# PROCEEDING LEGALLY: CLARIFYING THE SEC/DODD-FRANK WHISTLEBLOWER INCENTIVES

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*The 2016 U.S. presidential election was won on—among other things—promises to deregulate and to repeal the Dodd-Frank Act. Rather than completely eliminating the SEC Whistleblower Program created by Section 922 of that Act, I propose a legislative solution to the split in the Federal Circuit Courts of Appeals regarding the scope of the program's anti-retaliation protections. The legislative proposal promises to better align corporate interests and regulatory goals, save costly and time-consuming litigation, and remove employees' disincentives to report securities law violations within their company.*

*I begin by highlighting the imprecision of the concepts and terminology of whistleblowing. I trace the usage of the phrase "blow the whistle" from the 1930s to a set of twenty-two distinct modern-day definitions. Then, after closely considering the history of the SEC whistleblower program and the split between the circuits, I discuss the underlying policy basis for the program and corporations' objections to it. Finally, I propose that—in furtherance of both the policy basis for Dodd-Frank and in light of corporate concerns—lawmakers should amend 15 U.S.C. § 78u-6(h) to clearly protect individuals who disclose securities law violations within their corporations.*



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## INTRODUCTION

The financial crisis that culminated in the market crash of 2008 was multifaceted and complex. In total, it "caused $17 trillion in household wealth to disappear and raised unemployment to over 10%."[1] While scholars and commentators disagree on the precise causes of the crisis, key contributors included the way mortgages were collateralized, securitized, bundled, rated, sold on, and hedged by the market.[2] Congress responded. After hear-

[1] Matt Reeder, *You Can't Stop What You Can't See: Complementary Risk Mitigation Through Compensation Disclosure*, 8 WM. & MARY BUS. L. REV. 241, 245–46 (2017) (citing FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 389 (2011) ("Seventeen trillion dollars in household wealth evaporated within 21 months, and reported unemployment hit 10.1% at its peak in October 2009.")).

[2] *See, e.g.*, Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1249 (2011) ("[I]t was the 'big banks'—by funding the subprime lenders, buying their mortgages and securitizing them, slicing them to form CDOs and synthetic CDOs through derivatives, and leaning on the credit rating agencies to get AAA ratings for junk—that were the primary cause of the financial crisis."); Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373, 376 (2008) (blaming "conflicts of interest, investor complacency, and overall complex-

ing testimony about the failures of regulators and executives to identify and stop rampant fraud and corruption in the housing and financial markets, legislators passed the 850-page Dodd-Frank Wall Street Reform and Consumer Protection Act in July 2010.[3] A key Congressional goal was to protect consumers and restore public trust by improving transparency, accountability, and integrity throughout the financial sector, housing market, and banking industry.

One important legal innovation was geared towards encouraging corporate insiders to blow the whistle on fraud and corruption in the securities industry by offering financial rewards and greater protections against reprisals. To this end, section 922 of the Act created the Securities and Exchange Commission's (SEC) Whistleblower Incentives and Protection program by adding section 21F to the Securities Exchange Act.[4]

Five years after enactment, the SEC reported that this new provision had proven itself successful and attributed much of that success to anonymous whistleblowers who exposed fraud before it could cause systemic harm.[5] By the time of the SEC's Annual Report to Congress on the Dodd-Frank Whistleblower Program in 2015, the program had paid more than $54 million in whistleblower rewards.[6] "In fiscal year 2015 alone," the program received almost four thousand reports from whistleblowers and "more than 120 whistleblower award claims."[7] "The SEC received . . . more than 14,000 [tips from all over the world] since the program started."[8] In light of this novel program's early successes, this Article makes a policy-based legislative proposal to resolve the circuit split over whom the SEC program should protect against reprisals for blowing the whistle.

My ultimate conclusion is that Congress should build on the early successes of the program, clarify its intent, and amend the language of 15 U.S.C. § 78u–6(h) to extend whistleblower protections specifically to include those individuals who disclose misconduct internally to their corpora-

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ity" which were exacerbated by greed); Jeffrey M. Lipshaw, *The Epistemology of the Financial Crisis: Complexity, Causation, Law, and Judgement*, 19 S. CAL. INTERDIS. L. J. 299 (2010) (arguing that complexity led to the crisis and poses an insurmountable obstacle to regulators).

[3] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].

[4] *Id.* § 922, 15 U.S.C. 78u–6 (2016).

[5] U.S. SEC. AND EXCH. COMM'N, OFFICE OF THE WHISTLEBLOWER, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2015), https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf [hereinafter SEC REPORT ON DODD-FRANK WHISTLEBLOWER PROGRAM].

[6] *Id.* at 1.

[7] *Id.*

[8] Richard L. Cassin, *SEC Warns Advisors and Brokers to Comply with Whistleblower Protection Rule*, THE FCPA BLOG (Oct. 31, 2016, 7:00 AM), http://www.fcpablog.com/blog/2016/10/31/sec-warns-advisors-and-brokers-to-comply-with-whistleblower.html?utm_source=feedburner&utm_medium=feed&utm_campaign=feed%3A+fcpablog%2FsLbh+%28The+FCPA+Blog%29#sthash.iydyooFK.dpuf ("The SEC received about 4,000 tips last year and more than 14,000 since the program started. Tips have come from individuals in all 50 states and the District of Columbia and 95 foreign countries.").

tion—rather than just for those who disclose to the SEC.[9] This solution is effective for two primary reasons. First, it will allay criticisms of the program that corporations have raised. For example, concerns that employees might deliberately withhold information during an internal investigation in order to present that same information to the SEC in exchange for a monetary award.[10] Second, it will further enhance consumer protections by promoting corporate financial integrity and accountability.[11] Once Congress clarifies the scope of the SEC's program and stops extended litigation over the meaning of *whistleblower* in this context, the program can serve as an international gold standard for promoting and protecting whistleblowers.[12]

This Article consists of four substantive parts and a conclusion. In reaching the conclusion that Congress should clarify the SEC program's whistleblower protections, this Article strives to achieve a number of ancillary goals along the way.

Part I examines the history and use of the term whistleblower as it evolved from the phrase "blow the whistle."[13] While this inquiry is informative, it is not conclusive.

Part II considers the myriad of modern-day definitions of whistleblower. In addition to highlighting the discord between definitions in different contexts and between entities, Part II explores the SEC's definition

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[9] The Fifth Circuit reads the statutory language narrowly, interpreting the word "whistleblower" to mean only what it is defined as within the statute each time it occurs elsewhere in the statute. The Second and Ninth Circuits, however, read the anti-retaliation provisions as broadening the meaning of the term for the sake of those protections only. *See infra* Part III.

[10] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34306 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249) ("A number of commenters urged that our rules also preclude an individual from making a 'voluntary' submission after the individual has been contacted for information in the course of the company's internal investigation or other internal review.").

[11] I assert here (and later argue) that clarifying these protections will promote corporate accountability for two reasons: First, it will incentivize greater whistleblowing, which will bring to light corporate misconduct. Second, it will allow for a right of action against corporations that retaliate against whistleblowers. *See, e.g.*, Richard L. Cassin, *SEC says NeuStar Tried to Impede Whistleblowing*, THE FCPA BLOG (Dec. 20, 2016, 7:05 AM), http://www.fcpablog.com/blog/2016/12/20/sec-says-neustar-tried-to-impede-whistleblowing.html?utm_source=feedburner&utm_medium=feed&utm_campaign=feed%3A+fcpablog%2FsLbh+%28The+FCPA+Blog%29 (explaining that the SEC fined NeuStar $180,000 for including language in its severance agreements that would have required a departing employee to forfeit nearly all of his or her severance pay for "sending regulators 'any communication that disparages, denigrates, maligns, or impugns' the company").

[12] This is not to say that this one change will render the SEC whistleblower program perfect, but instead that this change will allow the program to embody a best practice in which corporate incentives and government interests are well balanced.

[13] As I detail in Part II, the term whistleblower has a great number of meanings across different contexts in the academic, policy, legal, and international contexts. Projects considering how to define and use this term are timely and helpful because they will inform the choices of domestic lawmakers, individual corporations, and international policymakers alike. The problem now confronting U.S. federal district courts with respect to the SEC whistleblower program is an example of how failing to define clearly the context of a whistleblower program can have later consequences with far-reaching effects.

of whistleblower and the internal inconsistency demonstrated by the split between the Second and Fifth Circuits on the question of whether, under this definition, protections extend to individuals who report within their company. Following this discussion of the circuit split, Part II adds context by recognizing several international perspectives.

Part III considers the definition of the SEC's program in particular and questions its scope relative to the two subsets of individuals the SEC claims the law protects: those who provide information regarding violations of securities laws either (i) internally to their company or (ii) directly to the SEC. I begin the section by discussing the legislative history of the program and the SEC's rulemaking process. Then, in light of this history, I analyze in detail the split between the Second and Fifth Circuits on the question of whether individuals who disclose violations of law internally to their company should be protected by law. I conclude that the Fifth Circuit's strict reading of the statute is legally correct.

Part IV argues that, even though the Fifth Circuit may correctly read the black letter law, the Second Circuit's decision charts a better course for the SEC in light of the purpose of Dodd-Frank and in light of corporations' objections and criticisms of both the law and the SEC's rule. Consequently, I propose that, rather than leaving this question to the Supreme Court,[14] lawmakers should amend 15 U.S.C. § 78u–6(h) to specifically protect against reprisal actions aimed at those individuals who disclose securities law violations using reporting channels internal to their corporation.

## I. A Brief Historical Survey of Blowing the Whistle and its Etymological Evolution

The *Oxford English Dictionary* (*OED*) attributes the first use of the word whistleblower[15] to a 1970 *New York Times* column written by John Hamilton, which recounts reprisals against a councilman who disclosed corruption in the New York City Council.[16] In 2013, Ben Zimmer of the *Wall Street Journal* credited Ralph Nader with introducing the modern use of the term—and to raising its esteem from slur to honorific—by tracing the usage of "blow the whistle" from early twentieth-century sports parlance, where it was used in 1936 to describe a sports figure who "unforgivably" "denounced the . . . fakery" of professional wrestling, to Nader's "terminological salvage job" of the early 1970s.[17] Vandekerckhove points out that the

[14] On June 26, 2017—after this Article was written, but before going to press—the Supreme Court granted certiorari on this issue in *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 85 U.S.L.W. 3600 (2017).

[15] *Whistleblower*, OED Online, http://www.oed.com/view/Entry/228546?rskey=JohfBz&result=1#eid (last visited Mar. 18, 2017).

[16] John A. Hamilton, *Blowing the Whistle on "The Bosses"*, N.Y. Times, Mar. 23, 1970, at 40.

[17] Ben Zimmer, *The Epithet Nader Made Respectable*, Wall St. J. (July 12, 2013), https://www.wsj.com/articles/SB10001424127887323368704578596083294221030.

*OED* did not even contain the term until its 1986 edition and situates the organizational application of the term in the early 1970s.[18] Though this narrative dovetails nicely with the current body of literature cataloguing whistleblower reprisals,[19] a closer look at the term's evolution suggests a more complicated history.

### *A. First Uses in the 1930s*

The *OED* attributes the first idiomatic use of "blow the whistle" to P.G. Wodehouse's 1934 novel *Right Ho, Jeeves*.[20] Seemingly overlooked is an important reference made that same year in a *New York Times* editorial.[21] The *Times* editors use the phrase in the same context and in the same idiomatic sense in which the word whistleblower is often used today. The piece praised the Federal Deposit Insurance Corporation (FDIC) Chairman's willingness to admit that the FDIC possessed limited authority over certain state banks.[22] The article also warned of over-regulation and praised Senator Glass, one of the godfathers of banking regulation,[23] for guarding against overreach and "stand[ing] ready to blow the whistle the instant the ball is out of bounds."[24] This early usage demonstrates a positive, though not universally accepted, connotation.[25]

### *B. The 1940s: Watchdogs, Politicians, Gangsters, and a Private Mechanism for Law Enforcement*

In 1945, in a piece highly critical of her sympathetic views toward Russia, the *Los Angeles Times* said that the First Lady of the United States, Eleanor Roosevelt, blew the whistle by saying that Soong Mei-ling, China's First Lady, "could talk very convincingly about democracy and its aims and

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[18] WIM VANDEKERCKHOVE, WHISTLEBLOWING AND ORGANIZATIONAL SOCIAL RESPONSIBILITY: A GLOBAL ASSESSMENT 7–8 (2006).

[19] *See, e.g.*, ETHICS RES. CTR., RETALIATION: WHEN WHISTLEBLOWERS BECOME VICTIMS 1 (2012) (claiming that just over one in five people who report wrongdoing at work in the United States said they were subject to retaliation).

[20] *Whistle*, OED ONLINE, http://www.oed.com/view/Entry/228546?rskey=johfBz&result=1#eid (last visited Mar. 18, 2017).

[21] Editorial, *On Proceeding Legally*, N.Y. TIMES, Dec. 31, 1934, at 12.

[22] *Id.*

[23] See Fed. Reserve Bank of Richmond, *Carter Glass*, FED. RESERVE HISTORY, https://www.federalreservehistory.org/people/carter_glass. Senator Glass was a member of the U.S. House of Representatives for sixteen years, the Secretary of the Treasury for two years under President Wilson, and was a U.S. Senator for over twenty-five years. During his time in office, he helped to form the Federal Reserve, the FDIC, and co-sponsored the Glass-Steagall Act, which contains many principles to which Dodd-Frank seeks to return.

[24] *On Proceeding Legally*, *supra* note 21.

