These cases result from internal whistleblowers alleging more violations under Dodd-Frank because of Dodd-Frank's whistleblower-friendly procedures and financial incentives.⁶⁵ Because of the increase in the number of cases under Dodd-Frank, a growing issue presented to courts is whether whistleblowers who internally report suspected violations are protected under Dodd-Frank,

than 40%, totaling over 4200 tips. *See generally id.* (recording number of whistleblower tips in 2016).

62. *See* Johnson, *supra* note 35 ("For employers, the changes could bring on heartburn."). While Dodd-Frank may expand whistleblower protection, it has also concerned employers about employees who may make "farfetched" claims for the possibility of a "lucrative payday." *See id.* (noting employers' concerns).

63. *See* Shen, *supra* note 53, at 3–4 (stating "Dodd-Frank provides significantly greater remedies for retaliation, and also offers significantly greater financial incentives" than Sarbanes-Oxley). Whistleblowers may receive double the amount of back pay under Dodd-Frank than Sarbanes-Oxley offers. *See id.* (evaluating employment remedies under Dodd-Frank compared to Sarbanes-Oxley). In addition to back pay, Dodd-Frank provides monetary awards ranging from ten to thirty percent of the money sanctions for successful enforcement actions. *See id.* (noting significant financial awards under Dodd-Frank). A whistleblower under Dodd-Frank may bring his or her private claims directly to court. *See id.* (illustrating procedural incentives under Dodd-Frank). Moreover, Dodd-Frank provides a longer statute of limitations than Sarbanes-Oxley. *See id.* (identifying statute of limitations advantage under Dodd-Frank).

64. *See id.* (noting extension of Dodd-Frank to include internal reporters creates "a more powerful cause of action than what is available under Sarbanes-Oxley"). This "powerful cause of action" is due to the more beneficial financial incentives under Dodd-Frank as compared to Sarbanes-Oxley, including back pay, monetary awards, statute of limitations, and filing requirements. *See id.* (explaining impact of Dodd-Frank's financial incentives on future claims). For a further discussion of the comparison of the financial incentives and procedural benefits between Dodd-Frank and Sarbanes-Oxley, see *supra* notes 53–64 and accompanying text.

65. *See id.* at 4 ("[The] plaintiff-friendly aspects of Dodd-Frank may in turn affect the frequency with which employees file whistleblower retaliation claims . . ."); see also Jyotin Hamid et al., *Client Update Recent Decisions Create Further Uncertainty on Question of Whether Internal Reporting Triggers Dodd-Frank Whistleblower Anti-Retaliation Protection*, N.Y. CITY BAR ASS'N, Mar. 11, 2016 (explaining increase of whistleblower complaints under Dodd-Frank has grown concern among private litigants). The uncertainty in the law will continue to increase SEC and litigant complaints for the foreseeable future. *See id.* (explaining impact on future complaints).

which normally protects those who report directly to the SEC.⁶⁶ As courts and the SEC attempt to address the issue, an expanding split among district and circuit courts has left employees confused about who they should call for protection.⁶⁷

1. *I Ain't Afraid of No Whistleblowers: The SEC Answers the Call*

With an increasing number of court cases, the SEC attempted to clarify the issue of whether Dodd-Frank grants internal whistleblowers protection in addition to Sarbanes-Oxley's protection.⁶⁸ In May 2011, the SEC issued Rule 21F-2(b) to state expressly that Dodd-Frank's whistleblower program applies both to employees who externally and employees who internally report alleged violations.⁶⁹ Specifically, the SEC opined that retaliation protection under § 78u-6(h)(1)(A) had an independent meaning compared to the definition of whistleblower under § 78u-6(a)(6).⁷⁰ On August 4, 2015, the SEC again attempted to clarify its understanding of Dodd-Frank's whistleblower protection.⁷¹ The SEC reiterated that an indi-

66. For a further discussion of courts addressing the issue in *Berman*, see *supra* note 26 and accompanying text.

67. For a further discussion of the growing split between courts, see *infra* notes 76–94 and accompanying text.

68. See 17 C.F.R. § 240.21F-2(a) (2016) (clarifying definition of “whistleblower” under Dodd-Frank). The SEC found a whistleblower received protection when:

(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;

(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)).

Id. §§ 240.21F-2(b)(1)(i)–(ii).

69. See Securities Whistleblowers Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249) (interpreting Dodd-Frank's anti-retaliation provision to “apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the [SEC]*”). The SEC interpreted Dodd-Frank to include two definitions of whistleblowers. See *id.* at 34,363 (explaining SEC's interpretation of Dodd-Frank). First, the definition of a whistleblower is “if, alone or jointly with others, you provide the [SEC] with information . . . and the information relates to a possible violation of the Federal securities laws.” *Id.* Second, “[f]or the purposes of the anti-retaliation protection . . . [an individual is] a whistleblower if . . . [the individual] provide[d] that information in a manner described in” § 78u-6(h)(1)(A).” *Id.* “Specifically, Section 21F(h)(1)(A)(iii) . . . incorporate[s] the anti-retaliation protections specified in Section 806 of [Sarbanes-Oxley] . . . [which occurs] when . . . employees report to . . . a person with supervisory authority over the employee.” *Id.* at 34,304.

70. See Shen, *supra* note 53, at 2 (explaining SEC's release contended that anti-retaliation has independent meaning that protects whistleblowers who report internally).

71. See Interpretation of the SEC's Whistleblower Rules Under Section 21F, Exchange Act Release No. 34-75592, 2015 WL 4624264 (Aug. 7, 2015) [hereinafter Exchange Act Release No. 34-75592] (issuing release to clarify that qualifying as whistleblower under Dodd-Frank includes individuals who internally report); SEC

vidual who internally reports suspected wrongdoing should be granted whistleblower protection under Dodd-Frank.⁷² In support of its opinion, the SEC claimed that this decision best comports with the overall goals of implementing the whistleblower program and encourages individuals to report internally.⁷³ In an attempt to advocate for its opinion, the SEC has filed amicus briefs in district and circuit court cases attempting to persuade courts to accept the SEC's interpretation.⁷⁴ The SEC's recent efforts reflect its initiative to encourage employees to report violations to their employers.⁷⁵

Issues Interpretation Regarding Definition of "Whistleblower" Under the Dodd-Frank Act's Anti-Retaliation Provision, SIMPSON THACHER & BARTLETT LLP 1 (Aug. 27, 2015), http://www.stblaw.com/docs/default-source/memos/firmmemo_08_27_15.pdf [<https://perma.cc/A9GS-QJX4>] (describing SEC's second release explaining understanding of Dodd-Frank's whistleblower protection).

72. See Exchange Release No. 34-75592, *supra* note 71, at *3 (opining that whistleblower under Dodd-Frank has two definitions); Leblang & Holtzman, *supra* note 56, at 2 ("The SEC declared . . . that for purposes of the employment retaliation protections provided by Dodd-Frank, an individual's status as a whistleblower does not depend on whether or not he or she reported wrongdoing to the SEC.").

73. See Exchange Release No. 34-75592, *supra* note 71, at *3 ("[B]y providing employment retaliation protections for individuals who report internally first . . . our interpretative rule avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally . . . and, thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting."). Accordingly, internal and external reporters will receive the same protection. See *id.* (explaining basis for interpretation).

74. See 2015 ANNUAL REPORT, *supra* note 58, at 2 (discussing SEC's amicus briefs requesting federal courts to defer to its opinion). Such amicus briefs have been filed within the Second, Third, and Sixth Circuits. See, e.g., *Danon v. Vanguard Grp., Inc.*, Civil Action No. 15-6864, 2016 WL 2988987, at *4 n.5 (E.D. Pa. May 23, 2016) ("The SEC submitted a brief advocating that the anti-retaliation provisions in Dodd-Frank allow anti-retaliation whistleblower protections under Dodd-Frank to apply to a putative whistleblower who reports securities fraud violations internally . . ."), *appeal filed*, No. 16-2881 (3d Cir. June 22, 2016); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 654 (E.D. Tenn. 2015) (discussing SEC attempts to convince court to adopt interpretation of Dodd-Frank to include protection of internal reporters), *aff'd*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017).

In *Verble*, the SEC filed an amicus brief advocating for the adoption of the Second Circuit's decision in *Berman* where the court accepted the SEC's interpretation of whistleblower. See generally Lisa M. Noller et al., *SEC Continues to File Amicus Briefs in Support of Its Definition of "Whistleblower"*, LEXOLOGY (Apr. 12, 2016), <http://www.lexology.com/library/detail.aspx?g=1a7cb7f1-90b8-402c-888a-4541f132d179> [<https://perma.cc/5HUK-MPZV>] (reviewing recent case developments on subject of whistleblowers). Similarly, in *Danon*, the SEC filed an amicus brief arguing that the plaintiff's "internal complaints qualified for whistleblower protection under the anti-retaliation provision of the Dodd-Frank Act." *Id.* (explaining basis for SEC's amicus brief).

75. See 2015 ANNUAL REPORT, *supra* note 51, at 2 (advocating SEC's initiative in "want[ing] whistleblowers—and their employers—to know that employees are free to come forward without fear of reprisals" (quoting Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the Ray Garrett, Jr. Corporate and Securities Law Institute, Northwestern University School of Law (Apr. 30, 2015))).

