WAKE FOREST JOURNAL OF BUSINESS AND INTELLECTUAL PROPERTY LAW

VOLUME 18 SPRING 2018 NUMBER 3

NOTE: FOR WHOM THE WHISTLE BLOWS: WHO QUALIFIES AS A DODD-FRANK WHISTLEBLOWER?

Isaac Halverson[†]

I. INTRODUCTION 506

II. BACKGROUND OF SEC WHISTLEBLOWER PROTECTION 508

III. THE CIRCUIT SPLIT 512

A. LIMITING DODD-FRANK PROTECTION TO SEC REPORTING 513

B. EXTENDING DODD-FRANK PROTECTION TO INTERNAL REPORTING 515

IV. RESOLVING THE CIRCUIT SPLIT 516

A. *DIGITAL REALTY TRUST, INC. V. SOMERS* 517

B. THE STATUTE IS AMBIGUOUS 518

C. THE SEC INTERPRETATION IS REASONABLE 520

D. POLICY CONSIDERATIONS 522

V. CONCLUSION 524

 B.A. Government, Wofford College (2015). The author would like to thank the Board of Editors and Staff members for their hard work in preparing this Note for publication and his family for their love and support.

I. INTRODUCTION

In response to the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act")[1] in order "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[2] One purpose in particular is to encourage whistleblowers to report securities misconduct to the Securities and Exchange Commission (the "SEC" or the "Commission").[3]

Specifically, Dodd-Frank incentivizes whistleblowing by including a "bounty" provision which requires the SEC to "pay an award" to "whistleblowers who voluntarily provided original information to the [SEC] that led to the successful enforcement" of relevant securities laws.[4] In addition, under Dodd-Frank's "anti-retaliation provision" in § 78u-6(h)(1)(A), it is unlawful for an employee to "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower . . . ."[5] A violation of this provision allows the whistleblower to sue under Dodd-Frank and potentially receive two times back pay, plus interest, in a successful action.[6] Unsurprisingly, as a result of these two strong incentives, the number of tips received by the SEC has drastically increased since the program's inception.[7]

Despite Dodd-Frank's undeniable success in increasing whistleblowing, the new protections have resulted in confusion as to who qualifies for whistleblower anti-retaliation protection.[8] In the definitions provision of the Act at § 78u–6(a)(6) (the "(a)(6) definition"), a whistleblower is defined as "any individual who

---

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

[2] *Id.* pmbl.

[3] Christina Pellino, Comment, *Don't Whistle While You Work – Unless You Whistle to the SEC*, 46 SETON HALL L. REV. 911, 912 (2016).

[4] 15 U.S.C. § 78u–6(b) (2012); *see* Pellino, *supra* note 3, at 919 (alteration in original) ("Dodd-Frank Act . . . increases whistleblowers' financial incentive to report by requiring the SEC to award bounties to persons who provide useful information to the SEC regarding securities law violations . . . .").

[5] 15 U.S.C. § 78u–6(h)(1)(A).

[6] *Id.* § 78u–6(h)(1)(B).

[7] Mathew R. Stock, *Dodd-Frank Whistleblower Statute: Determining Who Qualifies as a "Whistleblower"*, 16 FLA. ST. U. BUS. REV. 131, 133 (2017).

[8] Pellino, *supra* note 3, at 912.

continued . . .

provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*."[9] However, in the anti-retaliation provision of § 78u-6(h)(1)(A) (the "(h)(1)(A) provision"), protection is extended to whistleblowers "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" ("Sarbanes-Oxley").[10] Sarbanes-Oxley in turn, includes in its definition of "whistleblower," an employee who provides information to "a person with supervisory authority over the employee."[11] As a result, circuit courts are split as to whether Dodd-Frank's whistleblower protection extends to employees who internally report information to supervisors, as implied by the (h)(1)(A) provision, or if whistleblowers must report to the SEC to receive Dodd-Frank protection per the (a)(6) definition.[12]

The SEC interpreted the statute to mean the more expansive definition of whistleblower protection for employees who internally report to their supervisors.[13] In its 2011 regulation, the SEC clarified that:

> For purposes of the anti-retaliation protections afforded by . . . 78u–6(h)(1), you are a whistleblower if:
>
> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . and;
>
> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u–6(h)(1)(A)).
>
> (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.[14]

Under this regulation, a whistleblower need not report to the SEC to receive Dodd-Frank's anti-retaliation protection.[15] Rather, a properly made internal reporting made pursuant to Sarbanes-Oxley is

[9] 15 U.S.C. § 78u–6(a)(6) (alteration in original) (emphasis added).