[25] John Kieran, *Blowing the Whistle Through Clenched Teeth*, N.Y. TIMES, Jan. 18, 1937, at 13.

ideals—but she hasn't any idea how to live it."[26] In 1947, at a dinner of the Grand Jury Association of New York County, District Attorney Frank Hogan gave a speech criticizing the perceived hesitancy to disclose wrongdoing and arguing that law enforcement without public cooperation was impossible.[27] Hogan cast whistleblowers in a positive light and asked attendees to "try to convince the public that laws could not be enforced without their cooperation and that it was a primary duty of citizens to come forward with evidence of crimes."[28] An Associated Press article in *The Washington Post* described members of Congress who thought that bills passed during an extended session were unenforceable as "ready to blow the whistle."[29]

In 1949, the *Chicago Tribune* ran a story on a Russian plan to entrap U.S. diplomats into engaging in illegal "currency speculation" and called the Russians' decision to disclose the Americans' culpability as blowing the whistle.[30] Unsurprisingly, the term appears again in a Chicago publication just months later, but offset as an idiom by quotations marks.[31] The article lamented bills pending in the Illinois legislature that would have greatly increased taxes in Chicago.[32] In it, the author cites a study conducted by a "watchdog agency" that encouraged taxpayers to "blow the whistle" on state lawmakers.[33] Weeks later, the *Chicago Tribune* again used the term to refer to the National Collegiate Athletic Association's encouragement to member schools to report violations of a rule limiting athletes' scholarships.[34]

### *C. The 1950s: A Modern Idiom is Born*

In another Chicago connection, *The Washington Post* in 1950 compared the corruption of Al Capone to that of the judges and policemen he bribed, but credited him with a gangster's ethic that forbade him from "blowing the whistle" on them.[35] In October of the same year, the *Chicago Tribune* again

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[26] John O'Donnell, *Speaking of Democracy*, L.A. Times, Dec. 8, 1945, at A4 (internal quotation marks omitted).

[27] Editorial, *Slur on Informer Assailed by Hogan*, N.Y. Times, Feb. 5, 1947, at 26 ("A sports writer, in connection with an offer to bribe a professional athlete, undertook to explain the reluctance of people to come forward with information about criminals. 'Somehow or other,' he wrote, 'Americans have a moral code which makes them detest informers. They hate to blow the whistle or yell for the cops.'").

[28] *Id.*

[29] The Associated Press, *Legislation in Legal Haze*, Wash. Post, July 31, 1949, at M4.

[30] Walter Trojan, *Bare Red Trap for American Envoys' Staffs: Invited Black Market Deals in Rubles*, Chi. Trib., Feb. 26, 1949, at 7.

[31] Harold Smith, *How Tax Bills Are Influenced by Legislators: Why You Are Forced to Pay More*, Chi. Trib., May 16, 1949, at 5.

[32] *Id.*

[33] *Id.* (internal quotation marks omitted).

[34] Editorial, *20 Violators of Sanity Code Facing Trouble: Financial Deals Are Investigated*, Chi. Trib., May 29, 1949, at A2.

[35] Walter Winchell, *In New York: Crime, Criminal Investigations, & You*, Wash. Post, May 11, 1950, at B13.

used the phrase, this time to dissociate the Socialist Party of America and Russian communist sympathizers: The socialists "can be acquitted of serving the Reds . . . . They have the goods on Stalin and his American agents, in and out of the party, and they blow the whistle on them with vehemence and discernment."[36]

In 1952, the University of Maryland football program was held up as an example when players told their coach that a fixer had tried to bribe them into keeping the point spread under a certain limit.[37] The article suggests that "athletes finally have begun to realize that they *must* blow the whistle" on bribery in sport, and concludes the piece by saying that "only criminals are afraid to blow the whistle. Honest men never are."[38]

A *Washington Post* article in 1954 equates a journalist's warning about China's military strength and alliance with Russia to blowing the whistle.[39] The next month, the phrase appears again, but in a context wholly familiar to a modern audience. In an article about how corruption in the Federal Housing Administration (FHA) harmed homeowners, led to the resignation of the FHA Commissioner, and sparked FBI and Senate investigations, the author quipped that "now at least there is a chance that Congress will blow the whistle on a home financing program that has got completely out of control."[40]

By the end of 1956, "blowing the whistle" seemed fully integrated into the vernacular to signify what whistleblowing does today. In March of 1956, the phrase appeared in the context of business ethics when the president of the "largest textile producer" in the United States said publicly that "research and development personnel bear a responsibility to 'blow the whistle' on exaggerated promotional claims."[41] In this context, the use of the phrase seems to undercut Vandekerckhove's assertion that the concept was first used "in an organizational context" in the early 1970s.[42] A serial on the Eisenhower presidency described certain subcommittees of the Operations Coordinating Board as serving as monitors responsible for blowing the whistle on rogue foreign service personnel.[43] The *Chicago Tribune* ran an article about a Pennsylvania mayor who sought retribution when "two jointly owned news-

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[36] Editorial, *Those to Whom the Reds Turn for Support*, CHI. TRIB., Oct. 6, 1950, at 20.

[37] Arthur Daley, *Honesty Is the Best Policy*, N.Y. TIMES, Oct. 31, 1952, at 35.

[38] *Id.* (emphasis in original).

[39] Orval Hopkins, *Magazine Rack*, WASH. POST, Mar. 14, 1954, at B5.

[40] Editorial, *Fallen Roof: U.S. Housing Policy Needs Some Major Repairs*, BARRON'S NAT'L BUS. AND FIN. WKLY., Apr. 19, 1954, at 1.

[41] Editorial, *Caution is Urged on Fabric Claims: Overenthusiastic Promotion of New Textiles Deplored at Research Meeting*, N.Y. TIMES, Mar. 24, 1956, at 27.

[42] *See* VANDEKERCKHOVE, *supra* note 18, at 7–8. Admittedly, Vandekerckhove considers only the word whistleblower and this example uses the phrase "blow the whistle." However, to understand the former, it seems responsible to examine the use of the latter.

[43] James Reston, *The Presidency—IV: A Study of Eisenhower's Attempt to Make Unity a Guiding Principle of Government*, N.Y. TIMES, June 21, 1956, at 20.

papers" blew the whistle by informing the FBI of the illegal gambling operations run by the mayor's brother.[44]

In a political opinion piece in the *Los Angeles Times*, a whistleblower is equated to a truth teller: "Nixon has proven himself a strong campaigner, one who can blow the whistle of truth on Truman's mud-slinging whistle-stop campaigns."[45] A September article about racketeering in the New York garment industry said that the problem was allowed to become so widespread for many reasons, including "political power, reluctance of many business men to 'blow the whistle' on anyone and simple fear."[46] The next month, an article discussed the risk of securities fraud and the SEC and other regulators' ability to mitigate it. The author asked, "why isn't it possible, the public wants to know, to wipe out stock frauds entirely?" and claimed that some investors felt "that a Government official should be watching each deal, ready to blow the whistle whenever a citizen shows a tendency to make a fool of himself."[47] When a Federal District Court judge let Jimmy Hoffa become president of the Teamsters' Union, the court-appointed union monitors were called watchdogs and recognized as having the task of blowing the whistle on misdeeds.[48]

These historical examples demonstrate that, though pre-1970 parlance used the verb form rather than the noun form as signifier, whistleblowing as a metaphor for revealing corruption or misconduct has been part of the popular lexicon since at least the middle of the 20th century. Further, the image of a whistleblower did not universally bear a negative connotation. Even when the preferred moniker changed to its current form, the whistleblower was cast as a social servant, particularly by consumer activists like Ralph Nader who enabled their work.[49] Nader established the Clearinghouse for

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[44] *Rebuked Mayor*, CHI. TRIB., July 25, 1956, at 20.

[45] Billy the Boor, *Forceful Politics Examples*, L.A. TIMES, Aug. 20, 1956, at B4.

[46] Stanley Levey, *Rackets and Crime Linked In Riesel Case: Big New York Garment Industry A Rich Field for the Underworld*, N.Y. TIMES, Sept. 2, 1956, at E10.

[47] Burton Crane, *Is Fraud Inevitable? A View Here Is—Not Absolutely, But Laws Can't Eliminate Folly*, N.Y. TIMES, Oct. 25, 1956, at 47.

[48] *See* Editorial, *Union Bosses Squawk*, CHI. TRIB., Jan. 27, 1958, at 18 ("Judge Letts allowed himself to become party to a deal which will allow Hoffa to take office and can keep him there for as long as four years, but the court's misgivings were plainly indicated in the provision that he is to serve only as long as he is being watched by three wardens. These, supposedly, will blow the whistle if they find his hand in the till or catch him off base in some other particular."); *see also* A. H. Raskin, *Hoffa Takes the Wheel of Outcast Teamsters: His First Move is to Try to Give Union a Stronger Centralized Authority*, N.Y. TIMES, Feb. 2, 1958, at E4 ("Hoffa's activities will be subject to scrutiny by a three-man board of monitors, headed by a retired Washington judge. They will serve as watchdog of the members' interests in such matters as internal democracy and the administration of union funds. If their advice is flouted, they will have the right to go to the Federal court and blow the whistle on the union leadership.").

[49] Alexander Auerbach, *Company Tattler: a Hero or a Heel?: Company Squeeler No Longer Is an Outcast—But Is He a Hero?*, L.A. TIMES, June 27, 1971, at E1.

Professional Responsibility, a means for individuals to provide confidential tips for Nader and his staff to act on.[50]

### *D. From Descriptive Toward Definitional; Ralph Nader in the 1970s*

Even in these early days, the term lacked definition. For example, the Clearinghouse encouraged individuals to share their identity but provided confidentiality. That is, those who wrote in with tips were encouraged to share their identities, but the Clearinghouse, in turn, would protect those identities when seeking redress.[51] The press was informed only when all other options had failed, and whistleblowers were apparently encouraged to try to address issues within their company first.[52] Nader's deputy seemed to exclude from his definition of whistleblower anyone who discloses misconduct internally: "If a guy can make his case within the company, then he doesn't blow the whistle, the problem is cleaned up, he's proud of the company, and the company is spared problems."[53] The dean of the UCLA Graduate School of Management at the time did not think that a whistleblower's motivation was important and would include in his definition of whistleblower a tipster motivated by vindictiveness.[54] The chairman of General Motors resisted the concept of whistleblowing altogether, saying that anything that undermined "the loyalty of a management team" destroyed the "unifying values of cooperative work," sowed suspicion, and threatened to compromise proprietary information.[55] He equated whistleblowing with "industrial espionage."[56]

While this brief history well demonstrates how the phrase "blow the whistle" and the term whistleblower grew into signifiers for individuals who disclose wrongdoing in the public interest, it only helps explain these usages in the vernacular sense. Even as recently as the early 1970s, there was no clear definition of whistleblower. This wobble in the meaning and usage of the term both explains, and is likely responsible for, the lack of clarity in contemporary discussions. Even in scholarly literature, it is not uncommon for a journal article to use the term whistleblower dozens or scores of times without clearly defining it for the reader. More clearly defining this term

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[50] For the article announcing the formation of the Clearinghouse for Professional Responsibility, see John D. Morris, *New Nader Group Seeking Tipsters: Asks Professionals to 'Blow Whistle' on Employers*, N.Y. TIMES, Jan. 27, 1971, at 32.

[51] *See* Auerbach, *supra* note 49, at E1.

[52] *Id.* ("Only as a last resort is the press alerted to a problem . . . 'The general principle is exhaustion of remedies,' says Petkas. 'Quite often we have to calm people down, tell them to go back and try to resolve the problem within their company or organization, and to make sure their information is complete.'").

[53] *Id.* at 5 (internal quotation marks omitted).

[54] *Id.* ("The corporate misbehavior uncovered by the whistleblower may be more important than the motives of the individual who speaks out.").

[55] *Id.*

[56] *Id.*

through a process of research and debate will serve academics, policymakers, corporate executives, and potential whistleblowers. With this in mind, I now turn to cataloguing a number of existing definitions of this term.

## II. Some Definitional Sources for the Many Faces of Modern-Day Whistleblowers

### *A. From Activist to Academic: Nader and Jubb*

In 1972, Nader provided a succinct definition, which many regard as the first:

> [A]n act of a man or woman who, believing that the public interest overrides the interest of the organization he *serves*, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.[57]

Already, disagreement emerges. Nader's definition contrasts with that of the UCLA dean who discounted the whistleblower's motive as essential; Nader defined a whistleblower as motivated by public interest. Nader's definition also lacks the internal versus external disclosure distinction his own deputy implied the previous year.

In 1999, Peter Jubb considered the indiscriminate use of the word whistleblower and argued in favor of a narrow definition for two primary reasons.[58] First, Jubb hoped to prevent the concept of whistleblowing from becoming contaminated in the public perception by allowing it to become interchangeable with the concept of informing.[59] Second, he wished to preserve the special quality of whistleblowing and to prevent the concept from simply being viewed as another "control mechanism."[60] In pursuit of these goals, Jubb advanced the following definition:

> Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organisation, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organisation, to an external entity having potential to rectify the wrongdoing.[61]

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[57] Whistle Blowing: The Report of the Conference on Professional Responsibility 7 (Ralph Nader, Peter J. Petkas, and Kate Blackwell eds., 1972).

[58] Peter B. Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, 21 J. Bus. Ethics 77, 77–78 (1999).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 83.