2. *Federal Courts Remain Spooked: Confusion Between the Circuits*

Although the SEC has attempted to address this issue, district and circuit courts have remained uncertain as to whether Dodd-Frank grants retaliation protection to employees who internally report suspected wrongdoing.⁷⁶ On one hand, district courts in the First, Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits have found the tension between Dodd-Frank's provisions ambiguous enough to apply the framework articulated in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*⁷⁷ (known as *Chevron* deference).⁷⁸ Under *Chevron* deference's two-step analysis, the court must determine if Congress has "directly spoken to" the issue, and if so, then the court follows Congress's "expressed intent."⁷⁹ If not, a court may defer to the reasonable interpretation of the agency overseeing the statute.⁸⁰ Specifically, these courts found tension between Dodd-Frank's definition of whistleblower under § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii) because § 78u-6(h)(1)(A)(iii) refers to Sarbanes-Oxley, which protects individuals who internally report suspected wrongdoing but do not report to the SEC.⁸¹ Accordingly, district courts generally find Dodd-Frank ambiguous, apply *Chevron* deference to the SEC's opinion, and conclude that the SEC's interpretation of Dodd-Frank's whistleblower

76. For a further discussion of courts addressing the issue in *Berman*, see *supra* note 26 and accompanying text.

77. 467 U.S. 837 (1984).

78. See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015) (referring to cases in favor of applying *Chevron* deference); *Lamb v. Rockwell Automation Inc.*, Case No. 15-CV-1415-JPS, 2016 WL 4273210, at *3 (E.D. Wis. Aug. 12, 2016) (referencing circuits in favor of *Berman*); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 652 (E.D. Tenn. 2015) (collecting cases on both sides of issue), *aff'd*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017). For a further discussion of courts applying *Chevron* deference, see *supra* note 26 and accompanying text.

79. See *Chevron*, 467 U.S. at 842–43 ("First, always, is the question [of] 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.").

80. See *id.* at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnote omitted)); *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1097 (N.D. Cal. 2015) (explaining *Chevron* deference), *aff'd*, No. 15-17352, 2017 WL 908245 (9th Cir. Mar. 8, 2017).

81. See *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 755–56 (N.D. Cal. 2013) (noting arguments for expanding Dodd-Frank's whistleblower protection). District courts finding Dodd-Frank to be ambiguous did so on three grounds: (1) that expanding Dodd-Frank complies with the statute's purpose, (2) that § 78u-6(h)(1)(A)(iii) would be limited in scope if Dodd-Frank were not expanded, and (3) that the SEC had opined that whistleblowers may report violations internally to receive protection under Dodd-Frank. See *id.* (describing three bases for district courts' conclusion that Dodd-Frank is ambiguous regarding whistleblower protection).

protection provision, an interpretation that incorporates Sarbanes-Oxley's whistleblower protection provision into Dodd-Frank, is reasonable.⁸²

However, the Fifth Circuit disagreed and instead found the definition of whistleblower unambiguous and controlling; accordingly, the SEC's interpretation was not owed *Chevron* deference.⁸³ In *Asadi v. G.E. Energy (USA), L.L.C.*,⁸⁴ the Fifth Circuit was the first circuit court to address the issue of whether Dodd-Frank's whistleblower protection extends to individuals who report suspected violations to their employers.⁸⁵ In *Asadi*, the plaintiff alleged that his employer violated Dodd-Frank's whistleblower protection provision by terminating him after he internally reported suspected violations of securities law.⁸⁶ The Fifth Circuit acknowledged the SEC's interpretation of the statute but refused to apply it, noting that the SEC does not have the authority to extend Dodd-Frank's reach.⁸⁷ Instead, the court found that the definition of whistleblower under Dodd-Frank expressly protects employees who *externally* report suspected violations to the SEC.⁸⁸ In reaching its holding, the Fifth Circuit highlighted that the three categories listed in the anti-retaliation provision merely represent protected activities, rather than define a whistleblower under Dodd-Frank.⁸⁹ More precisely, individuals who qualified under the definition of

82. See *Berman*, 801 F.3d at 153 (comparing cases favoring application of *Chevron* deference).

83. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (concluding *Chevron* deference was inapplicable). The Fifth Circuit stated that "there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC." *Id.* at 625.

84. 720 F.3d 620 (5th Cir. 2013).

85. See *Banko*, 20 F. Supp. 3d at 756 (noting Fifth Circuit in *Asadi* was first circuit court to address split among multiple federal courts).

86. See *Asadi*, 720 F.3d at 621 (describing facts of case). *Asadi* was an employee of G.E. Energy, where he became "concerned [his employer's] alleged conduct violated the Foreign Corrupt Practices Act." See *id.* After *Asadi* reported the issue to his supervisor, *Asadi* received poor performance reviews and was pressured to accept a different position. See *id.* *Asadi* claimed he was terminated once he refused to "accept a reduced role in the [company]." See *id.* He "concede[d] that he [was] not a 'whistleblower' as that term is defined in § 78u-6(a)(6)," but contended that he should be covered under the anti-retaliation provision of § 78u-6(h)(1)(A)(iii). See *id.* at 624 (detailing plaintiff's primary contention).

87. See *id.* at 629–30 (refusing to extend Dodd-Frank's statutory reach despite SEC's interpretation). The Fifth Circuit acknowledged the SEC's opinion but found that Congress had clearly shown its intent by defining whistleblower in the statute. See *id.* ("Congress defined 'whistleblower' . . . and did so unambiguously.").

88. See *id.* at 623 ("[T]he plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC."). Thus, the Fifth Circuit found *Asadi* was not a whistleblower because he did not disclose his suspicions to the SEC. See *id.* The Fifth Circuit "held that providing information to the SEC was a prerequisite to Dodd-Frank whistleblower protection." Shen, *supra* note 53, at 2 (explaining Fifth Circuit's holding).

89. See *Asadi*, 720 F.3d at 627 (finding Dodd-Frank's anti-retaliation provisions do "not provide alternative definitions of the term 'whistleblowers'").

whistleblower are protected, but only if they engage in any of the three activities in the anti-retaliation provision.⁹⁰

In agreement with *Asadi*, multiple district courts in the Second, Sixth, Seventh, Ninth, and Tenth Circuits have found Dodd-Frank's definition of whistleblower to be unambiguous, and therefore, the SEC's interpretation of the statute undeserving of *Chevron* deference.⁹¹ Notably, these courts emphasized that it is not the responsibility of the courts to expand the statute's definition to obtain a particularly desired result.⁹² In further support, courts have indicated an internal reporter's protection claim may still be viable under Sarbanes-Oxley, even if not available under Dodd-Frank.⁹³ Nevertheless, the Second Circuit's decision in *Berman* officially created a circuit split and continued the confusion among employees.⁹⁴

III. GHOST OF WHISTLEBLOWERS PRESENT: THE SECOND CIRCUIT CREATES A CIRCUIT SPLIT OVER WHISTLEBLOWER PROTECTION IN *BERMAN*

In granting review of *Berman*'s appeal, the Second Circuit was tasked with deciding whether employees are entitled to retaliation protection

90. See *id.* at 626 (noting “Congress [] used the term ‘whistleblower’ throughout subsection (h)” before Dodd-Frank’s anti-retaliation provision).

91. See *Verfueth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 644 (E.D. Wis. 2014) (“There is no ambiguity in [Dodd-Frank] at all”); see also *Lamb v. Rockwell Automation Inc.*, Case No. 15-CV-1415-JPS, 2016 WL 4273210, at *3 (E.D. Wis. Aug. 12, 2016) (discussing circuits in favor of *Asadi*); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 652 (E.D. Tenn. 2015) (collecting cases on each side of issue), *aff’d*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017); *Hamid et al.*, *supra* note 65 (discussing district courts’ findings after *Berman*). In *Lamb*, a recent case to address the issue, the district court found that the plaintiff was not a whistleblower under Dodd-Frank because, although she submitted a complaint to the SEC, the plaintiff filed the complaint after she reported alleged wrongdoing internally and was terminated. See *Lamb*, 2016 WL 4273210, at *4 (explaining reasoning and holding of case). For a further discussion of district courts applying the Fifth Circuit’s rationale, see *supra* note 29 and accompanying text.

92. See *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014) (urging courts are not responsible “to second guess the reasoning or providence of unambiguous statutory language or expand explicit definitions within a statute to reach a desired result”); see also *Verfueth*, 65 F. Supp. 3d at 645 (“[E]ven if the statute produces a somewhat confusing public policy outcome . . . that does not mean there is any ambiguity in the statute itself.”).

93. See *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013) (“[Dodd-Frank] is not the only protection available to individuals who believe they are being retaliated against for revealing securities fraud. These plaintiffs have other options.”); see also Andrew Walker, Note, *Why Shouldn't We Protect Internal Whistleblowers? Exploring Justifications for the Asadi Decision*, 90 N.Y.U. L. REV. 1761, 1775–76 (2015) (explaining Sarbanes-Oxley grants protection to internal whistleblowers outside of Dodd-Frank).