[10] *Id.* § 78–6(h)(1)(A)(iii).

[11] 18 U.S.C. § 1514A(1)(C) (2012).

[12] *Compare* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013), *with* Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015), *and* Somers v. Dig. Realty Tr. Inc., 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017), *rev'd & remanded*, 138 S. Ct. 767 (2018).

[13] 17 C.F.R. § 240.21F–2(b) (2017).

[14] *Id.*

[15] Pellino, *supra* note 3, at 922.

continued . . .

sufficient.[16]

Some courts, however, declined to follow this regulation and held that the more restrictive (a)(6) definition—meaning someone who reports to the SEC—is required in order for the (h)(1)(A) provision to apply.[17] In doing so, these courts held that the (a)(6) definition and the (h)(1)(A) provision are unambiguous and that congressional intent is clear, thereby precluding the SEC from regulating the subject.[18]

In its recent decision, *Digital Realty Trust, Inc. v. Somers*,[19] the Supreme Court of the United States held that Dodd-Frank's anti-retaliation protection does not extend to employees who report information internally and do not report to the SEC. This Note will explore the circuit split history preceding this case and will argue that the Supreme Court should have applied the more expansive whistleblower definition as interpreted by the SEC regulation. Part II of the Note discusses the background of federal whistleblower protection found in Sarbanes-Oxley and Dodd-Frank. Part III addresses the state of the law before the Supreme Court's *Digital Realty Trust, Inc. v. Somers* opinion by comparing the lines of cases on both sides of the circuit split. Finally, Part IV argues for the SEC's expansive definition of "whistleblower" and why it should have been preferred.

II. BACKGROUND OF SEC WHISTLEBLOWER PROTECTION

Following the 1929 stock market crash, Congress created the SEC with the enactment of the Securities Exchange Act of 1934 (the "1934 Act").[20] Among its numerous provisions, the 1934 Act incentivizes whistleblowing in the insider trading contexts.[21] At the discretion of the SEC, whistleblowers could receive up to ten percent of the resulting SEC enforcement amount.[22] However, this provision generally failed to be an effective incentive to potential whistleblowers because of the low cap on a potential reward and because the issuing of any award was at the SEC's discretion.[23] Moreover, under the original 1934 Act, there was no retaliation protection for whistleblowers.[24]

---

[16] *Id.*

[17] *See*, e.g., *Asadi*, 720 F.3d. at 629.

[18] *See id.*

[19] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018).

[20] Pub. L. No. 73–291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–pp (2012)).

[21] *See* Pellino, *supra* note 3, at 915–16.

[22] *See id.* at 916.

[23] Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of "Greedy," the Eighth Dwarf,* 62 MERCER L. REV. 1279, 1282 (2010).

[24] Pellino, *supra* note 3, at 918.

continued . . .

It would not be until nearly seventy years later, with the enactment of Sarbanes-Oxley, that whistleblowers would have statutory protection from retaliation.[25] Sarbanes-Oxley was enacted in 2002 in response to corporate scandals such as Enron.[26] In the aftermath of Enron, Congress found that a "corporate code of silence" had "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally."[27] In addition, Enron employees attempting to report corporate misconduct faced discharge and other forms of retaliation.[28] Moreover, under existing law at the time, there was no available protection for would be whistleblowers.[29] As a result,

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.[30]

Clearly, a more robust whistleblower program was necessary to effectively protect investors.