In reaching his proposal, Jubb cataloged, analyzed, and criticized seven other definitions. The first definition is the only one of the seven requiring a whistleblower to be motivated by moral obligation:[62]

> Whistleblowing is the act, by an employee or office of any institution, profit or non-profit, private or public, of informing the public about a belief that either (s)he has been ordered to perform, or (s)he has obtained knowledge that the institution is engaged in, activities which (a) cause unnecessary harm to third parties, (b) are in violation of human rights, or (c) run counter to the defined purpose of the institution.[63]

Jubb considers two definitions that would only recognize as whistleblowers those who make disclosures that are otherwise unauthorized:

> [W]histleblowing . . . I define as the unauthorised and voluntary reporting of illegal or improper acts perpetrated within an organisation to authorities outside the organisation or to the general public.[64]

> [W]histleblowing by internal auditors is "The unauthorised disclosure in the public interest by internal auditors of audit results, findings, opinions, or information acquired in the course of performing their duties and relating to questionable practices."[65]

This second definition is one of two explicitly incorporateing a requirement that the disclosure be in the public interest. The other definition with this requirement is not limited in application to internal auditors, and also applies only to publicly made disclosures:

> "The whistleblower is a concerned citizen, totally, or predominantly motivated by notions of public interest, who initiates of her or his own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing."[66]

Only two of the seven definitions specifically envision that whistleblowers could disclose information about organizations where they are either current or former members:

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[62] *Id.* at 85.

[63] *Id.* at 84 (citing NORMAN E. BOWIE AND RONALD F. DUSKA, BUSINESS ETHICS 73 (2d ed. 1990)).

[64] *Id.* (citing Gil Courtemanche, *The Ethics of Whistle Blowing*, INTERNAL AUDITOR, Feb. 1988, at 36).

[65] *Id.* (quoting Andrew Chambers, *Whistleblowing and the Internal Auditor*, BUS. ETHICS: A EUR. REV., 192–93 (1995)).

[66] *Id.* (quoting WILLIAM DE MARIA ET AL., UNSHIELDING THE SHADOW CULTURE: QUEENSLAND WHISTLEBLOWER STUDY 3 (1994)).

> Whistleblowing occurs ". . . when
> 1 an individual performs an action or series of actions intended to make information public;
> 2 the information is made a matter of public record;
> 3 the information is about possible or actual non-trivial wrongdoing in an organisation;
> 4 the individual[s] who performs the action is a member or former member of the organisation."[67]

> "[W]e defined whistle-blowing to mean 'the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.'"[68]

Jubb considered only one definition that would apply expressly to someone who makes a disclosure either internally within an organization or externally to authorities:

> Whistleblowing, defined as disclosing questionable practice involving the organization or its members, may be either internal or external. Internal whistleblowing involves informing relevant organization members about wrongdoing. External whistleblowing involves going outside the organization . . . to voice concerns over an organizational wrongdoing.[69]

### *B. Statutory and Regulatory Definitions*

In a legal and regulatory context, statute-based definitions include each of the following:

> "Whistleblowing is the making of a protected disclosure, that is, a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority, unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences any violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of

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[67] *Id.* (quoting FREDERICK ELLISTON ET AL., WHISTLEBLOWING RESEARCH: METHODOLOGICAL AND MORAL ISSUES 15 (1985)).

[68] *Id.* (quoting MARCIA. P. MICELI AND JANET P. NEAR, BLOWING THE WHISTLE 15 (1992)).

[69] *Id.* (citing Michael Chiasson et al., *Blowing the Whistle: Accountants in Industry*, 65 CPA J. 24, 24 (1996)).

national defense or foreign affairs, unless such information is disclosed to Congress, the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it."[70]

"Any person who otherwise has or had access to any [tax] return or [tax] return information under this section may disclose such return or return information to [certain Congressional Committees] or [certain staff members thereof] if such person believes such return or return information may relate to possible misconduct, maladministration, or taxpayer abuse."[71]

"An intelligence community (IC) employee who lawfully discloses to an IC director, IC agency director, IC inspector general, 'congressional intelligence committee, or a member' thereof information 'which the employee reasonably believes evidences (1) a violation of a Federal law, rule or regulation; or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.'"[72]

"The term 'whistleblower' means any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Secretary original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter, which is likely to cause unreasonable risk of death or serious physical injury."[73]

"The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission."[74]

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[70] 5 C.F.R. § 1209.4(b) (2016).

[71] 26 U.S.C. § 6103(f)(5) (2016) (listing an exception to the confidentiality of tax return information in a subsection titled "Disclosure by whistleblower"). Importantly, this indirect definition would label as a whistleblower one government employee, authorized to see confidential taxpayer information, who discloses information to a member of Congress who is also authorized to see such confidential taxpayer information.

[72] Paraphrased from 50 U.S.C. § 3234(b) (2016); *see generally* Whistleblower Protection for Intelligence Community Employees Reporting Urgent Concerns to Congress, Pub. L. No. 105-272 §§ 701-702 (1998).

[73] 49 U.S.C. § 30172(a)(6) (2016).

[74] 15 U.S.C. § 78u-6(a)(6) (2016).

The Fifth Circuit and Second Circuit disagree regarding the application of the definition of whistleblower in 15 U.S.C. § 78u-6(a)(6) when granting a private cause of action for alleged violations of the following provision:

> (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 Commission in accordance with this section;
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information or
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-l(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[75]

In *Asadi v. G.E. Energy United States, L.L.C.*, the Fifth Circuit concluded that "the plain language of [15 U.S.C.] § 78u-6 limits protection under the Dodd-Frank whistleblower-protection provision to those individuals who provide 'information relating to a violation of the securities laws' to the SEC . . . Asadi did not provide any information to the SEC; therefore, he does not qualify as a 'whistleblower.'"[76] In contrast, the Second Circuit in *Berman v. Neo@Ogilvy LLC* ruled that, by referencing the reporting procedures of the Sarbanes-Oxley Act (SOX),[77] which include internal reporting, the law was ambiguous.[78] Consequently, the court deferred to the SEC's interpretation of the provision, which would provide protection "to three different categories of whistleblowers:" those who disclose to the SEC, those who disclose within their company, and those who disclose to other government entities.[79] This circuit split demonstrates the consequences of a disagreement over the meaning of the term whistleblower and underscores the need for clarity in academic and policy discussions. Without greater clarity, corporate boards and executives, attorneys, and whistleblowers lack the clarity necessary to make sound decisions. Instead they are left to make educated guesses and expend time, money, and energy in pretrial litigation over contractual forum

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[75] 15 U.S.C. § 78u-6(h)(1) (2016).

[76] Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).

[77] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 124 Stat. 745 (codified as amended at 15 U.S.C. § 7201–66 (2016) and other scattered sections of 15, 18, and 28 U.S.C.).

[78] *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 153–55 (2d Cir. 2015) (citing, for example, Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A(a)(1)(C) (2017)).

[79] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34304 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249). *See also Berman*, 801 F.3d at 155.

selection clauses and motions to dismiss for failure to state a claim, in appellate litigation seeking to find consensus among the circuits, and on uncertain footing in settlement negotiations.

### *C. International Definitions of Whistleblowing*

Turning to the international context only further proves the lack of consensus. For example, the Council of Europe, in its publication "Protection of Whistleblowers," defined a whistleblower as: "any person who reports—either internally within an organisation or enterprise, or to an outside authority— or makes public information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector."[80]

The Organisation for Economic Cooperation and Development (OECD) pointed out in a study it prepared for the G20 that "[t]here is no common legal definition of what constitutes whistleblowing."[81] The study then cites five definitional sources:

1) "the reporting by employees or former employees of illegal, irregular, dangerous, or unethical practices by employers"[82]
2) "public and private sector employees who report in good faith and on reasonable grounds to the competent authorities"[83]
3) "any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with [the United Nations Convention Against Corruption]"[84]
4) "employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities"[85]

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[80] Council of Europe, Protection of Whistleblowers 6 (2014), https://rm.coe.int/16807096c7 (paraphrased from original to incorporate additional definitions).

[81] Organisation for Economic Cooperation and Development [OECD], Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation 7 (2012), https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf [hereinafter OECD Study].

[82] *Id.* at 3 (quoting Int'l Labour Org. Thesaurus (2005), http://www.ilo.org/thesaurus).

[83] The OECD provision is not definitional by design. *Id.* at 7 (quoting OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation IX(iii); OECD Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service; OECD Guidelines for Multinational Enterprises, § II.9).

[84] *Id.* at 7 (quoting UN Convention against Corruption, art. 33, 2004, 2349 U.N.T.S. 27 [hereinafter UNCAC]).

[85] *Id.* (quoting Council of Europe Civil Law Convention on Corruption, art. 9 (1999)).

5) "any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following acts"[86]

From this brief survey, the OECD recommends three "key characteristics" which could commonly be included in the definition of whistleblowing: (i) "the disclosure of wrongdoings connected to the workplace; (ii) a public interest dimension, for example, the reporting of criminal offences, unethical practices, etc., rather than a personal grievance; and, (iii) the reporting of wrongdoings through designated channels and/or to designated persons."[87]

### *D. A Need for Greater Clarity*

While the OECD's recommended key characteristics offer a standardized starting point for any project seeking to define whistleblowing which may be helpful for future projects, they neither clarify nor categorize existing definitions, and they do not demonstrate unity or commonality among those definitions. Sections A, B, and C, of this Part catalogue a total of twenty-two different definitions from activists, scholars, nongovernmental entities, and legal sources. Of these twenty-two definitions, only seven contain all three of the OECD Study's characteristics.[88]

The third characteristic—designating reporting channels—is missing in ten of the twenty-two definitions.[89] Four definitions do not specify any reporting channels at all.[90] Three others allow nonspecific public disclosure in

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[86] *Id.* at 8 (quoting United Kingdom Public Interest Disclosure Act, 1998, c. 23, § 1, Section 43B (U.K.), http://www.legislation.gov.uk/ukpga/1998/23/section/1).

[87] *Id.* (quoting Marie Chêne, *Good Practice in Whistleblowing Protection Legislation*, U4 Anti-Corruption Resource Centre, 3 (July 1, 2009), http://www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/). I rely on the OECD characteristics as an analytical tool because they represent the most elemental definition of whistleblower, and are therefore easier to apply universally.

[88] Miceli & Near, *supra* note 68, at 84; 5 C.F.R. § 1209.4(b) (2017); 50 U.S.C. § 3234(b) (2016); 49 U.S.C. § 30172(a)(6) (2016); OECD Study, *supra* note 81, at 7 (quoting OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, Recommendation for Further Combatting Bribery of Foreign Public Officials in International Business Transactions, Recommendation IX(iii)); Council of Europe, *supra* note 80, at 6–7; United Kingdom Public Interest Disclosure Act, 1998, c. 23, § 1, Section 43B (U.K.).

[89] Whistle Blowing: The Report of the Conference on Professional Responsibility, *supra* note 57; Jubb, *supra* note 57; Bowie & Duska, *supra* note 63; Courtemanche, *supra* note 64; Chambers, *supra* note 65; Elliston, *supra* note 67; Chiasson et al., *supra* note 69, at 84; 17 C.F.R. § 240.21F-2 (2013), as interpreted by *Berman*, 801 F.3d 145, 155 (2d Cir. 2015); Council of Europe, *supra* note 80, at 6–7; Int'l Labour Org. Thesaurus, *supra* note 82.

[90] Whistle Blowing: The Report of the Conference on Professional Responsibility, *supra* note 57, at 8; 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2016), as interpreted by Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015); Interpretation of the Whistleblower Rules Under the Securities Exchange Act, 80 Fed. Reg. 47829 (Aug.10, 2015), https://www.regulations.gov/document?D=SEC-2015-1324-0001 (considering an individual a whistleblower who does not disclose in accordance with the statute for purposes of the anti-reprisal protections

their definitions,[91] and three exclude all but public disclosures from their definition.[92] Other characteristics missing in the twenty-two definitions listed above include a workplace connection[93] and requiring the disclosure to be in the public interest.[94] By way of example, the plain text of the SEC's definition and the Fifth Circuit's interpretation in *Asadi* contain all three of the OECD's key characteristics. It requires a workplace connection by implication since securities law violations are a product of companies engaged in the buying, selling, trading, and holding of securities instruments. It also has a public interest nexus since it is limited to disclosures of violations of securities laws. Finally, the provision designates the SEC as the appropriate reporting channel. However, the SEC's rule-based definition (and related interpretive guidance), as well as the *Berman* court's reading of the whistleblower protection provision, do not contain all three of the OECD's key characteristics since protecting as a whistleblower an individual who does not disclose in accordance with the statute broadens the definition to include someone who may disclose publicly, or in some other unspecified way. The statute and its interpretation bear clarification, but how? I next consider the history, purpose, and meaning of the statutory and regulatory language establishing the SEC whistleblower program and the disagreement between the Second and Fifth Circuits.

## III. Double Vision, or, The SEC's Definitional Duality

### *A. The Statute and the Rule*

#### *1. The Legislative History of Dodd-Frank*

In the immediate aftermath of the global financial crisis of 2008, the U.S. Congress wasted no time in getting to work. The work of the Senate Banking Committee and the House Financial Services Committee, which resulted in the creation of the Dodd-Frank Act, was closely watched and

would include someone who disclosed publicly, or in any other unspecified way); Int'l Labour Org. Thesaurus, *supra* note 82.

[91] Courtemanche, *supra* note 64, at 84; Chiasson et al., *supra* note 69, at 84; Council of Europe, *supra* note 80, at 6–7.

[92] Jubb, *supra* note 57, at 77–78; Bowie & Duska, *supra* note 63, at 84; Chiasson et al., *supra* note 69, at 84.

[93] De Maria et al., *supra* note 66, at 84; 26 U.S.C. § 6103(f)(5) (2016); 15 U.S.C. § 78u-6(a)(6) (2016); 17 C.F.R. § 240.21F-2 (2013), as interpreted by both *Berman*, 801 F.3d 145 and *Asadi v. G.E. Energy United States, L.L.C.*, 720 F.3d 620 (5th Cir. 2013); UNCAC, *supra* note 84, at 7.