94. See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015) (providing court’s analysis); see also Bryan F. DuBon, *BNA Insights: The Sound of Uncertainty—Whistle-Blowers and the SEC*, SEC. L. DAILY, Apr. 25, 2016, at 1, 3 (noting future circuit courts may be addressing this issue).

under Dodd-Frank if the employees report wrongdoing to their employers rather than the SEC.⁹⁵ In *Berman*, the majority answered that the plaintiff was entitled to retaliation protection under Dodd-Frank, even though he only internally reported the suspected wrongdoing.⁹⁶ Accordingly, the Second Circuit's approach differed from that of the Fifth Circuit, officially creating a circuit split and furthering the existing confusion surrounding whistleblower protection.⁹⁷ In effect, the majority's decision to expand Dodd-Frank's whistleblower definition has made Sarbanes-Oxley's whistleblower program irrelevant because future plaintiffs are more likely to use Dodd-Frank due to its plaintiff-friendly incentives, even if they do not satisfy the legislature's statutory definition of whistleblower definition.⁹⁸

A. *If There's Something Weird and It Don't Look Good:
Facts and Procedure in Berman*

Daniel Berman (Berman) was a finance director for Neo@Ogilvy LLC (Neo) and its parent company, WPP Group USA, Inc. (WPP), "from October 2010 to April 2013," when he was terminated.⁹⁹ As Neo's finance director, Berman was "responsible for Neo's financial reporting and its compliance with Generally Accepted Accounting Principles [(GAAP)]."¹⁰⁰ In addition, Berman was responsible for "internal accounting procedures of Neo and its parent[.]" WPP.¹⁰¹ While working for Neo, Berman

95. See *Berman*, 801 F.3d at 147 (stating issue before Second Circuit). More precisely, the issue was "whether an employee who suffers retaliation because he reports wrongdoing internally, but not to the SEC, can obtain the retaliation remedies provided by Dodd-Frank." *Id.*

96. See *id.* at 155 (holding Berman should be granted retaliation protection under Dodd-Frank for reporting wrongdoing to employer).

97. See *id.*

98. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 628 (5th Cir. 2013) (reasoning that extending Dodd-Frank's whistleblower protection would "render the [Sarbanes-Oxley] anti-retaliation provision, for practical purposes, moot"); see also Jason Zuckerman et al., *SOX Whistleblower Protections Are Not Obsolete*, LAW360 (Sept. 21, 2015, 10:45 AM), <https://www.law360.com/articles/704629/sox-whistle-blower-protections-are-not-obsolete> [<https://perma.cc/EQ8B-ZWX2>] ("Dodd-Frank is ostensibly a better remedy than SOX because Dodd-Frank authorizes double back pay and enables whistleblowers to bring their claims directly to federal court without having to exhaust administrative remedies to OSHA.").

99. See *Berman*, 801 F.3d at 148–49 (describing Berman's relationship to Neo). "Neo is a media agency that provides a range of digital and direct media services." *Id.* at 149; see also Defs.' Br. at 11, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626), 2015 WL 1156544, at *5 (describing Neo's business and services it provides). "WPP Group USA, Inc. is a nonpublic indirect parent of Neo." *Id.*

100. See *Berman*, 801 F.3d at 148–49 (describing Berman's responsibilities as finance director for Neo and WPP); see also Pl.'s Compl. at 3, *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404 (S.D.N.Y. 2014) (No. 14CV00523), 2014 WL 11307732 (explaining Berman's job responsibilities).

101. See *Berman*, 801 F.3d at 148–49 ("[Berman] was responsible for Neo's financial reporting and its compliance with . . . [GAAP], as well as internal account

claimed he noticed fraudulent accounting practices that violated the GAAP, WPP policies, Sarbanes-Oxley, Dodd-Frank, and U.S. securities law.¹⁰² Specifically, Berman's alleged suspicions of Neo and WPP's conduct included delayed media payments, "improperly recognizing revenues," "'reversed' accounting reserves," and "favorable and 'lenient' payment terms."¹⁰³ Rather than directly reporting these suspected violations to the SEC, Berman internally reported them to his employer.¹⁰⁴ In April 2013, one of Neo's senior officers terminated Berman.¹⁰⁵ Six months after his termination in October 2013, Berman reported Neo's suspected violations to the SEC for the first time.¹⁰⁶

On January 28, 2014, Berman filed an action in the U.S. District Court for the Southern District of New York against Neo and WPP, alleging a retaliation claim under Dodd-Frank.¹⁰⁷ Berman claimed his termination

procedures of Neo and its parent . . . [WPP]."); *see also* Pl.'s Compl., *supra* note 100, at 3 ("In [Berman's] capacity of Finance Director, [he] was responsible for the accuracy of Neo's financial reporting, and Neo's compliance with GAAP, and for compliance with WPP's accounting policies.").

102. *See Berman*, 801 F.3d at 149 (explaining case's factual background); *see also* Pl.'s Compl., *supra* note 100, at 4 (describing Berman's claim).

103. *See* Pl.'s Compl., *supra* note 100, at 5–7 (explaining Berman's suspected violations of securities law); Defs.' Br., *supra* note 99, at 7 (explaining Berman's claim). First, Berman alleged delayed media payments occurred when Neo purchased advertisement for its clients but delayed payments to the advertising companies in order to hold onto clients' capital for Neo's own purposes. *See* Defs.' Br., *supra* note 99, at 6–7 (describing Berman's claims). Second, Berman alleged a Neo executive improperly and fraudulently recognized revenue that was not yet permitted under GAAP and WPP policies. *See id.* (explaining Berman's allegations). Additionally, Berman contended a Neo executive "attempt[ed] to execute certain accounting transactions that would improperly and fraudulently 'reverse' accounting reserves directly into Neo's profits." *Id.* Lastly, Berman contended that "a senior level executive attempted to obtain favorable and 'lenient' payment terms for a client with whom he ha[d] a personal relationship." *Id.*

104. *See Berman*, 801 F.3d at 149 (explaining case's factual background); *see also* Pl.'s Compl., *supra* note 100, at 8 (explaining Berman's alleged violations of securities law); Defs.' Br., *supra* note 99, at 8 (describing Berman's claim).

105. *See Berman*, 801 F.3d at 149 ("A senior officer at Neo became angry with him, and he was terminated as a resulting of his whistleblower activities in April 2013."); *see also* Pl.'s Compl., *supra* note 100, at 7 (claiming Berman's termination was retaliation against him for uncovering "improper and fraudulent" practices); Defs.' Br., *supra* note 99, at 8–9 (contending Berman did not notify Neo or WPP of improper practices until after Berman was terminated). Berman claimed he attempted to report Neo's and WPP's fraudulent matters in accordance with his job duties, Dodd-Frank, Sarbanes-Oxley WPP policies, and federal securities laws before he was terminated. *See* Pl.'s Compl., *supra* note 100, at 7–8 (explaining events leading up to Berman's termination).

106. *See* Pl.'s Compl., *supra* note 100, at 9 ("On October 31, 2013, [Berman] reported to the [SEC] . . . WPP's and Neo's violations of U.S. Securities Laws.") *see also Berman*, 801 F.3d at 149 (stating that Berman's statute of limitations for his Sarbanes-Oxley's claim ran before he filed his SEC whistleblower claim).

107. *See Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404, 406 (S.D.N.Y. 2014) (describing Berman's allegations "that his employers' actions in response to his reporting violated the whistleblower protection provision of [Dodd-Frank]"). Berman claimed his actions were protected by Dodd-Frank, Sarbanes-Oxley, fed-

occurred in retaliation of his whistleblower actions and directly violated protections afforded to him under Dodd-Frank.¹⁰⁸ In response, Neo and WPP filed a motion to dismiss Berman's claim, arguing Berman was not a protected whistleblower under Dodd-Frank because he did not report his suspected violations to the SEC.¹⁰⁹

On December 8, 2014, the district court held that Berman did not qualify as a whistleblower under Dodd-Frank and dismissed the case.¹¹⁰ On appeal, a three-judge panel of the Second Circuit, in a 2-1 decision, reversed and remanded the district court's decision for further proceedings.¹¹¹ Unlike the district court, the Second Circuit found Berman was a whistleblower under Dodd-Frank and was entitled to retaliation protection.¹¹² The matter was remanded to the district court after Neo and WPP decided not to file a writ of certiorari to the Supreme Court.¹¹³ Neverthe-

eral securities laws, and WPP policies. See Pl.'s Compl., *supra* note 100, at 7 (listing Berman's protections for his activities).

108. See Pl.'s Compl., *supra* note 100, at 7 (claiming Berman "is a 'whistleblower' within the meaning of Dodd Frank"). Berman further claimed he was protected under Dodd-Frank's anti-retaliation provision even if he did not meet the definition of whistleblower under Dodd-Frank. See *id.* (providing further whistleblower protection claims).

109. See *Berman*, 72 F. Supp. 3d at 406 ("[Neo and WPP] argued that [Berman] was not a whistleblower under Dodd-Frank at the time of the alleged retaliation because he had not reported any violations to the [SEC].").

110. See *Berman*, 801 F.3d at 146 (denying magistrate judge's recommendation and finding Berman did not qualify under Dodd-Frank's whistleblower definition). Magistrate Judge Sarah Netburn, to whom the motion to dismiss was referred, found Berman qualified as a whistleblower "because of the retaliation protection of subdivision (iii) of subsection 21F(h)(A)(1), unrestricted by the definition of 'whistleblower' in subsection 21F(a)(6)[,]" thereby entitling him to Dodd-Frank protection against retaliation actions from his employer. See *id.* at 149 (explaining procedural history). Nonetheless, Judge Netburn recommended that the motion be granted because of legal insufficiencies. See *id.* (detailing procedural history); *Berman*, 72 F. Supp. 3d at 406 (providing procedural history).

111. See *Berman*, 801 F.3d at 146 (reversing and remanding district court's judgment). The majority decision noted on remand that the district court may "consider the [Magistrate Judge's Report and Recommendation] to dismiss, without prejudice to amendment, for lack of a sufficient allegation of a termination entitled to Dodd-Frank protection, and any other arguments made by the Defendants in support of their motion to dismiss." *Id.* at 155.