Sarbanes-Oxley was enacted to address this corporate code of silence and prohibit such attempts "to quiet whistleblowers."[31] Under Sarbanes-Oxley it is unlawful for an employer to "discriminate against" a whistleblower in any manner.[32] Sarbanes-Oxley defines a whistleblower as an employee who takes lawful action:

> (1) [T]o provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably

---

[25] *See id.*

[26] *See* Yates v. United States, 135 S. Ct. 1074, 1081 (2015) ("The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Anderson LLP, had systematically destroyed potentially incriminating documents."); *see also* Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014) (citing S. REP. NO. 107–146, at 2–11) ("To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002.").

[27] S. REP. NO. 107–146, at 5 (2002) (alteration in original).

[28] *See id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 10.

[32] *Id.* at 35.

continued . . .

> believes constitutes a violation . . . of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with *supervisory authority* over the employee . . . ; or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed . . . relating to an alleged violation of . . . Federal law relating to fraud against shareholders.[33]

It is important to note that under Sarbanes-Oxley, an employee reporting to a supervisor or some "other person working for the employer who has the authority to investigate, discover, or terminate misconduct" qualifies as a whistleblower, regardless of whether the employee reports to the SEC.[34]

In the event of discrimination, a whistleblower under Sarbanes-Oxley is "entitled to all relief necessary to make the employee whole."[35] Specifically, available compensatory damages include "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."[36]

Sarbanes-Oxley also includes very specific filing requirements for a whistleblower who has been discriminated against. An employee must first file a complaint with the Secretary of Labor before being able to file their discrimination suit in federal court.[37] In addition, an employee is time bared from filing suit 180 days from the time the employee learned of the alleged violation.[38] Despite the improvements provided by Sarbanes-Oxley relating to whistleblower protection, the

[33] 18 U.S.C. § 1514A(a)(1)–(2) (2012) (emphasis added).

[34] *Id.* § 1514A(a)(1)(C).

[35] *Id.* § 1514A(c)(1).

[36] *Id.* § 1514A(c)(2).

[37] John K. Mickles, Note, *If There's Something Strange in Your Workplace, Who You Gonna Call? The Second Circuit Expands Whistleblower Protection in Berman v. Neo@Ogilvy LLC.*, 62 VILL. L. REV. 357, 366 (2017).

[38] *See* Stock, *supra* note 7, at 136.

continued . . .

percentage of whistleblowers "actually dropped from 18.4% to 13.2%" after its enactment.[39] This decrease has been attributed to the protections offered being "narrow in scope and more illusory than real."[40] The complexity of the statute, the unavailability of punitive damages, the brief statute of limitations, and the lack of a right to a jury trial all served to limit incentives and protections for whistleblowers.[41]

Dodd-Frank attempted to address these flaws by providing a bounty incentive to whistleblowers and bolstering retaliation protection of whistleblowers.[42] The bounty provision of Dodd-Frank provides that the SEC *must* pay an award to whistleblowers between ten and thirty percent of the sanctions resulting from the enforcement action.[43] The anti-retaliation provision of Dodd-Frank also improves upon Sarbanes-Oxley's protection by significantly increasing the statute of limitations. Under Dodd-Frank, employees have either six years from the time of the retaliation or three years from the time they discover the material facts of the action.[44]

Along with these new provisions come the additional uncertainty as to who qualifies as a whistleblower. The Securities Whistleblower Incentives and Protection provision of Dodd-Frank defines a whistleblower as "any individual who provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission."[45] This definition appears to be limited only to individuals who report the SEC.[46] However, in the § 21F(h)(1)(A) anti-retaliation provision, Dodd-Frank also provides protection to individuals "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."[47] As previously discussed, Sarbanes-Oxley's anti-retaliation provision specifically protects individuals who report to "a person with *supervisory authority* over the employee;" that is, an internal report not made to the SEC.[48] Therefore, the (h)(1)(A) provision appears to

[39] Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act,* 113 MICH. L. REV. 121, 128 (2014).