[94] Bowie & Duska, *supra* note 63, at 84 (including disclosure of acts that "run counter to the purpose of the institution"); Courtemanche, *supra* note 64, at 84 (including any "improper act"); Chiasson et al., *supra* note 69, at 84 (applying to the disclosure of any "questionable practice").

well documented.[95] The first step for legislators was to stop the economic hemorrhage which began in earnest on September 15, 2008.[96]

To this end, on October 3, 2008, President Bush signed the Emergency Economic Stabilization Act, which included the Troubled Asset Relief Program (TARP).[97] The work on Dodd-Frank began on February 2, 2009.[98] By February 25th, the White House staff and the relevant Congressional committees had embraced their roles as architects of a bill that would, in the words of Senator Chris Dodd, "restor[e] consumer confidence and consumer protection."[99] By June of 2009, the Department of the Treasury released the executive branch's 88-page white paper that provided a roadmap for reform.[100] The document proposed sweeping changes to the SEC, but included only 2 cursory discussions of whistleblowers.[101]

The white paper contains an outline summary of the reform proposals.[102] The five major goals of the proposals are to (1) "promote robust supervision and regulation of financial firms," (2) "establish comprehensive regulation of financial markets," (3) "protect consumers and investors from financial abuse," (4) "provide the government with the tools it needs to manage financial crises," and (5) "raise international regulatory standards and improve international cooperation."[103]

This third goal, protecting consumers and investors from financial abuse, is further divided into three parts: (A) "create a new consumer financial protection agency,"[104] (B) "reform consumer protection," and (C)

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[95] *See, e.g.*, ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T (2013).

[96] *Id.* at 17.

[97] Pub. L. No. 110-343, 122 Stat. 3765 (2008); *see* BAIRD WEBEL, CONGRESSIONAL RESEARCH SERVICE, TROUBLED ASSET RELIEF PROGRAM (TARP): IMPLEMENTATION AND STATUS 1 (2013), https://www.fas.org/sgp/crs/misc/R41427.pdf.

[98] KAISER, *supra* note 95, at 36.

[99] *Id.* at 75.

[100] U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), https://www.treasury.gov/initiatives/wsr/Documents/FinalReport_web.pdf.

[101] *See id.* at 15, 72.

[102] *Id.* at 10–18.

[103] *Id.*

[104] *Id.* at 14–15. This agency is the Consumer Financial Protection Bureau which has been the subject of much debate. On October 11, 2016, the U.S. Court of Appeals for the D.C. Circuit held that the Bureau's structure was an unconstitutional violation of the separation of powers doctrine because its director lacked proper oversight. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 36 (D.C. Cir. 2016) ("In sum, the CFPB departs from settled historical practice regarding the structure of independent agencies. And that departure makes a significant difference for the individual liberty protected by the Constitution's separation of powers. Applying the Supreme Court's separation of powers precedents, we therefore conclude that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director."), *vacated by, and reh'g, en banc, granted by* 2017 U.S. App. LEXIS 2733 (D.C. Cir. 2017).

"strengthen investor protection."[105] This third section, strengthening investor protection, is further subdivided into five parts.[106]

These subdivisions are (1) giving more authority to the SEC "to promote transparency in investor disclosures," (2) creating a "fiduciary duty for broker-dealers offering investment advice," (3) making "financial firms and public companies . . . accountable to their clients and investors by expanding protections for whistleblowers, expanding sanctions available for enforcement, and requiring non-binding shareholder votes on executive pay plans," (4) creating a Financial Consumer Coordinating Council, and (5) "strengthening . . . retirement plans and encouraging adequate savings."[107]

This third subdivision that includes whistleblower provisions is stated differently in the body of the document. There, it appears under the heading "Financial firms and public companies should be accountable to their clients and investors."[108] The section on whistleblowers is titled "expand protections for whistleblowers," and reads as follows:

> The SEC should gain the authority to establish a fund to pay whistleblowers for information that leads to enforcement actions resulting in significant financial awards. Currently, the SEC has the authority to compensate sources in insider trading cases; that authority should be extended to compensate whistleblowers that bring well-documented evidence of fraudulent activity. We support the creation of this fund using monies that the SEC collects from enforcement actions that are not otherwise distributed to investors.[109]

The content and context of this paragraph are informative: The whistleblower provisions envisioned in June of 2009 were viewed as a component of a stepped-up SEC enforcement regime. The fund was an incentive for greater reporting *to the SEC*, and the mention of "protections" from the outline summary and section title is not reflected in the narrative paragraph. Thus, the financial incentives appear on this reading to form the substance of what previously was referred to as "protections." But the Department of the Treasury's white paper was only a first step toward final legislation.

On July 23, 2009, Republican Representative Spencer Bachus introduced in the House of Representatives the Consumer Protection and Regulatory Enhancement Act.[110] Congress almost immediately entered its August

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[105] U.S. DEP'T OF THE TREASURY, *supra* note 100, at 15–16.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 72.
[109] *Id.*
[110] Consumer Protection and Regulatory Enhancement Act, H.R. 3310, 111th Cong. (2009). This bill was a non-starter filed in a Democratic House by a group of Republicans led by Bachus who was the ranking member of the House Financial Services Committee, but it signaled movement on the issues of consumer protection. It was itself a concession to Democrats and the Obama administration on the question of whether regulatory reform was neces-

recess.[111] On November 3, 2009, Representative Barney Frank introduced the Financial Stability Improvement Act of 2009.[112] While the bill did not make it out of committee, it formed the basis for many of the provisions in the final law. On December 2, 2009, the vehicle that would become Dodd-Frank was introduced in the House of Representatives as the Wall Street Reform and Consumer Protection Act of 2009.[113]

Section 7203 of that bill was titled "whistleblower protection" and, like the final law, added section 21F to the Securities Exchange Act.[114] Subparagraph (A) of paragraph (1) (prohibition against retaliation) of subsection (g) (protection of whistleblowers) provides:

> No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee, contractor, or agent in the terms and conditions of employment because of any lawful act done by the employee, contractor, or agent in providing information to the Commission in accordance with subsection (a), or in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.[115]

The definition of whistleblower is found in paragraph (4) of subsection (j).[116] This definition is similar to the one in the enacted provision: a whistleblower is "an individual, or two or more individuals acting jointly, who submit information to the Commission as provided in this section."[117] These references seem to contemplate that only individuals who disclose information to the SEC qualify as whistleblowers. In the context of the whole section, such a reading is consistent with the award program, which was designed to increase reporting to the SEC. An individual reporting a violation internally would not be eligible for an award under the SEC program. On December 10, 2009, the U.S. Chamber of Commerce strongly opposed the Act in an open letter to members of the House, claiming that it failed "to achieve the meaningful financial regulatory reform necessary for vibrant capital markets and to fuel long-term economic growth and job creation."[118]

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sary and was used by Republicans for messaging as they tried to influence the debate on what would become Dodd-Frank.

[111] *See* KAISER, *supra* note 95, at 117–18.

[112] Financial Stability Improvement Act of 2009, H.R. 3996, 111th Cong. (2009).

[113] The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009) (as introduced in the House, Dec. 2, 2009).

[114] *Id.* § 7203.

[115] *Id.* § 7203(a).

[116] *Id.*

[117] *Id.*

[118] U.S. Chamber of Commerce, *Key Vote Letter on H.R. 4173, the "Wall Street Reform and Consumer Protection Act of 2009"* (Dec. 10, 2009), https://www.uschamber.com/letter/key-vote-letter-hr-4173-wall-street-reform-and-consumer-protection-act-2009.

Neither of these sections was amended in the bill as it was engrossed in the House of Representatives on December 11, 2009.[119] This piece of legislation, which remained largely intact in the final law, stretched to 2,223 pages in the form in which it was filed with the Government Printing Office.[120] The corporate world's opposition continued. In February, the Chamber of Commerce reiterated its opposition to the bill.[121]

On April 30, 2010, the Senate Banking Committee reported its version of the bill.[122] The Senate committee said that the goal of "[t]he Whistleblower Program [is] to motivate those with inside knowledge to come forward and assist the Government."[123] Again, the intent of the law is not to motivate information sharing broadly, but to incentivize disclosure to government officials. The Committee reinforces this when it admits that substantial risks remain even after the program is implemented. Instead of claiming to mitigate all risks, it recognizes that blowing the whistle may equate to "career suicide" and offers generous compensation in an attempt to offset any detrimental side effects to a whistleblower's career.[124]

As the bill was engrossed in the Senate on May 20, 2010, both sections were amended, better aligning them with the commodities whistleblower program.[125] The Senate bill—but for a small grammatical difference—amended the definition of whistleblower to the form in which it was enacted: "The term 'whistleblower' means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[126]

The prohibition against retaliation was also amended. The Senate version reads:

> (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 Commission in accordance with subsection (a); or

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[119] The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009) (as engrossed in the House, Dec. 11, 2009).

[120] *See* KAISER, *supra* note 95, at 159.

[121] U.S. CHAMBER OF COMMERCE, *Multi-industry Letter Regarding the Proposed Consumer Financial Protection Agency (CFPA)* (Feb. 17, 2010), https://www.uschamber.com/letter/multi-industry-letter-regarding-proposed-consumer-financial-protection-agency-cfpa.

[122] S. REP. NO. 111-176 (2010).

[123] *Id.* at 110.

[124] *Id.* at 111.

[125] Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. (2010) (as engrossed in the Senate, May 20, 2010).

[126] *Id.* at § 922.

> (ii) in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.[127]

The Senate bill, like the Treasury white paper and the House bill, situates the SEC whistleblower protections within an incentive program designed to increase reports that result in successful SEC enforcement actions. In the Senate's version of the bill, the SEC program is not drafted to incentivize or protect individuals who disclose securities law violations within their companies.

On June 17, 2010, the Chamber of Commerce wrote a six-page letter in opposition of the bill to the Conference Committee.[128] It appears as though the SEC whistleblower provisions were finalized in the Conference Committee on June 21.[129] On June 27, the Chamber of Commerce again voiced its opposition to the bill.[130] When, on June 29, 2010, the bill emerged from conference in its final form, the whistleblower protections were amended:

> (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 Commission in accordance with this section;
> (ii) in *initiating, testifying in, or* assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; *or*
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), this chapter,

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[127] *Id.*

[128] Letter from R. Bruce Josten, Executive Vice President Government Affairs, U.S. Chamber of Commerce, to Conferees for H.R. 4173 (June 17, 2010) (the benefits of the bill "are significantly outweighed by provisions that would only magnify and exacerbate flaws within the existing regulatory structure and hamper economic growth."), http://drustaging.uschamber.com/sites/default/files/legacy/100617_HR4173_RAFSA_conferees.pdf.

[129] *See* Press Release, U.S. House Committee on Financial Services, Democrats, The Wall Street Reform Bill: Conference Update (June 21, 2010) ("Agreed to—SEC and Improving Investor Protections. Encouraging Whistleblowers: Creates a program within the SEC to encourage people to report securities violations, creating rewards of up to 30% of funds recovered for information provided."), http://democrats.financialservices.house.gov/news/documentsingle.aspx?DocumentID=382835.

[130] Letter from R. Bruce Josten, Executive Vice President Government Affairs, U.S. Chamber of Commerce, to Members of the United States Congress, Letter Opposing the Conference Report for H.R. 4173 the "Dodd-Frank Wall Street Reform and Consumer Protection Act" (June 27, 2010), https://www.uschamber.com/letter/letter-opposing-conference-report-hr-4173-dodd-frank-wall-street-reform-and-consumer.

> including section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[131]

The explanatory statement accompanying the bill dedicates three sentences to the provision:

> The subtitle further enhances incentives and protections *for whistleblowers providing information leading to successful SEC enforcement actions*. Awards to whistleblowers will range from 10 percent to 30 percent of the amounts collected by the SEC in actions where the SEC obtained monetary sanctions exceeding $1 million. The subtitle also works to protect the confidentiality of whistleblowers.[132]

Searching the remainder of the Congressional record provides no additional insight and serves to reinforce the notion that the lawmakers who drafted, amended, and voted for Dodd-Frank thought of the SEC whistleblower program as part of a stepped-up enforcement regime. During floor debate in the Senate on May 20, 2010, Senator Edward "Ted" Kaufman explained that the expanded protections would help whistleblowers who "provide a vital early warning system to detect and expose fraud in the financial system. With the right protections, whistleblowers can help root out the kinds of massive Wall Street fraud that contributed to the current financial crisis."[133] Senator Leahy applauded the whistleblower protections because they protected those who "help uncover these crimes."[134] Even criticism of the provisions had in mind this same context for the program.[135] The SEC, however, had a broader concept in mind.

### *2. 17 C.F.R. § 240.21F-2 and the SEC's Rulemaking Process*

Four months after Dodd-Frank was signed into law, the SEC published in the Federal Register a sixty-eight-page proposed rule that would implement Section 922 of the new law.[136] Immediately, the Commission acknowledged certain criticisms of the whistleblower program, and the tension

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[131] 15 U.S.C. § 78u-6(h)(1) (2016) (substantive amendments made by The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) are in italics).

[132] 156 CONG. REC. H5197 (daily ed. June 29, 2010) (Joint Explanatory Statement of the Committee of Conference) (emphasis added).

[133] 156 CONG. REC. S4066 (daily ed. May 20, 2010) (statement of Sen. Kaufman).

[134] 156 CONG. REC. S4068 (daily ed. May 20, 2010) (statement of Sen. Leahy).

[135] 156 CONG. REC. S4076 (daily ed. May 20, 2010) (statement of Sen. McCain) ("The whistleblower provisions are well-intentioned attempts to address the SEC's failure during the Madoff scandal. However, the guaranteed massive minimum payouts and limited SEC flexibility ensure that a line of claimants will form at the SEC's door hoping for some of the hundreds of millions in the whistleblower pot. The SEC will spend limited resources sorting through these claims that would have been better spent bringing enforcement cases.").