112. See *id.* at 146 (granting Berman whistleblower protection under Dodd-Frank).

113. See *Noller et al.*, *supra* note 61, at 2 (explaining procedure after Second Circuit's decision).

On October 14, 2015, the Second Circuit stayed the issuance of its mandate to allow the United States Supreme Court to decide whether it would take up the issue. However, on November 10, 2015, the defendants in the matter advised the Second Circuit that they would not be pursuing a writ of certiorari with the Supreme Court. Thus, the matter [was] remanded to the district court for further proceedings.

Id. (explaining procedural posture of case). Neo and WPP's decision not to seek review by the Supreme Court has "re-invigorated the debate over whether Dodd-Frank's anti-retaliation protections cover individuals who report to their employ-

less, on remand, the district court dismissed Berman's complaint due to legal insufficiencies in his claims.¹¹⁴

B. *How May I Direct Your Call?: The Second Circuit Broadens Dodd-Frank's Whistleblower Protection*

The Second Circuit's decision to grant Berman retaliation protection under Dodd-Frank for his internal whistleblower reports amplified the pre-existing tension between the courts by officially creating a circuit split with the Fifth Circuit.¹¹⁵ In particular, the majority relied on precedent that found Dodd-Frank ambiguous and applied *Chevron* deference.¹¹⁶ The dissent, however, looked to the Fifth Circuit's precedent in reasoning that Berman did not qualify as a whistleblower under Dodd-Frank.¹¹⁷

1. *Who Can Ya Call?: The Majority Calls for the SEC's Interpretation*

The Second Circuit analyzed four areas in rejecting the district court's holding and denying Neo and WPP's motion to dismiss.¹¹⁸ First, the court analyzed whether the two Dodd-Frank sections at issue conflicted with each other.¹¹⁹ Second, the court reviewed the legislative history of Dodd-Frank.¹²⁰ Third, the court reviewed past precedent on the issue within district and circuit courts.¹²¹ Lastly, the court conducted a textual analysis of Dodd-Frank.¹²² After reviewing these areas, the Second Circuit held that the Dodd-Frank sections at issue were sufficiently ambig-

ers, as opposed to contacting the [SEC]." See Baker & Flinn, *supra* note 20 (explaining impact of defendants' decision not to seek Supreme Court review).

114. See *Berman v. Neo@Ogilvy LLC*, No. 1:14-cv-523-GHW-SN, 2016 WL 815158, at *1–2 (S.D.N.Y. Feb. 22, 2016) (explaining court's decision in dismissing Berman's complaint and granting time for Berman to amend complaint to resolve its legal insufficiencies).

115. See *id.* at 153 (noting that "although our decision creates a circuit split, it does so against a landscape of existing disagreement among a large number of district courts").

116. See *id.* at 155 (applying *Chevron* deference to Berman's case).

117. See *id.* at 160 (Jacobs, J., dissenting) (contending *Asadi* decision should apply to case).

118. For a further discussion of the majority's analysis, see *infra* notes 119–42 and accompanying text.

119. See *Berman*, 801 F.3d at 152 (explaining conflict between § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii)). For a further discussion of the majority's analysis of the conflict between Dodd-Frank and Sarbanes-Oxley, see *infra* notes 124–36 and accompanying text.

120. See *Berman*, 801 F.3d at 152 (explaining Dodd-Frank's legislative history). For a further discussion of the majority's review of the legislative history of Dodd-Frank, see *infra* notes 128–30 and accompanying text.

121. See *Berman*, 801 F.3d at 153 (discussing relevant case law). For a further discussion of the majority's review of the applicable precedent, see *infra* notes 131–34 and accompanying text.

122. See *Berman*, 801 F.3d at 155 (analyzing text of Dodd-Frank sections at issue). For a further discussion of the majority's textual analysis, see *infra* notes 135–39 and accompanying text.

uous to warrant *Chevron* deference to the SEC, thereby granting retaliation protection to Berman under Dodd-Frank.¹²³

First, the court found no direct conflict between the definition of whistleblower in § 78u-6(a)(6) and the lack of a notification requirement in either § 78u-6(h)(1)(A) or Sarbanes-Oxley, allowing for simultaneous reporting.¹²⁴ Simultaneous reporting occurs when employees report suspected allegations both to their employer and the SEC.¹²⁵ As such, a simultaneous reporting scenario could allow for protection under both acts.¹²⁶ Nevertheless, even though the majority opined that simultaneous reporting would avoid a conflict between Dodd-Frank's whistleblower definition and the Sarbanes-Oxley's protection granted under § 78u-6(h)(1)(A)(iii), the Second Circuit claimed such a scenario would be limited.¹²⁷

Second, in determining whether Dodd-Frank granted protection to internal reporters, the Second Circuit reviewed Dodd-Frank's legislative history in an attempt to uncover Congress's intent in adding Subdivision (iii).¹²⁸ However, the court's attempt to review the legislative history did not reveal any beneficial information because Subdivision (iii) was not

123. *See Berman*, 801 F.3d at 155 (“[W]e need not resolve the ambiguity ourselves, but will defer to the reasonable interpretive rule adopted by the appropriate agency.”).

124. *See id.* at 150–51 (“In our case there is no absolute conflict between the [SEC] notification requirement in the definition of ‘whistleblower’ and the absence of such a requirement in both [§ 78u-6(h)(1)(A)(iii)] of Dodd-Frank and the Sarbanes-Oxley’s provisions incorporated by subdivision (iii).”).

125. *See id.* (“An employee who suffers retaliation after reporting wrongdoing simultaneously to his employer and to the SEC is eligible for Dodd-Frank remedies and those provided by Sarbanes-Oxley.”).

126. *See id.* (illustrating § 78u-6(h)(1)(A)(iii) of Dodd-Frank would grant Berman “remedies, and his simultaneous report to the SEC assures him that he will not have excluded himself from Dodd-Frank remedies”).

127. *See id.* (finding simultaneous reporting would leave Subdivision (iii) “with an extremely limited scope”). In support of its finding, the court stated that such scenarios would be “few in number” and some jobs would not even allow for simultaneous reporting, such as auditors and attorneys. *See id.* at 151 (explaining court’s reasoning). For auditors, “if subdivision (iii) requires reporting to the [SEC], its express cross-reference to . . . Sarbanes-Oxley would afford [] auditors almost no Dodd-Frank protection for retaliation because [] auditors must await a company response to internal reporting before reporting to the [SEC], and any retaliation would almost always precede [SEC] reporting.” *Id.* at 151. Similarly, “[l]ike auditors, attorneys would gain little, if any, Dodd-Frank protection if subdivision (iii), despite cross-referencing Sarbanes-Oxley provisions protecting lawyers, protected only against retaliation for reporting to the [SEC].” *Id.* at 152.

128. *See id.* at 152 (reviewing legislative history of Subdivision (iii) in Dodd-Frank). The majority stated that the court “would normally look to the legislative history of subdivision (iii) to learn what Congress . . . had sought to accomplish by adding subdivision (iii).” *Id.*

present in “either version of Dodd-Frank that was passed by the House and the Senate.”¹²⁹ Rather, “no one seems to know whence it came.”¹³⁰

Third, due to a lack of legislative history, the court reviewed the applicable case law on the issue.¹³¹ On one hand, the Second Circuit cited various district court cases and the Fifth Circuit’s decision in *Asadi*, where the court had found “[the § 78u-6(a)(6)] definition of whistleblower controlling.”¹³² Conversely, the Second Circuit further cited the “far larger number of district courts” that have relied upon *Chevron* and found the SEC’s interpretation to be reasonable.¹³³ Similar to those district courts, the issue presented to the Second Circuit was whether the statutory definition of whistleblower applies to Subdivision (iii), or if the answer is sufficiently unclear to warrant *Chevron* deference.¹³⁴

Fourth, the majority highlighted that the SEC, Berman, and WPP separately argued that the outcome of the case “would render some language of Dodd-Frank superfluous.”¹³⁵ However, the court found none of the arguments persuasive.¹³⁶ Particularly, the court distinguished between

129. *See id.* at 152–53 (explaining legislative history of Subdivision (iii) of Dodd-Frank). The court noted that “[s]ubdivision (iii) first saw the light of day in that conference base text when it was added to follow subdivisions (i) and (ii) . . . both of which had been in the Senate version.” *Id.* However, neither Subdivision (iii) nor its purpose was mentioned in the legislative material. *See id.* (explaining legislative history). Within the legislative materials, there is mention only of “[Sub-title B of Title IX] further enhanc[ing] incentives and protection for whistleblowers providing information leading to a successful SEC enforcement actions.” *See id.* (alteration in original) (quoting H. REP. NO. 111-517, at 870 (2009–10) (Conf. Rep.)).

130. *Id.* at 153 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010)) (explaining legislative history of Subdivision (iii) of Dodd-Frank).

131. *See Berman*, 801 F.3d at 153 (reviewing relevant precedent).

132. *See id.* (referencing decisions in which Dodd-Frank’s definition of whistleblowers was viewed as controlling).

133. *See id.* at 153 (noting cases in favor of applying *Chevron* deference).

134. *See id.* at 151 (inquiring whether *Chevron* deference is applicable); *see also id.* at 154 (“[T]he issue . . . is not whether to read the words of the definition [] . . . literally, but the different issue of whether the definition should apply to a [] subdivision of a subsection that uses the defined term.”).

135. *See id.* (explaining parties’ and SEC’s arguments).