[40] Deborah L. Seifert et al., *The Influence of Organizational Justice on Accountant Whistleblowing,* 35 ACCT., ORGS. & SOC'Y 707, 709 (2010).

[41] Geoffrey Christopher Rapp*, Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act,* 2012 BYU L. REV. 73, 83 (2012).

[42] Pellino, *supra* note 3, at 919.

[43] 15 U.S.C. § 78u–6(b) (2012) (emphasis added).

[44] *Id.* at § 78u–6(h)(1)(B)(iii).

[45] *Id.* at § 78u–6(a)(6) (alteration in original) (emphasis added).

[46] *See id.*

[47] *Id.* at § 78u–6(h)(1)(A)(iii).

[48] 18 U.S.C. § 1514A(a)(1)(c) (2012) (emphasis added).

continued . . .

extend protection to whistleblowers who report internally and not to those employees who report to the SEC. The question now is whether such internal reporting alone qualifies for Dodd-Frank whistleblower protection.

On May 25, 2011, the SEC promulgated Rule 21F–2 in an attempt to answer this question.[49] This rule provides that:

> For purposes of the anti-retaliation protections afforded by [Dodd-Frank], you are a whistleblower if:
>
> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) . . . ;
>
> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u–6(h)(1)(A)).
>
> (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.[50]

With this regulation, the SEC extended Dodd-Frank's anti-discrimination protection to whistleblowers who report internally and not to the SEC.[51] The availability of a bounty would still be limited to Dodd-Frank's more restrictive definition of whistleblowers which requires reporting to the SEC.[52] However, under this SEC interpretation, clause (iii) of the (h)(1)(A) provision extends anti-retaliation protection to individuals who only report internally, filing under Sarbanes-Oxley.[53]

III. THE CIRCUIT SPLIT

Despite the SEC's regulation, for a time circuit courts were split over whether the SEC has the authority to define whistleblower as used in Dodd-Frank. The resulting case law was divided between the courts that sided with the SEC interpretation of extending anti-retaliation protection to employees who report internally and the courts that required employees to report to the SEC in order to receive Dodd-Frank anti-retaliation protection.[54]

---

[49] 17 C.F.R. § 240.21F–2 (2013); *see also* Pellino *supra* note 3, at 922.
[50] 17 C.F.R. § 240.21F–2(b) (alteration in original).
[51] *Id.*
[52] *See* 15 U.S.C. § 78u–6(b.).
[53] Mickles, *supra* note 37, at 373.
[54] *Id.* at 375–76; *compare* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d

continued . . .

A. Limiting Dodd-Frank Protection to SEC Reporting

The first circuit court to address this issue was the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*[55] In *Asadi*, the plaintiff worked as GE Energy's Iraq Country Executive.[56] During his tenure he reported to his supervisor that certain conduct appeared to be in violation of the Foreign Corrupt Practices Act.[57] After his disclosure, the plaintiff received a "surprisingly negative" performance review, was pressured into resigning, and after refusing to resign, was terminated.[58] Despite not providing any information to the SEC,[59] the plaintiff sued under Dodd-Frank's anti-retaliation provision.[60]

The Fifth Circuit Court held that "Dodd–Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws *to the SEC*. Because [the plaintiff] failed to do so, his whistleblower-protection claim fails."[61] The court held that since the (h)(1)(A) provision of Dodd-Frank uses the word "whistleblower," Congress unambiguously meant for the (a)(6) definition to apply, thereby requiring reporting to the SEC to receive Dodd-Frank's anti-retaliation protection.[62]

The plaintiff argued that clause (iii) of the (h)(1)(A) provision, which extends anti-retaliation protection to individuals "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," is in conflict with the (a)(6) definition, and as a result, the court should apply the SEC definition.[63] The court rejected this argument, stating that the (h)(1)(A) provision lists categories that "represent the *protected activity* in a whistleblower-protection claim. They do not, however, *define* which individuals qualify as whistleblowers."[64] The court furthermore found that since the statute clearly provided the "unambiguous expressed intent of Congress," the

---

Cir. 2015), *with* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 626–27 (5th Cir. 2013).