[136] Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488 (proposed Nov. 17, 2010) (to be codified

between trying to increase external reporting while avoiding a program that undermines corporations' internal compliance and internal disclosure programs:

> with this possible tension in mind, we have included provisions in the proposed rules intended not to discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate personnel, while at the same time preserving the whistleblower's status as an original source of the information and eligibility for an award.[137]

In its overview of the proposal, the SEC says that "broad anti-retaliation protections to whistleblowers furthers" the legislative purpose of the rule, which it summarizes from the Senate Banking Committee's report as "'motivate[ing] those with inside knowledge to come forward and assist the Government.'"[138] Thus, the SEC acknowledges the need to balance incentives for robust internal compliance programs and incentives for employees to make external reports.

The Committee proposed to define "voluntary" in a manner "consistent with the statutory purpose of creating a strong incentive for whistleblowers to come forward early with information about possible violations of the securities laws rather than wait until . . . investigators" ask for the information.[139] It does so by defining voluntary only to include information that is provided prior to requests from regulators, law enforcement personnel, or their agents—whether formal or informal.[140] The Commission was also careful in defining "original information" to make ineligible individuals who learn of violations due to their function as legal counsel or lawyer, auditor, accountant, internal compliance personnel, or internal investigator, external monitor, or similar role.[141] The reasoning for these exclusions was to ensure that the law was not "implemented in a way that would create incentives for persons who obtain information through such functions. . . to circumvent or undermine the proper operation of the entity's internal processes for responding to violations of law."[142]

The proposed rule builds on this theme of preserving corporations' internal processes, extolling the benefits of an effective internal compliance program, and pointing out that, if a corporation—once informed of a violation—fails to act in a timely fashion or "proceed[s] in bad faith," then these

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at 17 C.F.R. pts. 240 and 249), https://www.regulations.gov/document?D=SEC-2010-1760-0001.

[137] *Id.* at 70488.

[138] *Id.* at 70489 (quoting S. REP. NO. 111-176, at 110 (2010)).

[139] *Id.* at 70490.

[140] *Id.* (to be voluntary, the whistleblower "must come forward with the information *before* receiving any formal or informal request, inquiry, or demand from the Commission staff or from any other authority described in the proposed rule").

[141] *Id.* at 70492–93.

[142] *Id.* at 70493.

exemptions are rescinded, and such individuals may become SEC whistleblowers.[143] The aim was "to strike a balance between two competing goals."[144] These goals are to avoid "creating incentives for company personnel to seek a personal financial benefit by 'front running' internal investigations and similar processes that are important components of effective company compliance programs," while simultaneously permitting those same individuals to "act as whistleblowers in circumstances where the company knows about material misconduct but has not taken appropriate steps to respond."[145]

The Commission is again mindful of internal disclosure and compliance programs in discussing its proposed guidance for calculating award amounts: it would credit whistleblowers who "first report . . . through internal channels.[146] But the proposal stops short of making such an attempt mandatory, and provides an out. If a whistleblower does not attempt such an internal report, she may still receive an award in excess of the statutory minimum of the percent of the amount recovered if she did "not avail [herself] of this [internal reporting] opportunity for fear of retaliation or other legitimate reasons."[147] In other cases, the Commission will "consider higher percentage awards for whistleblowers who first report violations through their compliance programs."[148] Importantly, the narrative continues, "the Commission believes that encouraging whistleblowers to report securities violations to their corporate compliance programs is consistent with the Commission's investor protection mission."[149]

Later, in the cost-benefit analysis of the proposed rule, the SEC recognizes that "the incentives created by the statute also present some significant challenges."[150] Among those challenges are "financial incentives for employees to report violations to the Commission rather than follow their em-

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[143] *Id.* at 70494.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 70500.

[147] *Id.* This provision seems to cut against the policy reasons why the SEC program would protect individuals who make internal disclosures. If they are protected by law, then they should not fear retaliation for internal reporting. If they experienced retaliation, they could still report to the SEC and receive a higher award there since they first reported internally. Furthermore, they would maintain an additional private right of action under the anti-retaliation provisions in the statute. If, on the other hand, they gained protections only after disclosing to the SEC (and therefore would have a legitimate fear of the consequences of disclosing internally), then this seems a perfect justification for choosing only to report to the SEC, without any penalty in calculating an award.

[148] *Id.*

[149] *Id.* This policy statement is an important distinction between the evidence of Congressional intent available in the Congressional Record, the text of Dodd-Frank, and the popular media sources about its drafting. As discussed above, Dodd-Frank seems to view the SEC whistleblower program in the context of an enforcement regime, while the SEC, here, is looking at it as a tool that assists in the SEC's broader mission of investor protection. This is a preview of the internal tension between the SEC program and corporate interests which became so apparent during the notice and comment period. *See* discussion *infra* Section V.B.2.

[150] *Id.* at 70514.

ployers' internal compliance procedures," which "could undermine the effectiveness of internal compliance programs."[151]

The SEC's proposed rule is significant for our analysis here because it demonstrates the Commission's realization that, despite the Senate's and House's design, a whistleblower program intended purely to increase reports to the SEC would severely undermine corporations' internal reporting and compliance frameworks. Accordingly, the proposed rule tries to temper some of the incentives to external reporting and encourage whistleblowers first to report internally. However, the proposed rule does not mention whistleblower protections for those who only report internally, and the word "internal" appears only on twelve of the proposal's sixty-eight pages.

In contrast, when the final rule was published, the word "internal" appears on fifty-two of the rule's eighty-five pages.[152] The final rule suggests that this intense focus results from the volume of comments relating to the concerns the SEC expressed in its proposed rule. Specifically, many commentators were worried that the rule would undermine corporations' internal compliance programs and argued that internal reporting should be a prerequisite for qualifying under the SEC program.[153] While the rule rejects this approach, it does focus more clearly on questions of internal reporting—in the consideration of award payments, and in terms of affording protections to those making internal disclosures. The rule recognizes a limited number of employees who could qualify for whistleblower protections under the rule if they make an internal disclosure:

> The second prong of the Rule 21F– 2(b)(1) standard provides that, for purposes of the anti-retaliation protections, an individual must provide the information in a manner described in Section 21F(h)(1)(A). This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*. Specifically, Section 21F(h)(1)(A)(iii)— which incorporate [sic] the anti-retaliation protections specified in Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. 1514A(a)(1)(C)—provides anti-retaliation protections for employees of public companies,

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[151] *Id.*

[152] *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300–2, 34304, 34306–8, 34310–11, 34313, 34315–19, 34321–27, 34329–32, 34334–40, 34346–47, 34350, 34352, 34355–67, 34370–71 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249).

[153] *Id.* at 34300–01 ("A significant issue discussed in the Proposing Release was the impact of the whistleblower program on companies' internal compliance processes. While we did not propose a requirement that whistleblowers report through internal compliance processes as a prerequisite to eligibility for an award, we requested comment on this topic, and we included in the proposed rules several other elements designed to encourage potential whistleblowers to utilize internal compliance. Commenters were sharply divided on the issues raised by this topic.").

> subsidiaries whose financial information is included in the consolidated financial statements of public companies, and nationally recognized statistical rating organizations when these employees report to (i) A Federal regulatory or law enforcement agency, (ii) any member of Congress or committee of Congress, or (iii) *a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct*. However, the retaliation protections for internal reporting afforded by Section 21F(h)(1)(A) do not broadly apply to employees of entities other than public companies.[154]

A related footnote provides additional explanation, pointing out that in "a few limited situations—reporting by employees of subsidiaries and [Nationally Recognized Statistical Rating Organizations] covered by SOX Section 806, and by employees whose reports were required or protected under SOX or the Exchange Act, see Section 21F(h)(1)(A)(iii)—internal reporting is expressly protected."[155] This rule would soon be put to the test.

### *B.* Asadi *in the Southern District of Texas and the Fifth Circuit*

Just eight months after the SEC promulgated its final rule, Khaled Asadi filed a complaint in the Southern District of Texas and alleged that, while serving in Jordan, he was fired from his job in retaliation for making an internal complaint to the company ombudsman of activity that violated the Foreign Corrupt Practices Act (FCPA).[156] On February 27, 2012, GE responded with a motion to dismiss for failure to state a claim, and the parties argued the motion in a hearing on April 9.[157] After the hearing, Asadi filed an amended complaint that alleged that his internal disclosure fell within the purview of the statute because the SEC program protects all disclosures made "under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201), the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq*.), and any other law, rule, or regulation subject to the jurisdiction of the" SEC.[158] Asadi conceded that he did not qualify as a "whistleblower" under the definitional statute[159] but argued that he was protected by the anti-retaliation provisions,[160] which applied more broadly.[161] On June 28, 2012, the District Court granted GE's

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[154] *Id*. at 34304 (second emphasis added).

[155] *Id.* at n.38.

[156] Brief for Plaintiff-Appellant at 15–16, Asadi v. GE Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013) (No. 12-20522).

[157] *Id*. at 14.

[158] *Id.* at 13.

[159] 15 U.S.C. § 78u-6(a)(6) (2016).

[160] *Id.* § 78u-6(h)(1)(A).

[161] Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 U.S. Dist. LEXIS 89746, at *8–9 (S. Dist. Tex. June 28, 2012).

motion to dismiss but sidestepped the question of whether Asadi qualified as a whistleblower for purposes of the anti-retaliation provisions.[162] Instead, the Court held (1) Dodd-Frank does not apply outside the United States;[163] (2) to the degree Sarbanes-Oxley applies to his disclosure, it does not "extend the territorial reach of the Anti-Retaliation Provision;"[164] and (3) the SEC anti-retaliation provision is inapplicable with respect to Asadi's FCPA disclosure since the FCPA does not "protect" or "require" such disclosure.[165]

Asadi appealed and the Fifth Circuit issued its decision in July of 2013.[166] The Fifth Circuit frames its task purely as one of statutory interpretation.[167] Asadi made a similar argument on appeal as in the court below, conceding that he did not qualify as a whistleblower under the law's definitional section because he had not made a report to the SEC,[168] but that, notwithstanding this fact, he had standing to sue because he *did* make an internal disclosure of the type encompassed by the anti-retaliation section of SOX.[169] Asadi justified this reasoning by pointing out that G.E. was obligated under sections 302 and 404 of SOX "to disclose potential violations of the FCPA."[170]

Accordingly, the court framed the issue for consideration as "whether an individual who is not a 'whistleblower' under the statutory definition of that term in [15 U.S.C.] § 78u-6(a)(6) may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision."[171] Before reaching its conclusion, the court parses 15 U.S.C. § 78u-6(h), pointing out that the law offers protection to a specific class of individuals (those satisfying the definition of whistleblower) who engage in specific acts (by making certain disclosures).[172] The Court recognized that a number of lower courts had already ruled on similar grounds, and extended whistleblower protections to plaintiffs in situations similar to Asadi's.[173] However, when viewed

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[162] *Id.* at *14, *33.

[163] *Id.* at *23 ("The Court holds that the Anti-Retaliation Provision does not extend to or protect Asadi's extraterritorial whistleblowing activity.").

[164] *Id.* at *29.

[165] *Id.* at *32.

[166] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).

[167] *Id.* at 623 ("We start and end our analysis with the text of the relevant statute . . . .").

[168] *Id.* at 623–24.

[169] *Id.* at 624 (citing specifically 15 U.S.C. § 78u-6(h) (2016) and generally Sarbanes-Oxley Act of 2002 § 2, 15 U.S.C. § 7201 (2016) and Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (2016)).

[170] Brief of Plaintiff-Appellant at 42, Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013) (No. 12-20522).

[171] *Asadi*, 720 F.3d at 623.

[172] *Id.* at 626, 630.

[173] *Id.* at 624 n.6. The opinion cites to and quotes Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011), which was decided before the SEC promulgated its final rule implementing Section 922 of Dodd-Frank. In that case, the district court conceded that "other provisions of the Dodd-Frank Act show that Congress was perfectly capable of extending whistleblower protection to persons other than those reporting to a particular federal agency," and gives an example, codified at 12 U.S.C. § 5567(a)(1) (2016). *Egan*, 2011 WL 1672066, at *4. The court goes on to conclude that "the absence of similarly

in the manner outlined by the Fifth Circuit, the two statutory provisions are not internally inconsistent or ambiguous: qualifying as a whistleblower under the statutory definition is a prerequisite to gaining protection for engaging in certain acts (including making an internal report required by SOX). In affirming the lower court's dismissal, the court in *Asadi* concluded "that the plain language of § 78u-6 limits protection under the Dodd-Frank whistleblower-protection provision to those individuals who provide 'information relating to a violation of the securities laws' to the SEC. Asadi did not provide any information to the SEC; therefore, he does not qualify as a 'whistleblower.'"[174]

### *C.* Berman *in the Southern District of New York*

After *Asadi* and concurrent with *Safarian,* discussed below, Daniel Berman's Dodd-Frank retaliation claim was working its way through the Southern District of New York.[175] For purposes of the legal analysis in *Berman*, the facts are identical to *Asadi*: Mr. Berman reported within his company what he perceived to be violations of SOX, Generally Accepted Accounting Principles (GAAP), and Dodd-Frank, and was subsequently fired in what he alleged to be retribution.[176] Ruling on the defendant's motion to dismiss for failure to state a claim, the district court held on December 5, 2014 that "because the language of the statue unambiguously requires that a person provide information to the Commission in order to qualify as a whistleblower under the Act, the Court holds that plaintiff is not a whistleblower and that his suit must be dismissed."[177]

In reaching this conclusion, the Court expressly rejected the ruling in *Egan*[178] that would "craft a 'narrow exception' to the definition of 'whistleblower'" for purposes of extending protections against retaliation to

broad protections for whistleblowers alleging securities law violations indicates that Congress intended to encourage whistleblowers reporting such violations to report to the SEC." *Id.* The court went on to hold that the statutory language was "best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC *as a narrow exception* to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower as one who reports to the SEC. Therefore, Plaintiff must either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC." *Id.* at *5 (emphasis added). *Asadi* also cites cases from the District of Connecticut and the Middle District of Tennessee. *See Asadi*, 720 F.3d at 624 n.6 (citing Kramer v. Trans-Lux Corp., No. 3:11CV1424(SRU), 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012); Nollner v. S. Baptist Convention, Inc., 852 F. Supp.2d 986, 994 n.9 (M.D. Tenn. 2012)).