Berman contends that if subdivision (iii) is subject to the [SEC] reporting requirement by virtue of subsection 21F(a)(6), then most of subdivision (iii) would be superfluous because the Sarbanes-Oxley protections . . . would have no effect. The SEC argues that if the definition of ‘whistleblower’ applies . . . then the [SEC] reporting requirement . . . would be superfluous. Neo contends that if subdivision (iii) does not require an employee to report violations to the [SEC], then the SEC reporting requirement . . . would be superfluous All these arguments ignore the realities of the legislative process.

Id.

136. *See id.* (“In deciding whether sufficient ambiguity exists in Dodd-Frank to warrant deference to the SEC’s Rule, we note, but are not persuaded by, the arguments that any reading would render some language of Dodd-Frank superfluous.”). Berman claimed Subdivision (iii) would be “superfluous” if Dodd-Frank’s

the legislature's use of the word "Commission" in Subdivisions (i) and (ii) of the anti-retaliation provisions and the lack of such wording in Subdivision (iii).¹³⁷ Under its textual analysis of Dodd-Frank, the majority was uncertain as to the goal of Congress in leaving "Commission" out of Subdivision (iii).¹³⁸ Nonetheless, the court did not believe the drafters "would have expected it to have the extremely limited scope it would have if it were restricted by the [SEC] reporting requirement in the 'whistleblower' definition in subsection 21F(a)(6)."¹³⁹

Due to the Second Circuit's uncertainty after reviewing the legislative history, precedent, and statutory text surrounding Dodd-Frank, the majority applied *Chevron* deference and called on the SEC to "resolve the ambiguity" that was presented before the court.¹⁴⁰ Thus, in conjunction with SEC's interpretation, the Second Circuit held that, even though Berman did not report his allegations to the SEC, under Dodd-Frank, his internal reports to Neo and WPP were sufficient to grant him protection against

definition of whistleblower applied because Sarbanes-Oxley would have no effect. *See id.* (restating Berman's argument). On the other hand, Neo advocated that if individuals did not have to report to the SEC under Subdivision (iii), Dodd-Frank's definition of whistleblower, which requires reporting to the SEC, would become meaningless. *See id.* (restating Neo's argument).

137. *See id.* (finding Subdivision (iii) "expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley . . . which . . . do not require reporting violations to the [SEC]"). The court compared the use of the word "Commission" in "[s]ubdivisions (i) and (ii), which were included in the Senate version of Dodd-Frank before the conferees met." *Id.* (relying on legislative history in analyzing Dodd-Frank's anti-retaliation provisions). Specifically, while "[s]ubdivision (i) explicitly requires reporting 'to the Commission,' and subdivision (ii) concern assisting action 'of the Commission' . . . subdivision (iii) do[es] neither." *Id.*

138. *See id.* at 155 (questioning whether "conferees, at the last minute, inserted subdivision (iii) within subsection 21F(h)(1)(A) . . . to . . . limit[] . . . the statutory definition of 'whistleblower' in subsection 21F(a)(6), or . . . [to permit] employees to be protected by subdivision (iii) whenever they report violations internally, without reporting to the [SEC]").

139. *See id.* (opining that Dodd-Frank's lack of legislative history suggests broad reading of Dodd-Frank's anti-retaliation provision).

140. *See id.* (analyzing whether Dodd-Frank is ambiguous enough to apply *Chevron* deference). The court emphasized that instead of "definitively constru[ing] the statute," it needed only to determine if the "tension" renders the statute "ambiguous to obligate [the court] to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute." *See id.* (explaining analysis of *Chevron* deference).

retaliation.¹⁴¹ Accordingly, the Second Circuit reversed and remanded the case to the district court.¹⁴²

2. *No Internal Whistleblowers Allowed: The Dissent Calls for the Fifth Circuit's Reasoning*

Instead of calling on the SEC for help, the dissent urged the court to apply the *Asadi* standard because the court's "obligation is to apply congressional statutes as written."¹⁴³ The dissent reasoned that Berman would have been protected under Sarbanes-Oxley because Sarbanes-Oxley governs protection of internal whistleblowers, even if they are not protected under Dodd-Frank.¹⁴⁴ Further, the dissent argued "the SEC and the majority perceive[d] a hole in coverage, or an insufficiency of remedy, and are patching."¹⁴⁵

Rather than apply *Chevron*, the dissent considered the statutory text to be unambiguous.¹⁴⁶ First, it determined that Subdivision (iii) protects only a whistleblower, which "is a defined term[,] and does not protect an employee, as noted in Sarbanes-Oxley."¹⁴⁷ Second, the dissent focused on the definition of whistleblower under Dodd-Frank, which "provides that [it] 'shall apply' anywhere else '[i]n this section.'"¹⁴⁸ Third, the dissent disagreed with the majority's conclusion that a literal application of Subdi-

141. *See id.* (deferring to SEC's interpretation of Dodd-Frank). Instead of favoring a broad interpretation of Dodd-Frank, the majority deferred to the SEC's interpretation. *See id.* ("We need not resolve the ambiguity ourselves, but will defer to the reasonable interpretive rule by the [SEC]."). Relying on the SEC's interpretation, the majority held that Berman's report to his employers regarding the company's suspected wrongdoing was enough to grant him Dodd-Frank protection, even though he did not directly report to the SEC. *See id.* (applying SEC's interpretation of Dodd-Frank to Berman's actions).

142. *See id.* (reversing and remanding case).

143. *See id.* (Jacobs, J., dissenting) (advocating *Asadi* rationale).

144. *See id.* at 155–56 (contending Sarbanes-Oxley, rather than Dodd-Frank, governs Berman's case). While Dodd-Frank protects whistleblowers who report to the SEC directly, "Sarbanes-Oxley protects employees who blow a whistle to management or to regulatory agencies." *See id.* at 156. The dissent claimed that Berman's internal reports to his employer would provide protection under Sarbanes-Oxley. *See id.* (explaining protection for whistleblowers under Sarbanes-Oxley).

145. *Id.* at 156 (opining that majority ignored plain reading of Dodd-Frank).

146. *See id.* ("This definition, standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u-6." (quoting *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013))).

147. *See id.* at 157 (distinguishing use of "whistleblower" in Subdivision (iii) of Dodd-Frank from use of "employee" in Sarbanes-Oxley).

148. *See id.* at 156 (alteration in original) (contending Dodd-Frank's definition of whistleblower is unambiguous). From the definition, the dissent emphasized that the court knows: "(1) who is protected; and (2) what actions by protected individuals constitute protected activity." *See id.* at 157 (quoting *Asadi*, 720 F.3d at 625). The dissent further explained that: (1) a whistleblower is protected, and (2) the actions protected are "any lawful act done by the whistleblower" that falls within one of the three categories of action described in

vision (iii) would have an “extremely limited scope” because the majority provided no support for its reasoning.¹⁴⁹

Analyzing these three factors, the dissent urged that *Asadi* should govern because the statutory language is unambiguous.¹⁵⁰ Accordingly, Berman could have received protection under Sarbanes-Oxley for internally reporting had he followed its statutory requirements; however, the dissent reasoned that under the language of Dodd-Frank, Berman should not have received protection for his internal reports.¹⁵¹ For these reasons, the dissent would have affirmed the district court’s decision to grant the motion to dismiss.¹⁵²

IV. THE SECOND CIRCUIT’S BROAD INTERPRETATION OF DODD-FRANK SUMMONS UNNECESSARY GHOSTS

Although the Second Circuit’s evaluation of Dodd-Frank in *Berman* increased whistleblower protection, in doing so, the majority incorrectly applied *Chevron* deference to Dodd-Frank’s express and unambiguous definition of whistleblower, sidestepping Sarbanes-Oxley.¹⁵³ First, under the principles of statutory interpretation, Dodd-Frank’s definition of whistleblower is clear and unambiguous.¹⁵⁴ Second, because the definition of whistleblower is unambiguous, *Chevron* deference to the SEC is not applicable.¹⁵⁵ Third, there is no need to expand Dodd-Frank’s protection to employees who report violations to their employers because Sarbanes-Oxley already grants adequate protection.¹⁵⁶ Therefore, the Fifth Circuit’s reasoning should apply to prevent an improper replication of Sarbanes-Oxley that would render it obsolete.¹⁵⁷

the statute.” *See id.* (quoting *Asadi*, 720 F.3d at 625) (explaining conclusion that Dodd-Frank provision at issue is unambiguous).

149. *See id.* at 158 (urging there is no support for majority’s claim that literally reading Subdivision (iii) “leave[s] [it] . . . with ‘extremely limited scope’” (quoting *id.* at 151)).

150. *See id.* at 160 (concluding Dodd-Frank is unambiguous).

151. *See id.* at 159 (opining Berman’s cases should be governed by Sarbanes-Oxley instead of Dodd-Frank under *Asadi*).

152. *See id.* (opining Neo and WPP’s motion to dismiss should be affirmed).

153. *See id.* at 155–56 (contending Sarbanes-Oxley governs Berman’s case instead of Dodd-Frank).

154. For a further discussion of applying the principles of statutory interpretation to Dodd-Frank, see *infra* notes 158–66 and accompanying text.

155. For a further discussion of the inapplicability of *Chevron* deference to Dodd-Frank, see *infra* notes 167–75 and accompanying text.

156. For a further discussion of Sarbanes-Oxley providing protection to internal reporters instead of Dodd-Frank, see *infra* notes 176–81 and accompanying text.

157. *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629–30 (5th Cir. 2013) (claiming Sarbanes-Oxley will become moot if Dodd-Frank’s protection is expanded).