[55] *See Asadi*, 720 F.3d at 620; *see also* Mickles, *supra* note 37, at 376.

[56] *Asadi*, 720 F.3d at 621.

[57] *See id.*

[58] *Id.*

[59] *See id.* at 624.

[60] *See id.*

[61] *Id.* at 623 (alteration in original) (emphasis added).

[62] *Id.* at 625.

[63] *Id.* at 624 ("[Plaintiff] bases this construction of the statute on a perceived conflict between the statutory definition of 'whistleblower' in section 78u–6(a)(6) and the third category of protected activity, which does not necessarily require disclosure of information to the SEC.").

[64] *Id.* at 625 (emphasis added).

continued . . .

SEC's rule on the more expansive interpretation of whistleblower was invalid.[65]

In addition, the court examined the impact that the expansive definition of whistleblower could have on Sarbanes-Oxley.[66] The court argued that extending Dodd-Frank protection to Sarbanes-Oxley protected disclosures "renders the [Sarbanes-Oxley] anti-retaliation provision, for practical purposes, moot."[67] While Sarbanes-Oxley allows an award of back pay for successful claims, Dodd-Frank allows double back pay.[68] In addition, claimants under Dodd-Frank can file directly in federal district court, instead of having to first file with the Department of Labor.[69] Finally, the statute of limitations is considerably longer under Dodd-Frank than under Sarbanes-Oxley.[70] According to the court, whistleblowers would circumvent Sarbanes-Oxley altogether in order to take advantage of Dodd-Frank's more generous provisions.[71]

After *Asadi*, multiple district courts in the Second, Sixth, Seventh, Ninth, and Tenth Circuits agreed with the Fifth Circuit opinion and rejected the SEC's broad definition.[72] For instance, in *Verfuerth v. Orion Energy Sys., Inc.*, the Eastern District Court of Wisconsin held that "[t]here is no ambiguity in the statute at all" and that arguments to the contrary are "based solely on a disagreement about public policy, not statutory interpretation."[73]

Similarly, in *Berman v. Neo@Ogilvy LLC*, the Southern District of New York held that "the plain meaning of the Dodd–Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the Commission."[74] In that case, the plaintiff was

---

[65] *Id.* at 630 (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984)).

[66] *See id.* at 628.

[67] *Id.* (alteration in original).

[68] *Id.* at 629.

[69] *Id.*

[70] *Id.*

[71] Pellino, *supra* note 3, at 930.

[72] Wiggins v. ING U.S., Inc., No. 3:14–CV–1089 (JCH), 2015 WL 3771646, at *9–11 (D. Conn. June 17, 2015); Verble v. Morgan Stanley Smith Barney, LLC, 148 F. Supp. 3d 644, 652 (E.D. Tenn. 2015); Verfuerth v. Orion Energy Sys. Inc., 65 F.Supp.3d 640, 642–46 (E.D. Wis. 2014); Banko v. Apple Inc., 20 F.Supp.3d 749, 756–57 (N.D. Cal. 2013); Wagner v. Bank of Am. Corp., No. 12–cv–00381–RBJ, 2013 WL 3786643, at *4–6 (D. Colo. July 19, 2013).

[73] Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 644 (E.D. Wis. 2014).

[74] Berman v. Neo@ogilvy LLC, 72 F. Supp. 3d 404, 409 (S.D.N.Y. 2014), *rev'd & remanded*, 801 F.3d 145 (2d Cir. 2015).

continued . . .

a finance director who internally reported a number of fraudulent accounting practices which violated Sarbanes-Oxley and Dodd-Frank.[75] He was subsequently terminated for his reporting.[76] He later reported the securities violations to the SEC but not before the statute of limitations had tolled on any available Sarbanes-Oxley claim.[77] He then filed a retaliation claim as a Dodd-Frank whistleblower.[78] The district court held that since he had not reported to the SEC, he did not qualify as a whistleblower under Dodd Frank.[79] In particular, the district court held that "what plaintiff asks for here is not access to legal protection from retaliation for disclosing information to his employers—Sarbanes-Oxley already provides that. Rather, he asks for the right to file a private lawsuit without the need to first contact a government agency."[80] Plaintiff instead should have followed Sarbanes-Oxley procedure to receive protection.