[174] *Asadi*, 720 F.3d at 630.

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

[176] *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 149 (2d Cir. 2015).

[177] *Berman*, 72 F.Supp.3d at 405.

[178] *Id.* at 408; *see* discussion *supra* note 173.

certain individuals who make internal disclosures.[179] The court adopted the Fifth Circuit's reasoning in *Asadi.*[180] In justifying this choice, the opinion pointed out that it "appears to be the exception, not the rule, for Congress to grant an individual a private right of action to sue for damages arising from retaliation without requiring that individual to make contact with a federal agency first," and provides examples.[181] In this context, the Court declined to interpret the statute as Berman proposed because there was no "clear intent by Congress" to allow such a "significant expansion of the class of individuals eligible to bring a private right of action under the Act."[182] Berman appealed to the Second Circuit.[183]

### *D.* Safarian *in the District of New Jersey, the SEC's Amicus Brief, and the Decision of the Third Circuit*

In April of 2014, the United States District Court for the District of New Jersey issued an opinion in *Safarian v. American DG Energy Inc*.[184] Here the district court denied the plaintiff's claims of protection under the anti-retaliation provisions of the SEC whistleblower program.[185] The opinion sidestepped the question of whether the anti-retaliation protections applied to those who disclose internally because, even if it did, Mr. Safarian would not have qualified, since his disclosure was not required or protected by SOX.[186]

Safarian appealed to the Third Circuit, and—just six days after the District Court granted a dismissal in *Berman*—the SEC filed an amicus brief.[187] The brief begins with a surprising assertion: "The [SEC], after notice-and-comment rulemaking, issued a rule to clarify an ambiguity in the whistleblower employment anti-retaliation provisions in Section 21F(h)(1) of the Securities Exchange Act."[188] The word ambiguity appears once in the entirety of the Commission's final rule, in the section discussing exclusions from the definition of the terms "independent knowledge" and "independent

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[179] Berman*,* 72 F.Supp.3d at 408.

[180] *Id.*

[181] *Id.* at 409–10. The Court points out that, to bring a lawsuit under SOX, an individual must first report to the Department of Labor, 18 U.S.C. § 1514A(b)(1) (2016); to merit anti-retaliation protection under Section 748 of Dodd-Frank, an individual must first report to the Commodity Futures Trading Commission; and to merit anti-retaliation protections under Section 1057 of Dodd-Frank, an individual must first report to the Secretary of Labor.

[182] *Id.* at 410.

[183] Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015).

[184] Safarian v. Am. DG Energy Inc., Civ. No. 10-6082, 2014 U.S.Dist. LEXIS 59684 (D.N.J. Apr. 30, 2014), *aff'd*, 622 Fed.App'x 149 (3d Cir. 2015).

[185] *Id.* at *5.

[186] *Id.* at *4–5.

[187] Brief for the Securities and Exchange Commission, Amicus Curiae Supporting Appellants, Safarian v. Am. DG Energy Inc., 622 Fed.App'x 149 (3d Cir. 2015) (No. 14-2734), 2014 WL 7240193 [hereinafter *SEC's Safarian Amicus Brief*].

[188] *Id.* at 1.

analysis."[189] The word ambiguous also appears once but in reference to information that leads to successful enforcement.[190] The rule does not state that the purpose of Section 21F(h)(1)(A)(iii) is to clarify or alleviate ambiguity.

The brief goes on to say that the "rule interpreted the anti-retaliation protections to extend to any individual who engages in the whistleblowing activities described in Section 21F(h)(1)(A), irrespective of whether the individual makes a separate report to the Commission."[191] While technically consistent with the rule, the brief's language strikes a different tone than the final rule which said "the retaliation protections for internal reporting afforded by Section 21F(h)(1)(A) *do not broadly apply* to employees of entities other than public companies."[192] The SEC explains that Rule 21F-2(b)(1) was promulgated to clarify that any employee who discloses under a statute listed in 15 U.S.C. 78u-6(h)(1)(A)(iii)—regardless of whether she discloses to the SEC—merits anti-retaliation protections.[193] This clarification is justified in the context of the rule because it "complements the overall goal of the whistleblower program rulemaking to maintain incentives for individuals to first report internally in appropriate circumstances."[194]

After hearing oral argument on June 2, 2015, the Third Circuit, on July 21, 2015, affirmed the district court's dismissal of Mr. Safarian's Dodd-Frank claim.[195] However, the circuit court signaled that it will likely defer to the SEC's interpretation of the provision in future cases. In footnote four the court implies that, had Safarian's disclosure been made pursuant to SOX, he would have had standing to bring his Dodd-Frank claim.[196]

### *E.* Berman *in the Second Circuit: Oral Argument and the SEC's Amicus Brief*

Less than two months after filing its amicus brief in *Safarian* and five months before the Third Circuit's decision in that case, the SEC filed an

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[189] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34315 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249) ("Additional ambiguity was created by proposed Rule 21F-(4)(b)(4)(iv), which would have created a separate exclusion for individuals who have "legal" responsibilities for an entity.").

[190] *Id.* at 34,323 ("Although a few commenters approved of the standards in the Proposed Rule, most stated that the standards were too high, ambiguous, or both.").

[191] *SEC's Safarian Amicus Brief*, *supra* note 187, at 1–2.

[192] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34304 (emphasis added).

[193] *SEC's Safarian Amicus Brief, supra* note 187, at 14.

[194] *Id.* at 16.

[195] *See* Safarian v. Am. DG Energy Inc., 622 Fed.App'x 149, 152–53 (3d Cir. 2015).

[196] *Id.* at 152 n.4 ("In order to receive Dodd-Frank whistleblower protection, an employee must report 'conduct which the employee reasonably believes constitutes a violation of [certain laws or regulations] . . . ' Amicus Department of Labor expressed concern that the District Court's opinion could be read narrowly to imply that Dodd-Frank whistleblower protection only applies to lawyers, accountants, or auditors who report shareholder fraud. We do not read the District Court opinion so narrowly.").

amicus brief in the *Berman* appeal.[197] The *Berman* amicus brief is a virtual carbon copy of the amicus brief filed in *Safarian*.

Oral argument in *Berman* was held on June 17, 2015, fifteen days after oral argument in the Third Circuit on *Safarian*.[198]

### *F. The SEC's Interpretive Rule*

Approximately two months after oral argument in *Berman*, less than three weeks after the Third Circuit issued its *Safarian* opinion, and one month before the Second Circuit issued its *Berman* opinion, the SEC promulgated an interpretive rule "to clarify that, for purposes of the employment retaliation protections provided by Section 21F of the Securities Exchange Act of 1934 ("Exchange Act"), an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Exchange Act Rule 21F-9(a), but is determined solely by the terms of Exchange Act Rule 21F-2(b)(1)."[199] The Commission insisted that when it issued its final rule in June of 2011, it "recognized that Section 21F [was] ambiguous on the issue of the scope of the employment retaliation protections afforded thereunder."[200] In order "to resolve this ambiguity, the Commission in Rule 21F-2 promulgated two separate definitions of 'whistleblower.'"[201] The separate "definitions apply in different circumstances and each involves its own specified reporting procedures that must be satisfied in order for an individual to qualify."[202] The interpretive rule characterizes the Fifth Circuit's flat rejection of such an interpretation as having "expressed some uncertainty about this reading."[203] The Commission justifies its interpretive guidance by concluding that "a contrary interpretation would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting."[204]

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[197] Brief for the Securities and Exchange Commission, Amicus Curiae in Support if the Appellant, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626), 2015 WL 636112.

[198] Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015).

[199] Interpretation of the Whistleblower Rules Under Section 21F of the Securities and Exchange Act, 80 Fed. Reg. 47,829, 47,830 (Aug. 10, 2015).

[200] *Id.* at 47,829.

[201] *Id.*

[202] *Id.*

[203] *Id.* at 47,830, 47,830 n.4 (citing Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013)).

[204] *Id.* at 47,830.

### *G.* Berman *in the Second Circuit: Opinions*

#### *1. The Majority*

One month after the SEC published its interpretive rule, a divided panel of the Second Circuit found Dodd-Frank sufficiently ambiguous to justify granting *Chevron*[205] deference to the SEC's rule (keep in mind, the rule was published only two months after oral argument in *Berman*).[206] The contrast between the Second Circuit's majority opinion in *Berman* and the Fifth Circuit's unanimous opinion in *Asadi* immediately is apparent. The Second Circuit observed in its "discussion" section that a strict interpretation of the plain language of the statute "would leave [15 U.S.C. § 78u-6(h)(1)(A)(iii)] with an extremely limited scope."[207]

After discussing these limitations, the *Berman* court said that "apart from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) [of 15 U.S.C. 78u-6(a)(1)(A)] with any scope."[208] The majority then asked "whether Congress intended to add [that subdivision] only to achieve such a limited result," and "look[ed] to the legislative history of" the provision which "yield[ed] nothing."[209]

Next, the Court considered how federal district judges have ruled on the issue.[210] Finally, recognizing that Mr. Berman fell outside the statutory defi-

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[205] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). This is the seminal case in which the Court articulated the "administrative deference" doctrine.

[206] Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 146 (2d Cir. 2015).

[207] *Id.* at 151.

[208] *Id.* at 152.

[209] *Id.*

[210] *Id.* at 153. The opinion cites *Asadi* and observes a number of cases that reached the same result, including Verfuerth v. Orion Energy Systems, Inc., 65 F. Supp. 3d 640, 643–46 (E.D. Wis. 2014); Banko v. Apple Inc., 20 F. Supp. 3d 749, 756–57 (N.D. Cal. 2013); Wagner v. Bank of America Corp., No. 12-cv-00381-RBJ, 2013 U.S. Dist. LEXIS 101297, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013). After *Asadi* but before *Berman* a Connecticut District Court ruled following the Fifth Circuit in *Wiggins v. ING U.S., Inc.*, 2015 U.S. Dist. LEXIS 78129, 2015 WL 3771646, *9–11 (D. Conn. June 17, 2015). The Court then lists a great number of cases where district courts deferred to the SEC's definition as set forth in 17 C.F.R. § 240.21F-2(b), including Somers v. Digital Realty Trust, Inc., No. C-14-5180 EMC, 2015 U.S. Dist. LEXIS 64178, 2015 WL 2354807, at *4–12 (N.D. Cal. May 15, 2015); Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519, 533–34 (S.D.N.Y. 2014); Khazin v. TD Ameritrade Holding Corp. No. 13-4149 (SDWQ)(MCA), 2014 U.S. Dist. LEXIS 31142, 2014 WL 940703, at *3–6 (D.N.J. Mar. 11, 2014); Azim v. Tortoise Capital Advisors, LLC, No. 13-2267-KHV, 2014 U.S. Dist. LEXIS 22974, 2014 WL 707235, at *2–3 (D. Kan. Feb. 24, 2014); Ahmad v. Morgan Stanley & Co., 2 F. Supp. 3d 491, 495–97 n.5 (S.D.N.Y 2014); Rosenblum v. Thomson Reuters (Mkts.) LLC, 984 F. Supp. 2d 141, 146–49 (S.D.N.Y. 2013); Murray v. UBS Securities, LLC, No. 12-5914, 2013 U.S. Dist. LEXIS 71945, 2013 WL 2190084, at *4 (S.D.N.Y. May 21, 2013); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 44–46 (D. Mass. 2013); Genberg v. Porter, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); Nollner v. Southern Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); Kramer v. Trans-Lux

nition contained in the subdivision granting the protections he asserted, the Court framed the issue: "The issue here, however, is not whether to read the words of the definitional section literally, but the different issue of whether the definition should apply to a late-added subdivision of a subsection that uses the defined term," or whether the statute is ambiguous and the Court should defer to the SEC's rule-based definition.[211]

Then, having found no legislative history to aid the Court's interpretation of the law, it simply invents one: "All these arguments [pointing out that any given interpretation of one provision must render some other provision superfluous] ignore the realities of the legislative process."[212] After evoking images of Congressional staffers hurriedly assembling the final version of Dodd-Frank in conference committee and inadvertently failing clearly to reconcile a late-amended subsection therein, the opinion finds it "doubtful that the conferees who accepted the last-minute insertion of [the subdivision] would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition."[213] The tension that creates this doubt "renders [the statute] as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute."[214] Accordingly, the Second Circuit deferred to the SEC's rule, and the SEC's interpretation of that rule, and held that "Berman is entitled to pursue Dodd-Frank remedies for alleged retaliation."[215]

*2. The Dissent*

Judge Jacobs's dissent is somewhat scathing. He opens by accusing the majority of altering "a federal statute by deleting three words ('to the Commission') from the definition of 'whistleblower' in the Dodd-Frank Act."[216] He proceeds, somewhat sarcastically, observing that his colleagues could, no doubt, "improve many federal statutes by tightening them or loosening them, or recasting or rewriting them."[217] He points out that the majority's opinion "creates a circuit split, and places [the Second Circuit] on the

Corp., No. 3:11CV1424 SRU, 2012 U.S. Dist. LEXIS 136939, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012); Egan v. Tradingscreen, Inc., No. 10 Civ. 8202, 2011 U.S. Dist. LEXIS 47713, 2011 WL 1672066, at *4–7 (S.D.N.Y. May 4, 2011).

[211] *Berman*, 801 F.3d at 154.

[212] *Id.*

[213] *Id.* at 155.

[214] *Id.*

[215] *Id.*

[216] *Id.* at 155 (Jacobs, C.J., dissenting).