A. *Whistleblowers Are Not an Apparition: Applying the Plain Meaning of the Definition of Whistleblowers*

The Second Circuit created inconsistency in Dodd-Frank's definition of whistleblower by ignoring the plain meaning of the definition.¹⁵⁸ The court's "obligation is to apply [the] congressional statute as written[,]” not to assist in reconstructing the statute for optimal whistleblower protection.¹⁵⁹ The plain language of Dodd-Frank's whistleblower definition makes clear that protection is granted to individuals who report suspicions to the SEC.¹⁶⁰ When comparing the anti-retaliation provisions to the definition, Subdivision (iii) is a subsection of “section (h), which relates only to ‘whistleblowers[,]’” a term that is expressly defined in Dodd-Frank.¹⁶¹ Accordingly, subdivision (iii) is subordinate to the whistleblower defini-

158. See *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 755 (N.D. Cal. 2013) (quoting *Asadi*, 720 F.3d at 622) (“When faced with questions of statutory construction, ‘we must first determine whether the statutory text is plain and unambiguous’ . . .”). In determining if the statute is ambiguous, the court “reference[s] [] the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” See *id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)).

159. See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015) (Jacobs, J. dissenting) (declaring majority opinion and SEC are ignoring Dodd-Frank's strict reading). Similarly, the Fifth Circuit explained the “plain-meaning” canon of statutory interpretation requires the court to apply the statute's text if clear. See *Asadi*, 720 F.3d at 622–25 (explaining Fifth Circuit's statutory interpretation analysis). Congress used the statutorily-defined term “whistleblower” throughout the anti-retaliation section, which illustrates that the definition applies throughout. See *id.* at 622–27 (analyzing Dodd-Frank's text). Congress could have used more neutral words, such “employee” or “individual,” but chose to use the word “whistleblower throughout” the statute. See *id.* (analyzing statutory text); see also *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *5 (D. Colo. July 19, 2013) (citing *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)) (“When the statutory text is plain and unambiguous, it is the Court's job to apply the statute according to its terms.”); *Deykes v. Cooper-Standard Auto., Inc.*, Case No. 2:16-cv-11828, 2016 WL 6873395, at *2 (E.D. Mich. Nov. 22, 2016) (stating courts are not responsible for setting optimum policy).

160. See *Banko*, 20 F. Supp. 3d at 756 (applying principles of statutory interpretation). Dodd-Frank specifies who a whistleblower is in § 78u-6(a)(6), and the later provision of § 78u-6(h)(1)(A) is subordinate to the definition. See *id.* (analyzing Dodd-Frank's text); see also *Deykes*, 2016 WL 6873395, at *2 (citing *Antonin Scalia et al.*, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 226 (1st ed. 2012)) (“[W]hen a ‘statute's definitional section says a word means something, the clear import is that this is the *only* meaning.”).

161. See *Banko*, 20 F. Supp. 3d at 756 (“[T]he ‘whistleblower protection’ provided by Section 78u-6(h) is only available to individuals who meet the Dodd-Frank definition of ‘whistleblower found in Section 78u-6(a).’”); *Wagner*, 2013 WL 3786643, at *5 (D. Colo. July 19, 2013) (“No matter what else one might say about subsection (iii), it is part of section (h) which relates only to ‘whistleblowers.’ That term is defined in the statute There is no separate or different definition of ‘whistleblower’ in subsection (iii).”); see also *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 653 (E.D. Tenn. 2015) (“[Dodd-Frank provides] only one definition of a whistleblower, and it is found in the definition section.”), *aff'd*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017).

tion because “[r]eporting to the SEC is the precondition that triggers the anti-retaliation protection of the statute.”¹⁶² However, rather than focus on applying the statutory text of Dodd-Frank, the majority improperly focused on increasing whistleblower protection.¹⁶³ The danger in the majority’s approach is that judges may be inclined to interpret whistleblower statutes beyond their intended reach.¹⁶⁴ When drafting Dodd-Frank, if Congress wanted to broaden Dodd-Frank’s definition, it could have used a more generic and broad term than “whistleblower,” as it did in Sarbanes-Oxley.¹⁶⁵ Yet, because “Congress . . . used the term ‘whistleblower’ throughout . . . we must give that language effect.”¹⁶⁶

B. *Boo! Scaring Away the Majority’s Chevron Deference*

Chevron deference is inapplicable because Congress expressly addressed who qualifies as a whistleblower in Dodd-Frank’s definition section.¹⁶⁷ The SEC is authorized to release its opinion and file amicus briefs to advocate its position, but ultimately, the interpretation resides in the courts.¹⁶⁸ If courts were to defer to the SEC’s interpretation, the defini-

162. See *Verfueth*, 65 F. Supp. 3d at 645 (holding Dodd-Frank anti-retaliation provisions do not apply to employees who internally report suspected wrongdoing).

163. See *Asadi*, 720 F.3d at 622 (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)) (“When faced with questions of statutory construction, ‘we must first determine whether the statutory text is plain and unambiguous’ and, ‘[i]f it is, we must apply the statute according to its terms.’” (alteration in original)). Thus, the court’s analysis “begins and ends with the text.” See *id.* at 622 (citing *Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). To find Dodd-Frank unambiguous would be ignoring applicable canons of statutory interpretation. See *Banko*, 20 F. Supp. 3d at 756 (finding Dodd-Frank unambiguous under canons of statutory interpretation).

164. See *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting) (“The only palpable danger lurking here is that bureaucrats and federal judges assume and exercise power to redraft a statute to give it a more respectable reach.”); see also *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014) (declaring that courts are not responsible for interpreting statutes to reach desired results).

165. See *Verble*, 148 F. Supp. 3d 644 at 653–54 (noting Congress chose to limit scope of Dodd-Frank instead of using more generic terms like it did when drafting Sarbanes-Oxley); *Verfueth*, 65 F. Supp. 3d at 645 (explaining Congress could have used more generic terms than “whistleblower” with respect to Dodd-Frank).

166. *Asadi*, 720 F.3d at 626–27 (analyzing Congress’ use of specific words in Dodd-Frank); *Banko*, 20 F. Supp. 3d at 756 (“Congress could have used a word other than ‘whistleblower’ but chose not to.”).

167. See *id.* at 630 (“Because Congress has directly addressed the precise question at issue, we must reject the SEC’s expansive interpretation of the term ‘whistleblower.’”). *Chevron* deference is not needed when the term ‘whistleblower’ is clearly defined in the statute. See Walker, *supra* note 93, at 1769 & n.66 (citing cases relying on *Asadi*) (explaining *Chevron* deference is applicable when statutory text is ambiguous).

168. See *Asadi*, 720 F.3d at 620 (refusing to extend Dodd-Frank’s statutory reach despite SEC’s opinion); see also *Verfueth*, 65 F. Supp. 3d at 645 (“Congress could not have defined ‘whistleblower’ more clearly, and yet the SEC apparently

tion of whistleblower in Dodd-Frank and the terms in § 78u-6(h)(1)(A) would be read out of the statute.¹⁶⁹ Specifically, there would be no purpose to the phrase “to the Commission” in the statutory definition of whistleblower if Dodd-Frank whistleblower expanded to internal reporters.¹⁷⁰ Such an interpretation would render the definition of whistleblower meaningless.¹⁷¹ Instead, Congress requires an individual to meet the definition of whistleblower before being granted anti-retaliation protection under one of the § 78u-6(h)(1)(A) categories.¹⁷² Because Sarbanes-Oxley was already enacted to protect internal reporters when Dodd-Frank was created, Congress’s intent is clear in creating different protection measures for external reporters.¹⁷³ Furthermore, while the Constitution empowers Congress with the ability to “legislate . . . [t]he SEC does not have the power to re-write legislation, and neither does the

believes that entire definition should be case aside on the flimsy grounds that Congress really didn’t mean it.”). The SEC’s interpretation does not resolve the issue because it is the courts who are the “arbiter of statutory construction” and therefore “are not obligated to follow” the Commission’s interpretation. *See SEC Issues Interpretation Regarding Definition of “Whistleblower” Under the Dodd-Frank Act’s Anti-Retaliation Provision*, *supra* note 71 (emphasizing federal court’s responsibility in interpreting issues).

169. *See Asadi*, 720 F.3d at 628 (noting that § 78u-6(a) would be superfluous if Subdivision (iii) were treated as exception); *Lamb v. Rockwell Automation Inc.*, Case No. 15-CV-1415-JPS, 2016 WL 4273210, at *4 (E.D. Wis. Aug. 12, 2016) (“To allow the SEC’s rule to hold otherwise would read that . . . term itself out of Subsection 78u-6(h)(1)(A).”); *Verfueth*, 65 F. Supp. 3d at 645–46 (“If the Dodd-Frank protections were construed broadly, it would essentially replicate and render moot the [Sarbanes-Oxley] whistleblower protections already in place”); *see also Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756–57 (N.D. Cal. 2013) (“Construing the statute in this matter would violate the surplusage canon that every word is to be given effect.” (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))).

170. *See Deykes v. Cooper-Standard Auto., Inc.*, Case No. 2:16-cv-11828, 2016 WL 6873395, at *2 (E.D. Mich. Nov. 22, 2016) (“If the Court were to adopt Deyke’s definition of ‘whistleblower,’ the words ‘to the Commission’ would serve no purpose at all.”).

171. *See Verfueth*, 65 F. Supp. 3d at 645 (“The SEC’s interpretation renders an entire section of the statute superfluous, namely, the definition of ‘whistleblower’ itself.”).