B. Extending Dodd-Frank Protection to Internal Reporting

However, a number of other courts have disagreed with the restrictive view of the Fifth Circuit in *Asadi*. In particular, the Second and Ninth Circuit Courts have both deferred to the SEC's interpretation.[81] It is this interpretation that should have been preferred in the Supreme Court's recent ruling on *Digital Realty Trust, Inc. v. Somers*.[82] On appeal in *Berman v. Neo@Ogilvy LLC*, the Second Circuit reversed the district court and held that the section is "sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute."[83]

Prior to being heard by the Supreme Court, the Ninth Circuit in *Somers v. Digital Realty Trust Inc.* extended whistleblower protection "to those who report internally as well as to those who report to the SEC."[84] In that case, the plaintiff was terminated after making several

[75] Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 148–49 (2d Cir. 2015).
[76] *Id.* at 149.
[77] *Id.*
[78] *Id.* at 405–06.
[79] *Id.* at 405.
[80] *Id.* at 409.
[81] *Id.*; Somers v. Dig. Realty Tr. Inc., 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017), *rev'd & remanded*, 138 S. Ct. 767 (2018); Pellino, *supra* note 3, at 924; *see* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 838 (1984) (allowing for deference to an agency's reasonable interpretation of a statute when it is ambiguous).
[82] *See Dig. Realty Tr., Inc.*, 138 S. Ct. at 781–82.
[83] *Berman*, 801 F.3d at 146.
[84] *Somers*, 850 F.3d at 1050.

continued . . .

reports to his employers about possible securities law violations.[85] His termination occurred before he was able to make any reports to the SEC, but he subsequently sued as a whistleblower under Dodd-Frank's anti-retaliation provisions.[86] The court held that "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty . . . the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference."[87] Therefore, the SEC's broad interpretation is applied to resolve the ambiguity.[88]

The determination of whether to give deference to an agency interpretation hinges on the *Chevron* test. Under the two-part test established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[89] the court first inquires as to "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[90]

While the Fifth Circuit Court in *Asadi* found the statute unambiguous, making the SEC regulation invalid,[91] the Second and Ninth Circuit Courts found the statute to be ambiguous and so progressed to the second step of *Chevron*, in which, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[92] To determine whether an agency's construction is rational, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached."[93] As a result, courts that have found ambiguity in the section have given *Chevron* deference to the SEC's "reasonable interpretation."[94]

IV. RESOLVING THE CIRCUIT SPLIT

In its recent decision in *Digital Realty Trust, Inc. v. Somers*, the Supreme Court reversed the Ninth Circuit decision and held that "[t]o sue under Dodd–Frank's anti-retaliation provision, a person must first 'provid[e] . . . information relating to a violation of the securities laws

[85] *Id.* at 1047.
[86] *Id.*
[87] *Id.* at 1050–51.
[88] *Id.*
[89] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[90] *Id.* at 842–843.
[91] Asadi v. G.E. Energy (USA) L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).
[92] *Chevron*, 467 U.S. at 843.
[93] *Id.* at 843 n.11.
[94] Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015).

continued . . .

to the Commission.'"[95] Moreover, "[b]ecause 'Congress has directly spoken to the precise question at issue,' [the Supreme Court did] not accord deference to the contrary view advanced by the SEC . . . ."[96] However, the Court should have upheld the Ninth Circuit decision in giving *Chevron* deference to the SEC regulation. Deferring to the SEC regulation is appropriate because the statute is ambiguous, the SEC's construction is reasonable, and because the SEC construction best fits within the overall policy behind Dodd-Frank.