[217] *Id.*

wrong side of it."[218] His analysis then largely repeats the reasoning the *Asadi* court relied on, with some added discussion of statutory interpretation.[219]

He then proceeds to accuse the majority of "a bad misreading, tantamount to a misquotation" because the majority characterizes the whistleblower protections in Dodd-Frank as protecting "employees," as a category, from retaliation, rather than protecting only those employees who take statutorily "protected activity."[220] Since this textual substitution is of a term specifically defined in the statute, Judge Jacobs finds it dispositive. He points out that "if the statute used the word 'employee,'. . . Berman might have a claim."[221] His criticism continues: "the majority has no support for the proposition that when a plain reading of a statutory provision gives it an 'extremely limited' effect, the statutory provision is impaired or ambiguous."[222] His accusations do not stop with the majority—he takes aim at the SEC too. "The regulation at issue reflects the SEC's territorial interests, not its own reading. . . . After oral argument, the SEC issued an 'interpretive rule' amending its regulations to conform to the error it has (successfully) argued here."[223] Judge Jacobs would have affirmed the lower court's dismissal of Berman's Dodd-Frank claim.

### *H. No Right Answer*

To bring this current project full circle, the circuit split, and the tangled timeline that created it, demonstrate the practical effect of a definitional dispute. But what is the solution? Which circuit decided correctly, and how should the split be resolved? Recognizing the need for such resolution, the Supreme Court recently has granted certiorari on this issue, but Congress need not wait.[224]

The SEC has made its voice heard, but since the interpretive rule, many district courts have continued to rule that 15 U.S.C. § 78u-6(h)(1)(A)(iii)

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[218] *Id.* at 155–56 (citing Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620 (5th Cir. 2013)).

[219] *Id.* at 156–57 (adding, for example, that "a definition is one of the 'prominent manner[s]' for limiting the meaning of statutory text").

[220] *Id.* at 157.

[221] *Id.*

[222] *Id.* at 158.

[223] *Id.* at 158 n.2.

[224] After this Article was written but before publication, the Ninth Circuit decided Somers v. Digital Realty Trust, Inc., 850 F.3d 1045 (9th Cir. 2017). The *Somers* opinion reads like *Berman*, with two judges following the Second Circuit's approach in *Berman*, and one dissenter (Judge Owens) preferring the Fifth Circuit's ruling. The vote totals demonstrate how divided the appellate bench is on this issue. Two of three circuits have granted Chevron deference to the SEC. However, of the nine judges who have heard the case, four have sided with the SEC and five have not.

On June 26, 2017 the Supreme Court granted certiorari to review the Ninth Circuit's *Somers* opinion. Dig. Realty Tr., Inc. v. Somers, No. 16-1276, 2017 U.S. LEXIS 4190 (June 26, 2017).

only protects individuals who make a disclosure to the SEC.[225] There are sound policy reasons for protecting internal disclosures. Such disclosures are good for consumers, good for putative whistleblowers, and good for corporations who want to identify and correct securities law violations before they negatively influence pricing and value. However, the statue clearly defines the term whistleblower, and then later uses that term in an easily interpreted manner. Consequently, courts should not manufacture ambiguity in order to superimpose good policy on an otherwise clearly drafted statute. In the courts, the choice is between bad law and bad policy and there cannot be a right answer; Congress, on the other hand, is not limited by the Hobson's Choice it created.

## IV. A Legislative Solution to a Regulatory Problem

### *A. Dodd-Frank Revisited*

The history of Dodd-Frank and the statutory context of section 922[226] both suggest that, in drafting the provision, Congress viewed the program as one aspect of a privatized enforcement mechanism for improving the SEC's regulatory function. By the 2010 enactment of Dodd-Frank, scholars and academics had long discussed the policy reasons for and against such a privatized enforcement mechanism (a discussion which continued well after the passing of Dodd-Frank).[227] However, while courts are constrained by the canons of statutory construction, policymakers face no such constraint. Consequently, it is informative to step back and revisit the broader policy goals of Dodd-Frank in order to question whether the SEC program in general, and

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[225] *See, e.g.*, Verbal v. Morgan Stanley Smith Barney, LLC, 148 F. Supp. 3d 644, 651 (E.D. Tenn. 2015); Puffenbarger v. Engility Corp., 151 F. Supp. 3d 651, 663 (E.D. Va. 2015); Lamb v. Rockwell Automation, Inc., 2016 U.S. Dist. LEXIS 106976 (E.D. Wis. August 12, 2016).

[226] Section 922 serves as the basis for the SEC Whistleblower Program.

[227] For examples of scholars arguing either for or against privatized enforcement mechanisms in various contexts, see generally Julie Rosen O'Sullivan, *"Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include a Qui Tam Provision?*, 53 Am. Crim. L. Rev. 67 (2016); D. Daniel Sokol, *Policing the Firm*, 89 Notre Dame L. Rev. 785 (2013); Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U. L. Rev. 73 (2012); Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 Duke J. Comp. & Int'l L. 503 (2011); Julie E. Steiner, *Should "Substitute" Private Attorneys General Enforce Public Environmental Actions? Balancing the Costs and Benefits of the Contingency Fee Environmental Special Counsel Arrangement*, 51 Santa Clara L. Rev. 853 (2011); Richard A. Nagareda, *Demisesquicentennial: Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. Chi. L. Rev. 603 (2008); Michael Waterstone, *A New Vision of Public Enforcement*, 92 Minn. L. Rev. 434 (2007); Ric Simmons, *Private Criminal Justice*, 42 Wake Forest L. Rev. 911 (2007); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum. L. Rev. 319 (2005); Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 Washburn L.J. 515 (2002); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 Law & Contemp. Prob. 167 (1997).

the anti-retaliation provision in particular, reflect and further those broad goals.

As discussed above, the process of drafting Dodd-Frank began with the goal of restoring "consumer confidence and consumer protection."[228] Because the market value of securities is tied to consumer confidence, this sweeping statement is easily supported by all stakeholders.[229] The executive branch provided more clarity by including as one of its five goals for the new legislation "protect[ing] consumers and investors from financial abuse."[230] This goal has several subdivisions, one to "create a new consumer financial protection agency," a second to "reform consumer protection," and another to "strengthen investor protection," which is further broken down to include "promot[ing] transparency" and making "financial firms and public companies . . . accountable to their clients and investors by expanding protections for whistleblowers."[231] Here, two observations are important. First, promoting this accountability is cast as one sub-element of the policy goal of protecting consumers. Second, the envisioned accountability is to clients and investors, not to the public, to regulators, or to the government.

Using this policy lens to consider the SEC anti-retaliation protections suggests that these protections may best serve the broader policy goals of Dodd-Frank if they protect individuals who make internal disclosures. However, this conclusion is not self-evident. Unless the policy reasons for creating and maintaining whistleblowing programs are consistent with promoting transparency by making companies more accountable to their clients and investors, then a policy-based fix to the Circuit Court split will be untenable. Further, before proposing a legislative amendment, the proposal must be considered against the policy goals and likely responses of stakeholders. The next subsection engages in this analysis.

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[228] KAISER, *supra* note 95, at 75.

[229] *See, e.g.*, Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 CONN. L. REV. 393, 418–24 (2006) ("The idea of a cycle of investor confidence and investor trust builds upon economic evidence of periodic fluctuations in investor expectations in the level of the economy and of the capital markets. Behavioral finance economists have labeled this phenomenon 'investor sentiment' and argued that it creates the natural conditions for bubbles to grow and investors to adopt positive feedback trading. But investor confidence also captures a deeper insight that a functioning market depends on investor trust in the integrity of that market and its institutions."); Brent J. Horton, *When Does a Non-Bank Financial Company Pose a "Systemic Risk"? A Proposal for Clarifying Dodd-Frank*, 37 IOWA J. CORP. L. 815, 823 (2012) (discussing how declining investor confidence and economic outlook created pricing and liquidity problems for Citigroup and created systemic risk); Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1314–16 (2014) (discussing the importance of public confidence in the bank deposits to ensure a stable and successful banking industry and arguing that deposit insurance is one critical way to promote this confidence).

[230] U.S. DEP'T OF THE TREASURY, *supra* note 100, at 10–18.

[231] *Id.* at 15–16.

### *B. Whistleblowing in Context*

#### *1. Why Whistleblowing?*

The act of whistleblowing may be cast differently within both regulatory and policy frameworks. Some see whistleblowing "as an embodiment of the human right of freedom of expression."[232] As such, blowing the whistle can be seen as a type of civil disobedience.[233] Inversely, it can have positive impacts for the corporation itself.[234] However, in all contexts, whistleblowing involves a disclosure of information[235] about a perceived, or at least alleged, wrongdoing. Finally, it involves information that is either unknown to the person receiving the report, or that has not been acted on in the manner the whistleblower believes necessary.[236] As such it is a form of "dissent."[237]

So while particular stakeholders may have different reasons for encouraging and supporting or for discouraging and undermining various types of whistleblowing activity, whistleblowing—in an elemental sense—relies on the innate human need to speak and be heard and fills functional gaps in regulatory, law enforcement, and corporate governance. Encouraging whistleblowing holds promise, therefore, for reducing illegal conduct, improving market efficiency, and mitigating corporate liability. But can good whistleblower policy do all of these things at once? In order to address this

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[232] Robert G. Vaughn et al., *The Whistleblower Statue Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L L. REV. 857, 862–63 (2003) ("The model statute incorporates an expansive view of protection because it approaches whistleblower protection not only as a labor provision but also as an embodiment of the human right of freedom of expression. As such, whistleblower protection forms an integral part of a series of reforms necessary to implement freedom of expression and to secure the democratic accountability that it supports."); *see also* VANDEKERCKHOVE, *supra* note 18, at 92–101 (discussing various justifications for calling whistleblowing a human right).

[233] *See* ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 43–49 (2012).

[234] *See, e.g.*, Richard E. Moberly, *Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers*, 2006 B.Y.U.L. REV. 1107, 1159 (2006) ("Whistleblower disclosure channels also benefit corporations by giving corporate employees greater voice through an additional avenue of participation in corporate governance."); Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 189–196 (2002).

[235] VANDEKERCKHOVE, *supra* note 18, at 92 ("What is common to all possible definitions of whistleblowing, is that whistleblowing is always about individuals disclosing information.").

[236] *See, e.g.*, Meuwissen v. DOI, 234 F.3d 9, 12–13 (Fed. Cir. 2000) (discussing why, for legal and policy reasons, an employee who reports information that already is known does not make a "disclosure" within the meaning of the Whistleblowers' Protection Act. This is because "[t]he purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information.").

[237] Jubb, *supra* note 58, at 78–80.

question, I now consider what the individual stakeholder interests might be, and whether there is a convergence of these interests that creates an opportunity for a responsible policy to promote all of them effectively.

*2. Stakeholder Interests*

Companies subject to the SEC's jurisdiction commit infractions on a spectrum, with administrative and procedural errors at one end and grossly illegal conduct like large-scale fraud and corruption at the other. The stakeholders who have an interest in preventing these infractions include law enforcement agencies, regulators, the corporations themselves, corporate shareholders, and consumers or the general public. For practical reasons, this discussion will limit its consideration to the interests of law enforcement, regulators, and corporations.[238] All of these stakeholders have an interest in preventing all possible infractions, but for different reasons. Similarly, all of these stakeholders work to reduce the number and frequency of all of these infractions but with different tools.

*a. Law Enforcement and Regulatory Enforcement*

In the carrot-and-stick model of incentivizing individual and corporate behaviors, law enforcement entities carry the big stick. Their job is to identify, investigate, and prosecute illegal conduct.[239] Successful prosecutions provide a deterrent effect and negative incentive for violating the law. Consequently, maximizing enforcement actions is a powerful tool for achieving this effect, which is perhaps why the Department of Justice considers prosecuting corporate crime such a high priority.[240]

Crimes resulting in pecuniary gain can incur substantial fines; which means that a company that pays a bribe can face large monetary penalties .[241] Corporations may try to avoid criminal punishment by providing information to law enforcement about the individuals who violated securities laws,

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[238] For purposes of this discussion, corporations, shareholders, and the general public will share the same interests. This is because corporations will want to preserve and increase the firm's value, which is shareholders' chief aim. The general public or consumers will want to ensure market stability, which is a shared interest with law enforcement and regulators. Admittedly, the market forces available to consumers and shareholders are markedly different than the tools available to corporate directors and law enforcement personnel and regulators. Nonetheless, because each interest is represented by considering law enforcement, regulators, and corporations, and because consumers and shareholders will not play a direct role in implementing the proposed policy, it is appropriate to limit consideration in this way.

[239] *See generally* FBI, *White-Collar Crime*, https://www.fbi.gov/investigate/white-collar-crime (last visited Feb. 15, 2017); U.S. DEP'T OF JUSTICE, *Criminal Fraud*, https://www.justice.gov/criminal-fraud (last visited Feb. 15, 2017).

[240] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing, to all United States Attorneys (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download ("Fighting corporate fraud and other misconduct is a top priority of the Department of Justice.").