172. *See Asadi*, 720 F.3d at 628 (explaining § 78u-6(h)(1)(A) only explains conduct protected under Dodd-Frank instead and does not define whistleblower). “Specifically, this category [subsection (iii)] protects whistleblowers from retaliation, based not on the individual’s disclosure of information to the SEC but, instead, on that individual’s other possible required or protected disclosure(s).” *Id.* at 627.

173. *See Verfueth*, 65 F. Supp. 3d at 645–46 (“If the Dodd-Frank protections were construed broadly, it would essentially replicate and render moot the SOX whistleblower protections already in place, which do not require reporting directly to the SEC. Thus, it makes much more sense to assume that Congress was attempting to create something different than pre-existing law, and it did so by defining ‘whistleblower’ and then creating certain protections for those who qualify.”).

[c]ourt.”¹⁷⁴ Accordingly, *Chevron* deference should not be applied because Dodd-Frank’s definition of whistleblower is unambiguous.¹⁷⁵

C. *Alive and Well: Sarbanes-Oxley Grants Proper Protection*

Even if whistleblowers cannot obtain protection under Dodd-Frank, those who internally report wrongdoing can seek protection under Sarbanes-Oxley.¹⁷⁶ The only consequence of applying Dodd-Frank as written is that such whistleblowers would not reap the financial incentives and whistleblower-friendly benefits of Dodd-Frank.¹⁷⁷ However, those consequences do not prevent protection and relief under Sarbanes-Oxley.¹⁷⁸ If Congress wanted to replace Sarbanes-Oxley’s whistleblower protection

174. *Deykes*, 2016 WL 6873395, at *3 (emphasizing Congress’s responsibility to enact laws).

175. *See Asadi*, 720 F.3d at 626–27 (explaining that *Chevron* deference does not apply to Dodd-Frank); *Deykes*, 2016 WL 6873395, at *3 (quoting *Asadi*, 720 F.3d at 622) (“To give [Dodd-Frank] another construction would require an unnatural reading. The [c]ourt will not strain to find a contradiction where none exists. Rather, the [c]ourt must ‘interpret provisions of a statute in a manner that renders them compatible, not contradictory.’”).

176. *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 156, 160 (2d Cir. 2015) (Jacobs, J., dissenting) (emphasizing whistleblowers who internally report suspected violations of securities law are not without protection). Rather, Berman filed his whistleblower retaliation claim under the wrong statute. *See id.* (noting Berman could have received protection under Sarbanes-Oxley instead of Dodd-Frank). The Fifth Circuit similarly recognized that *Asadi* could have raised a retaliation claim under Sarbanes-Oxley. *See Asadi*, 720 F.3d at 628 n.11 (noting Sarbanes-Oxley would have granted *Asadi* proper retaliation protection). An individual’s failure to file under Sarbanes-Oxley may “lead to unfortunate results[,]” but this outcome is not due to lack of available protection. *See Banko*, 20 F. Supp. 3d at 757 (“While this forfeiture may sometimes lead to unfortunate results where individuals who take socially-desirous actions fail to be granted protection, this conclusion comes as the result of that individual’s own delay and does not bear upon the availability of . . . relief.”).

177. *See Berman*, 801 F.3d at 160 (Jacobs, J., dissenting) (declaring Berman would still have received whistleblower protection under Sarbanes-Oxley). Under Sarbanes-Oxley, a whistleblower would receive “the same protection every securities whistleblower had before the passage of Dodd-Frank in 2010, and more protection than any securities whistleblower had before the passage of Sarbanes-Oxley in 2002.” *Id.* There would be “[n]o market collapses, no castles fall[ing]” under a strict reading of Dodd-Frank. *See id.* at 159 (emphasizing that there would be no negative consequences to using strict reading of Dodd-Frank). In contrast to Sarbanes-Oxley, Dodd-Frank provides plaintiffs greater monetary damages, the ability to file first in federal court, and a longer statute of limitations. *See Asadi*, 720 F.3d at 629 (comparing benefits of bringing claim under Dodd-Frank versus Sarbanes-Oxley). For a further discussion of Dodd-Frank’s incentives and procedures as compared to those provided by Sarbanes-Oxley, see *supra* notes 53–64 and accompanying text.

178. *See Berman*, 801 F.3d at 155 (Jacobs, J. dissenting) (explaining that Berman could still receive protection under Sarbanes-Oxley); *Verble v. Morgan Stanley Smith Barney LLC*, 148 F. Supp. 3d 644, 653–54 (E.D. Tenn. 2015) (noting plaintiffs may still seek protection under Sarbanes-Oxley), *aff’d*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017).

program, Congress could have done so itself.¹⁷⁹ The enactment of both Sarbanes-Oxley and Dodd-Frank illustrates Congress's intent to create a different type of protection.¹⁸⁰ Yet, by finding a way around Sarbanes-Oxley, the majority's decision superseded Sarbanes-Oxley, rendering it obsolete.¹⁸¹

V. GHOST OF WHISTLEBLOWERS YET TO COME

After *Berman*, and in conjunction with Dodd-Frank and Sarbanes-Oxley, an employee should report suspected wrongdoing in the workplace to the SEC to be protected from retaliation and remove any question as to whether the employee is a whistleblower for purposes of Dodd-Frank and Sarbanes-Oxley.¹⁸² Employees may shift their reports to the SEC instead of internally reporting first because of this uncertainty.¹⁸³ In addition,

179. See Walker, *supra* note 93, at 1769 (“Because Congress did not act to extend the anti[-]retaliation provisions of Dodd-Frank to internal whistleblowers, such whistleblower could not be protected.”); see also Deykes, 2016 WL 6873395, at *2 (emphasizing Congress’s responsibility in writing and enacting laws); *Verfueth*, 65 F. Supp. 3d at 645–46 (stating that it makes more sense for Congress to have wanted different whistleblower protections because protection afforded by statutes is different); *Banko*, 20 F. Supp. 3d at 757 (illustrating that plaintiffs can still receive protection under Sarbanes-Oxley, even if Dodd-Frank is not expanded).

180. See *Asadi*, 720 F.3d at 630 (explaining Congress’ intent is clear because Congress defined whistleblower in § 78u-6(a)(6) of Dodd-Frank); *Verfueth*, 65 F. Supp. 3d at 645–46 (“[I]t makes much more sense to assume that Congress was attempting to create something *different* than pre-existing law, and it did so by defining ‘whistleblower’ and then creating certain protections for those who qualify.”). “Congress specified that a ‘whistleblower,’ not merely any individual, is protected from employer retaliation on the basis of the whistleblower’s protected activities.” *Asadi*, 720 F.3d at 630. Congress clearly defines a whistleblower as an individual who provided information of suspected securities law violations to the SEC. See *id.* (finding Dodd-Frank’s whistleblower to be clear). Further, the dissent in *Berman* separately defined Sarbanes-Oxley’s whistleblower protection as protecting employees who report suspected violations to employers and that of Dodd-Frank as individuals who report suspected violations to the SEC. See *Berman*, 801 F.3d at 156 (Jacobs, J., dissenting) (distinguishing between whistleblowers under Dodd-Frank and Sarbanes-Oxley). Without evidence of Congress’s intention in drafting Dodd-Frank, the court should presume that Congress “says in a statute what it means and means in a statute what it says there.” See *Verble*, 148 F. Supp. 3d at 656 (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)) (internal quotation marks omitted) (analyzing Congress’s intent in enacting Dodd-Frank and Sarbanes-Oxley).

181. See *Asadi*, 720 F.3d at 629–30 (stating Dodd-Frank will become moot if statute replicates Sarbanes-Oxley’s protections).

182. See DuBon, *supra* note 94, at 3 (explaining employees who are unsure regarding whom to contact for whistleblower protection should contact SEC because of certainty in protection). In the event that an employee directly reports to the SEC, reporting would “eliminate any inquiry as to whether the employee qualifies as a ‘whistle-blower.’” See *id.* Further, “[i]t is well-settled that whistleblower protections of [Sarbanes-Oxley] apply regardless of whether an employee reports to the SEC.” Shen, *supra* note 53, at 1 (explaining whistleblowers enjoy better protection if they report to SEC).

183. See DuBon, *supra* note 94, at 3 (explaining employees’ motivation to report externally).

employers may expect a continued shift in more actions filed under Dodd-Frank than under Sarbanes-Oxley because of Dodd-Frank's increased incentives.¹⁸⁴ Employers, particularly those in the Second Circuit, should therefore be mindful that they could be held liable for retaliatory actions against internal whistleblowers.¹⁸⁵ As the circuit split continues to blur the distinction between Dodd-Frank's and Sarbanes-Oxley's whistleblower programs, employers should take measures to mitigate whistleblower retaliation risks.¹⁸⁶ On one side, applying *Asadi* may encourage employees to report to the SEC, despite employer compliance programs, to ensure pro-

184. See Shen, *supra* note 53, at 4 (“[The] plaintiff-friendly aspects of Dodd-Frank may in turn affect the frequency with which employees file whistleblower retaliation claims”). As Shen notes, with the plaintiff-friendly decision in *Berman*, the expanded protection of Dodd-Frank may result in an increase in anti-retaliation protection claims for internal whistleblowers under the statute. See *id.* (explaining potential impact of *Berman* on future claims); Tracey Richelle High et al., *Who Do Dodd-Franks’ Anti-Retaliation Provisions Protect*, BLOOMBERG BNA (Dec. 13, 2016), <https://www.bna.com/doddfranks-antiretaliation-provisions-n73014448503/> [<https://perma.cc/UG3C-A6FA>] (“Acceptance of the broad interpretation of the Dodd-Frank anti-retaliation provision renders SOX cause of action dead letter to a significant extent, as the Dodd-Frank cause of action is far more enticing individuals given its procedural and substantive advantages”); 2016 ANNUAL REPORT, *supra* note 61, at 1 (illustrating increasing number of Dodd-Frank whistleblower claims and awards).