A. *Digital Realty Trust, Inc. v. Somers*

As previously mentioned, *Digital Realty Trust, Inc. v. Somers* arose out of the termination of Paul Somers by his former employer, Digital Realty Trust, Inc.[97] Somers began his tenure at Digital Realty in 2010 and worked as Vice President of Portfolio Management in Europe and later in Singapore.[98] While in Singapore he reported to Senior Vice President Kris Kumar.[99] A short time before his termination, Somers complained to senior management regarding "serious misconduct" by Kumar, including violations of Sarbanes Oxley internal control requirements.[100] Somers was subsequently terminated on April 9, 2014.[101]

In district court, Digital Realty moved to dismiss Somers's Dodd-Frank whistleblower claim because he did not report the alleged misconduct to the SEC.[102] However, the district court held that the statute was ambiguous and applied *Chevron* deference to the SEC's broad interpretation.[103] The Ninth Circuit Court affirmed,[104] and on June 26, 2017, the Supreme Court granted Certiorari.[105]

Writing for a unanimous court, Justice Ginsburg held that "we do

---

[95] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 772 (2018) (quoting 15 U.S.C. § 78u–6(a)(6) (2012)).

[96] *Id.* at 782 (quoting *Chevron*, 467 U.S. at 842) (alteration in original).

[97] *Id.* at 769.

[98] Somers v. Dig. Realty Tr., Inc., 119 F.Supp.3d 1088, 1092 (N.D. Cal. 2015), *aff'd*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017), *rev'd & remanded*, 138 S. Ct. 767 (2018).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1047 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017), *rev'd & remanded*, 138 S. Ct. 767 (2018).

[105] *See Dig. Realty Tr., Inc.*, 137 S. Ct. at 2300; *Dig. Realty Tr., Inc.*, 138 S. Ct. at 776.

continued . . .

not accord deference to the contrary view advanced by the SEC."[106] In reaching this conclusion, the Court relied on the "explicit definition" given under (a)(6) and applied it to the (h)(1)(A) provision.[107] Furthermore, the Court held that Dodd-Frank's purpose was to get individuals to report misconduct *to the SEC*, and this narrower interpretation accomplishes the legislative objective.[108] Finally the court briefly disposed of several of Somers and the SEC's arguments in favor of the SEC interpretation.[109]

However, in this decision, the Court was incorrect in finding the statute to be unambiguous. As a result, it failed to properly apply the two steps of *Chevron* and determine if the SEC's interpretation is a "permissible construction of the statute."[110] Finally, the Court has failed to address several of the crucial policy considerations regarding internal whistleblowing.

B. The Statute is Ambiguous

According to the SEC's argument, the ambiguity of the statute stems from the "significant tension" between the (a)(6) definition of whistleblower and the (h)(1)(A) provision.[111] As previously discussed, the (a)(6) definition clearly requires that a whistleblower "provide, information relating to a violation of the securities laws *to the Commission*."[112] Yet, clause (iii) of the (h)(1)(A) provision provides protection to "whistleblower[s] . . . making disclosures that are required or protected under the Sarbanes-Oxley Act,"[113] which would include individuals reporting internally and not to the SEC.[114] Reading the (a)(6) definition as requiring SEC reporting to also apply to the (h)(1)(A) provision raises some "bizarre consequences,"[115] indicating that the statute does not demonstrate the unambiguous intent of Congress.

However, the Supreme Court found no ambiguity in the two

[106] *Dig. Realty Tr., Inc.*, 138 S. Ct. at 782.
[107] *Id.* at 776–777.
[108] *Id.* at 777.
[109] *Id.* at 778–791.
[110] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
[111] Brief for the SEC, as Amici Curiae Supporting Appellee at 19, Somers v. Dig. Realty Tr. Inc., 850 F.3d 1045 (9th Cir. 2017) (No. 15–17352), 2016 WL 3088310.
[112] 15 U.S.C. § 78u–6(a) (2012) (emphasis added).
[113] *Id.* § 78u–6(h)(1)(A)(iii) (alteration in original).
[114] 18 U.S.C. § 1514A(a)(1)(c) (2012).
[115] Brief for the SEC, *supra* note 111, at 22.