[241] *See* 18 U.S.C. § 3571(d) (2016) (allowing fines against a company of up to 200% of the benefit obtained by a corrupt payment).

but such reduction in punishment is no guarantee.[242] To the degree criminal sanctions in one case create an effect powerful enough to prompt a voluntary self-report in another, such law enforcement action may be deemed a success. And even in cases where a corporation cannot avoid prosecution by self-reporting, the corporation may nonetheless choose to cooperate during the investigative phase of the case in order to mitigate a sentence.[243] In most cases, criminal investigators and prosecutors work in concert with regulators and civil litigators and often receive or provide referrals or coordinate criminal and civil penalties in individual cases.[244]

Regulatory or civil enforcement actions occupy something of a middle ground of the enforcement landscape. While civil fines affect a company's bottom line exactly as criminal fines do, civil fines are capped at a lower amount than criminal fines and carry less of a stigma.[245] Because the mission of regulatory enforcement is less punitive than criminal enforcement, and more focused on "protect[ing] investors and the markets;" an adverse regulatory action is not always accompanied by criminal charges.[246] Regulators fulfill this mission by identifying and remediating misconduct that is less serious than criminal misconduct or is discovered before it becomes systemic. Just as criminal prosecutors seek to encourage self-disclosure and cooperation from companies that have violated securities laws, so does the SEC.[247]

Law enforcement personnel and regulators obtain information about securities law violations from a number of sources, including law enforcement intelligence activities,[248] eyewitness tips or reports,[249] self-disclosures,[250] and

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[242] *See* U.S. Dep't of Justice, U.S. Attorney's Manual §§ 9-28.700, 9-28.900 (2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[243] U.S. Sentencing Guidelines Manual § 8C2.5(g) (U.S. Sentencing Comm'n 2016).

[244] *See, e.g.*, Richard L. Cassin, *DOJ, SEC Now Investigating Wells Fargo Sales Practices*, The FCPA Blog (Nov. 7, 2016, 8:28 AM), http://www.fcpablog.com/blog/2016/11/7/doj-sec-now-investigating-wells-fargo-sales-practices.html.

[245] *See* 18 U.S.C. § 3571(d) (2016) (allowing fines against a company of up to 200% of the benefit obtained by a corrupt payment); *see also* 15 U.S.C. § 78u (2016); 17 C.F.R. § 201.1004 (2009) (allowing the SEC to impose civil penalties of $16,000 and up to $725,000 for violations of the anti-bribery and accounting provisions).

[246] U.S. Sec. & Exch. Comm'n, Div. of Enforcement, Enforcement Manual § 1.4.1 (2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [hereinafter SEC Enforcement Manual].

[247] *See id.* at §§ 6.1.2–6.3 (discussing the "framework for evaluating cooperation by companies;" cooperation tools including cooperation, deferred, and non-prosecution agreements; and publicizing the benefits of cooperation); U.S. Sec. & Exch. Comm'n, *Enforcement Cooperation Program*, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml (last visited Feb. 15, 2017).

[248] *See generally Leadership and Structure: Intelligence Branch*, Fed. Bureau of Investigation, https://www.fbi.gov/about/leadership-and-structure/intelligence-branch (last visitied Feb. 15, 2017); *Financial Fraud Enforcement Task Force*, U.S. Dep't of the Treasury FinCEN, https://www.fincen.gov/financial-fraud-enforcement-task-force-ffetf (last visited Feb. 15, 2017).

[249] *See Forms: FBI Tips and Public Leads*, Fed. Bureau of Investigation, https://tips.fbi.gov/ (last visited Feb. 15, 2017).

irregularities in mandatory reports.[251] Whistleblowers are another vital source of information,[252] which explains why in Dodd-Frank's legislative history and the SEC's rule, the SEC whistleblower program initially was framed as an enforcement tool.[253] It also explains why many corporations urged the SEC to require whistleblowers to report internally before disclosing information to the SEC.[254]

*b. Corporations*

For corporations, preventing securities law violations is the most effective way to avoid the sanctions discussed above. Consequently, internal prevention, compliance, and ethics programs are congruent with maximizing shareholder value. Even small errors that may not amount to an illegality, but could have a substantive effect, can undermine public confidence and lead to lower share prices. Greater infractions, including conduct that may be technically legal but skirts the law, can impose outrage costs and longer-lasting effects.[255] Clear-cut violations of the law can result in fines and sanctions and, in extreme cases, can jeopardize the continued existence of the company. Robust internal compliance programs also can mitigate a corporation's exposure to the types of sanctions discussed above. United States sentencing and enforcement policy recognizes the legitimacy of a corporation's ability to claim that a violation occurred in spite of its best efforts at prevention. If such a claim is deemed accurate based on a number of factors, then prosecutors and regulators may be more lenient in bringing an enforcement action.[256]

For these reasons, corporations have strong incentives to create compliance, ethics, and internal reporting programs in order to identify and correct errors and violations before they rise to the level of illegality or gain the attention of—or require disclosure to—shareholders, regulators, or the public. Greater internal transparency allows a corporation to respond more

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[250] *See* U.S. DEP'T OF JUSTICE, *supra* note 242, §§ 9-28.700, 9-28.900; SEC ENFORCEMENT MANUAL, *supra* note 246, §§ 6.1.2–6.3.

[251] The public reports are available on the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system at https://www.sec.gov/edgar/searchedgar/companysearch.html.

[252] SEC REPORT ON DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 5.

[253] *See* discussion *supra* Section IV.A.

[254] *See* discussion *supra* Section IV.A.2; Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300–01 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249).

[255] I discuss these so-called "outrage constraints" in the context of another Dodd-Frank provision in Reeder, *supra* note 1, at 254 (discussing LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004)).

[256] *See, e.g.*, U. S. SENTENCING GUIDELINES MANUAL, § 8C2.5(f) (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/guidelines-manual/2015/2015-ussc-guidelines-manual (giving sentencing credit for an "effective compliance and ethics program"); SEC ENFORCEMENT MANUAL, *supra* note 246, § 6.1.2 (explaining how—as part of evaluating cooperation for purposes of granting leniency to companies—credit is given for "[s]elf-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top.").

quickly to errors or misconduct. When errors are identified early, the corporation can take corrective action to fix the source of the problem, ensure ongoing compliance, maintain investor and public confidence, and avoid sanctions or other enforcement actions.

The potential conflict between these internal and external whistleblower programs are immediately apparent and explain why many voices from the private sector advocated to the SEC that whistleblowers should have to make an internal report before making a report to the Commission.[257] If corporations are not given the chance to remediate internally before regulators investigate securities law violations, internal compliance efforts may not be as effective. The promise of a large monetary award for reporting directly to the SEC may compound this effect. Worse still, a corporation that tries to require internal reporting—or to incentivize internal reporting in a way that could be interpreted as discouraging external reporting[258]—may be in violation of Rule 21F-17 and face sanctions.[259]

However, despite this inherent conflict, the data suggest that the vast majority of whistleblowers do not report exclusively via external channels.[260] So while policymakers could point to these statistics as evidence that the requests to require internal disclosure represent an uniformed or disingenuous set of voices coming from the private sector, a more productive discourse also emerges, and public and corporate policy converges. How can corporate and public policies encourage more internal reporting and make that reporting more effective? By reassuring anyone who discloses securities violations internally that they will not suffer reprisals. Protecting both internal and external whistleblowers will help make companies more accountable to their shareholders and the public, reduce the likelihood of illegal conduct, create transparency that promotes market efficiency, and instill corporate boards' confidence in their own internal compliance programs' chances for

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[257] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300–01 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249).

[258] Here, I imagine the offer of monetary awards for internal reporting.

[259] *See* 17 C.F.R. § 240.21F-17 (2016) ("No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation."); *see also* Press Release, U.S. Sec. & Exch. Comm'n, Companies Cannot Stifle Whistleblowers in Confidentiality Agreements (Apr. 1, 2015), https://www.sec.gov/news/pressrelease/2015-54.html (discussing KBR's settlement with the SEC for $130,000 and its revising of its employee confidentiality agreement after the SEC determined that KBR's confidentiality agreement "potentially discouraged employees from reporting" to the Commission).

[260] OECD, Committing to Effective Whistleblower Protection 116–17 (2016), http://dx.doi.org/10.1787/9789264252639-en ("Although protection under domestic whistleblower protection laws are most commonly provided to those reporting misconduct externally to competent authorities, in reality, private sector employees report first, if at all, inside the company. According to a recent study of private sector employees in the United States, only one in six disclosers (18%) ever chose to report externally. . . . Only 2% of employees go solely outside the company and never report the wrongdoing they have observed to their employer. Of the private sector whistleblowers who have made reports to the US SEC's Office of the Whistleblower to date, over 80% first raised their concerns internally to their supervisors or corporate compliance officers before reporting to the commission.").

success. Lawmakers can promote these outcomes by effectively defining whistleblower in the context of the SEC anti-retaliation provision to include individuals who disclose information internally. This fix is simple, and Congress should enact it immediately.

### *C. A Simple Fix*

The definition of whistleblower in 15 U.S.C. § 78u-6(a)(6) is both clear and effective. It is easy to interpret and defines the group of individuals who should be eligible for rewards under the SEC's whistleblower program. It does not, however, include individuals who disclose internally. Thus, the protections found in 15 U.S.C. § 78u-6(h)(1)(A) should be legislatively expanded. There are multiple ways to do this, including creating two different definitions of whistleblower or expressly broadening the definition for the purpose of the anti-retaliation provisions. However, Judge Jacobs, in his dissent in *Berman*, suggested what might be the most artful way of achieving this policy goal with minimal legislative revision: simply leave the definition of whistleblower alone but protect a group that includes individuals who are not whistleblowers under that definition.

Judge Jacobs accuses the majority in *Berman* of engaging in legislative drafting, quipping that his "colleagues . . . could improve many federal statutes by tightening them or loosening them, or recasting or rewriting them."[261] He continues, accusing the majority of an incorrect reading so egregious as to amount "to a misquotation" by effectively substituting the word employee for the word whistleblower.[262] In this criticism of his colleagues' reasoning, Judge Jacobs offers a clear, simple, and artful path for policymakers to align the whistleblower protections afforded under the SEC program to the larger policy interests at stake in Dodd-Frank and whistleblower programs in general. Congress should amend 15 U.S.C. § 78u-6(h)(1)(A) to substitute the word employee for whistleblower in the statutory language. The revised text would read as follows.

> (A) In General.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, ~~a whistleblower~~ *an employee* in the terms and conditions of employment because of any lawful act done by the ~~whistleblower~~ *employee*—
> (i) in providing information to the Commission in accordance with this section;

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[261] Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2nd Cir. 2015); *see also* Somers v. Digital Realty Trust, Inc, 850 F.3d 1045, 1051 (Owens, J., dissenting).

[262] *Id.* at 157.

> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information or
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[263]

This amendment would resolve the circuit split, clarify Congress's intent, and serve the policy interests of law enforcement agencies, regulators, corporations, corporate shareholders, consumers, and the general public.

## Conclusion

While this project culminates with a simple proposal for legislative change, it also contains an important, though implied, indictment. Lawmakers, policy professionals, academics, researchers, advocacy organizations, and corporations are in the midst of a conversation about whistleblowing that has been ongoing for *at least* 40 years (and perhaps as long as 60 years). Yet, we cannot agree on what whistleblower means, and we often fail in our conversations to speak and write with the precision that this important topic deserves.

Whistleblowers can serve important functions in public regulatory and private governance frameworks. Their disclosures can fill gaps in an imperfect system of consumer protection that relies heavily on regulatory surveillance, disclosure-based detection, and government enforcement. They disclose information, often at personal risk, as an exercise of "freedom of expression."[264] The data suggest that many of these whistleblowers make disclosures not in hope of receiving rewards but in hope of eradicating illegal, unethical, or fraudulent behavior.[265] Companies with robust compliance programs embrace these disclosures and incorporate them into their systems of internal governance, even if only in response to powerful "market forces."[266] Furthering these positive outcomes requires clarity: in purpose, in intent, and in the words we use to explain, describe, and set whistleblower policies.

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[263] 15 U.S.C. § 78u-6(h)(1) (2016) with proposed deletions annotated by strikethrough text and additions annotated in underlined and italicized text.

[264] *See, e.g.*, Vaughn et al., *supra* note 232, at 862–63; Vandekerckhove, *supra* note 18, at 92–101.

[265] *See* OECD, *Committing to Effective Whistleblower Protection*, *supra* note 260, at 116–17 ("Only 2% of employees go solely outside the company and never report the wrongdoing they have observed to their employer.").

[266] *See* Moberly, *supra* note 234; Callahan et al., *supra* note 234.

A failure to delineate clearly between who is and who is not a whistleblower brings real consequences. By tracing the evolution of the phrase blowing the whistle and considering the early uses of the term whistleblower, we observed how the term emerged from vernacular usages in the context of sports parlance, domestic politics, and foreign relations and gave way to more familiar modern usages. However, these everyday uses have not converged; they gave way to a wide range of definitional terms—at least twenty-two such definitions I have catalogued and distinguished here to demonstrate the lack of consensus. Finally, we see that imprecise language can have consequences in the circuit courts' split over the scope of the SEC whistleblower program's anti-retaliation protections.

After considering the legislative history of Dodd-Frank, the SEC's rulemaking process, and the split between the Second and Fifth Circuits regarding the program's anti-retaliation provisions, I moved on to discuss why we promulgate pro-whistleblower policy at all, and why individuals who disclose wrongdoing should be protected against retaliation. Because fraudulent, unethical, and illegal conduct all undermine public trust and market stability, and because strong whistleblower policies help reveal misconduct and deter potential wrongdoers, the policy goals of the corporate world, the policy goals of the SEC (as spelled out by Dodd-Frank and the SEC's rules), and the public interest are best served when individuals who report perceived violations of securities laws are protected against retaliation—whether their disclosures are internal to their company or to an external government agency.

Consequently, lawmakers should clarify and broaden the scope of the SEC program to protect more individuals who make disclosures. Judge Jacobs's dissent in *Asadi* provides a simple solution for policymakers and lawmakers. Congress should broaden the applicability of the SEC anti-retaliation provisions by substituting employee[267] for whistleblower in the statutory language of 15 U.S.C. § 78u-6(h)(1)(A). With the enactment of this change, whistleblower policy will be better aligned with the broader policy goals of the financial regulatory framework in the United States and the purpose of the Dodd-Frank Act.

[267] Admittedly, this term would require its own definition, lest more litigation result from my proposed solution. One available option would be to simply borrow the National Labor Relations Act's definition as codified at 29 U.S.C. § 152(3) (2016).