185. See Baker & Flinn, *supra* note 20 (analyzing effect of *Berman* on future cases); Goldin et al., *supra* note 20, at 3 (explaining implications of circuit split). Companies should be aware of the circuit split, particularly in the Second Circuit, and understand that employees who internally report suspected wrongdoing, but not to the SEC, could obtain anti-retaliation protection under Dodd-Frank. See *id.* (emphasizing importance of employer awareness of *Berman*'s decision in certain jurisdiction). In an effort to prevent liability and mitigate risk, companies should review their whistleblower policies and procedures, particularly because of growing whistleblower complaints. See Hamid et al., *supra* note 65 (discussing ways companies can prevent liability stemming from future retaliation claims brought by whistleblowers).

186. See Baker & Flinn, *supra* note 20 (suggesting employers be aware of split in order to mitigate liability); see also McLucas et al., *supra* note 20 (suggesting strategies for employers to limit whistleblower retaliation liability). Employers “should consider” the following strategies:

- [1] processes to review internal reports of compliance concerns;
- [2] written procedures for safeguarding the identity of reporting employees;
- [3] periodic mandatory training for managers on confidentiality and anti-retaliation;
- [4] well publicized communications across the organization about internal reporting mechanisms;
- [5] regular formal opportunities for internal reporting, including during annual certification and employee exit processes; and
- [6] internal processes to resolve retaliation complaints.

Id. In addition, employers may “implement[] compliance programs that strongly encourage internal reporting, while simultaneously promoting policies and practices to reassure employees that internal disclosures will not result in adverse employment action against the disclosing employee.” Shen, *supra* note 53, at 4 (suggesting policy changes for employers).

tection.¹⁸⁷ Conversely, applying *Berman* may result in an employer's increased liability and litigation costs stemming from retaliation claims.¹⁸⁸ Employers will have to adapt to the divergent impact on their companies regardless of the circuit split's final resolution.¹⁸⁹

This trend of uncertainty has continued in the district courts during the past year.¹⁹⁰ Further, the divide between the narrower and broader interpretations of Dodd-Frank has remained among circuit courts, as well.¹⁹¹ The Sixth Circuit heard an appeal on a similar issue but affirmed the lower court's decision to prevent protection to an internal whistleblower under Dodd-Frank on different grounds.¹⁹² However, the

187. See Shen, *supra* note 53, at 4 (explaining consequences of Supreme Court decision favoring *Asadi*). Employees may be encouraged to ignore an employer's internal reporting programs and report suspect wrongdoing to the SEC to guarantee protection under Dodd-Frank. See *id.* (discussing employee's potential actions to receive protection). Such consequence may result in increased SEC enforcement, financial harm, and "reputational [risks]" to the employers if employees consistently report to the SEC. See *id.* (discussing impact of employees reporting wrongdoing externally); Martin T. Wymer, *Ninth Circuit Widens the Circuit Split on Whether Dodd-Frank Protects Internal Whistleblowers*, BAKERHOSTETLER (Mar. 14, 2017), <https://www.bakerlaw.com/alerts/ninth-circuit-widens-the-circuit-split-on-whether-dodd-frank-protects-internal-whistleblowers> [<https://perma.cc/47U7-P3UM>] ("[I]f the *Asadi* view is adopted, employees . . . may be encouraged to report to the SEC to obtain additional Dodd-Frank protections . . .").

188. See *id.* (explaining consequences of Supreme Court decision favoring *Berman*).

189. See *id.* ("Regardless of how the court split is resolved, the outcome may yield a double-edged sword for employers.").

190. Compare *Wiggins v. ING U.S., Inc.*, Civil Case No. 3:14-CV-01089 (JCH), 2015 WL 8779559, at *1–2 (D. Conn. Dec. 15, 2015) ("In light of *Berman*, the court now holds that *Wiggins* is entitled to file a Second Amended Complaint, which will include a Dodd-Frank claim . . ."), *appeal dismissed*, No. 15-2262 (2d Cir. Sept. 19, 2016), and *Lutzeier v. Citigroup Inc.*, Case No. 4:14CV183 RLW, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015) ("Based upon the SEC's new interpretive rule and the decision of *Berman* . . . the [c]ourt finds that Dodd-Frank is ambiguous and Court affords deference to [the SEC]."), with *Lamb v. Rockwell Automation Inc.*, Case No. 15-CV-1415-JPS, 2016 WL 4273210, at *4 (E.D. Wisc. Aug. 12, 2016) (finding *Asadi* persuasive), and *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 664–65 (E.D. Va. 2015) (accepting Fifth Circuit's reasoning in *Asadi*), and *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 653 n.6 (E.D. Tenn. 2015) (recognizing Fifth Circuit's reasoning in *Asadi* was similar to that of court), *aff'd*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *petition for cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017); see also Baker & Flinn, *supra* note 20 (analyzing effect of *Berman* on future cases).

191. See *Somers v. Dig. Realty Tr. Inc.*, No. 15-17352, 2017 WL 908245, at *1 (9th Cir. Mar. 8, 2017) (determining issue of whether Dodd-Frank protects internal whistleblowers); *Verble v. Morgan Stanley Smith Barney, LLC*, No. 15-6397, 2017 WL 129040, at *1 (6th Cir. Jan. 13, 2017) (analyzing issue of whether Dodd-Frank should be expanded).

192. See DuBon, *supra* note 94, at 3 (predicting Sixth Circuit would face similar issue in *Verble*); see also *Verble*, 148 F. Supp. 3d at 647–48 (holding whistleblowers under Dodd-Frank must notify SEC to receive retaliation protection). An employee of Morgan Stanley alleged he was terminated after he became aware of his employer's criminal conduct and started to leak information to the government. See *Verble*, 148 F. Supp. 3d at 647–48 (explaining facts of case). The employee

Supreme Court denied the plaintiff's "[p]etition for [w]rit of [c]ertiorari, thereby declining an opportunity to resolve the conflict amongst circuit courts."¹⁹³ In March 2017, the Ninth Circuit continued the divide by ruling in favor of the Second Circuit's opinion.¹⁹⁴ Further, changes in the new administration and the appointment of a new Supreme Court Justice may influence a final decision on the split.¹⁹⁵ Regardless, the issue will ultimately be left unresolved until it reaches the Supreme Court.¹⁹⁶ In the meantime, if there is something strange in the workplace, employees are not entirely certain who to call.¹⁹⁷

subsequently filed claims under Dodd-Frank, Sarbanes-Oxley, and the False Claims Act, but because the employee did not follow Sarbanes-Oxley procedures properly, the trial court dismissed his Sarbanes-Oxley retaliation claim for lack of jurisdiction. *See id.* In addition, the court dismissed the employee's Dodd-Frank claim by relying on *Asadi*. *See id.* The district court held that the plaintiff improperly waited to provide information to the SEC once he was terminated and, therefore, did not qualify as a whistleblower in the definition of section 78u-6(a)(6). *See* Noller et al., *supra* note 61 (reporting *Verble* court declined to follow *Berman*). The district court further held that there was no alternative definitions of "whistleblower" under § 78u-6(h)(1)(A), contrary to the SEC's opinion. *See id.* Accordingly, the district court found the plaintiff was not a whistleblower under § 78u-6(h)(1)(A)(iii). *See id.* On appeal, a unanimous bench affirmed the dismissal of the plaintiff's Dodd-Frank claim but on "grounds . . . not relied on by the district court." *See Verble*, 2017 WL 129040, at *4 (denying plaintiff's Dodd-Frank claims on different grounds).

193. *See* Harris M. Mufson, *U.S. Supreme Court Passes on Opportunity to Address Scope of Dodd-Frank "Whistleblower" Provision*, NAT'L L. REV. (Mar. 23, 2017), <http://www.natlawreview.com/article/us-supreme-court-passes-opportunity-to-address-scope-dodd-frank-whistleblower> [<https://perma.cc/MNC9-MB63>] (reporting that plaintiff's writ of certiorari in *Verble* was denied). The Supreme Court could hear a future case on the issue out of the Third Circuit in *Danon*. *See id.* (noting potential future writ of certiorari from Third Circuit).

194. *See Somers*, 2017 WL 908245, at *1 (holding employees who report suspected wrongdoing internally are granted protection under Dodd-Frank without having to report to SEC).

195. *See Wymer*, *supra* note 187 ("Judge Gorsuch . . . has demonstrated that he is no fan of *Chevron* deference, and his addition to the Court may increase the chance that a majority will interpret Dodd-Frank's terms consistent with their plain meaning."). Moreover, under the Trump administration, the SEC may revisit its interpretation of Dodd-Frank protection, or the legislature may "attempt[] to overhaul Dodd-Frank[.]" which may impact whistleblower protection. *See id.* (explaining potential influence of new administration on Dodd-Frank's whistleblower protection program).

196. *See* DuBon, *supra* note 94, at 3 (predicting Sixth Circuit would face similar issue in *Verble*); Mufson, *supra* note 193 ("Until the Supreme Court addresses this important issue . . . the courts will continue to issue conflicting decisions as to who is a covered 'whistleblower' under Dodd-Frank.").

197. For a further discussion of the uncertainty in the courts, see *supra* notes 76–152 and accompanying text.