continued . . .

provisions. Instead, it held that "'[w]hen a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."[116] Therefore, since the (a)(6) definition requires reporting to the SEC, that is the definition the Court must follow.[117] The (h)(1)(A) provision is not definitional and only describe "what *conduct,* when engaged in by a whistleblower, is shielded from employment discrimination."[118] As a result, an individual must meet both requirements to have Dodd-Frank protection.[119]

However, in this instance the Court has overly simplified the issue, since several other canons of construction must also be considered. This same Court has previously held that even "the presumption of consistent usage 'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'"[120] Here, the "distinct statutory object" in clause (iii) is to provide anti-retaliation protection to whistleblowers who report under Sarbanes-Oxley.[121] Requiring strict consistent interpretation of the term "whistleblower" under the (a)(6) definition subverts this object by eliminating protection for all individuals who report under Sarbanes-Oxley but fail to report to the SEC. Moreover, if one reads the (a)(6) definition as having the "distinct statutory objective" of making SEC reporting an overarching prerequisite to being a whistleblower, it is unclear why Congress would even draft clause (iii) to suggest a broader type of disclosure protection.[122]

In addition, the canon against surplusage states that a "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[123] Requiring an overarching, limited (a)(6) definition of whistleblower makes the subsequent clause (iii) unnecessary.[124] All disclosures under clause (iii) would also have to be filed with the SEC under the (a)(6) definition to receive anti-retaliation protection.[125] But clauses (i) and

[116] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 776 (2018) (quoting Burgess v. United States, 553 U.S. 124, 130 (2008)).

[117] *Id.* at 777.

[118] *Id.*

[119] *Id.*

[120] Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2441 (2014) (quoting Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007)).

[121] 15 U.S.C. § 78u–6(h)(1)(A)(iii) (2012).

[122] Brief for the SEC, *supra* note 111, at 21.

[123] Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting Market Co. v. Hoffman, 101 U.S. 112, 115–16 (1879)).

[124] Brief of the SEC, *supra* note 111, at 22.

[125] *Id.* at 21.

continued . . .

(ii) already specifically provide anti-retaliation protection to individuals who disclose to the SEC.[126] Therefore, there would be no additional protection actually provided under clause (iii) that was not already provided under (i) and (ii). As a result, clause (iii) becomes surplusage when the (a)(6) definition is also required.[127]

Yet, the Court stated that clause (iii) is not superfluous because it still "protects a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure."[128] In this scenario, an employee reports securities law misconduct internally under clause (iii) and also reports to the SEC under the (a)(6) definition.[129] The employer then takes discriminatory action against the employee based on the internal reporting, but is unaware that the employee has also reported to the SEC.[130] In this way an employee would be a whistleblower consistent with the (a)(6) definition and would also have to rely specifically on clause (iii) of the (h)(1)(A) provision for anti-retaliation protection of an internal disclosure.[131]

However, this hypothetical fails to save clause (iii) from being superfluous for two reasons. First, the anti-retaliation provision is designed to "*prevent* retaliation by placing employers on notice" that they may not retaliate against whistleblowers.[132] In other words, the provision is aimed at deterring retaliation by employers. Under this hypothetical, there is no deterrence value in clause (iii), since an employer would have to be unaware of an SEC disclosure for the provision to apply.[133] Secondly, this hypothetical is extremely unlikely to allow a plaintiff to successfully rely on clause (iii). If an employer were truly unaware of the disclosure to the SEC, it would be almost impossible to establish that the employer had the "requisite retaliatory intent" to punish the employee specifically for reporting to the SEC.[134]

C. The SEC Interpretation is Reasonable

Since the statute fails to demonstrate the unambiguous intent of Congress, the Supreme Court should have deferred to the SEC's

[126] *Id.*; *see also* 15 U.S.C. § 78u–6(h)(1)(A)(i)–(ii) (providing anti-retaliation protection to whistleblowers who report to the SEC).

[127] Brief for the SEC, *supra* note 111, at 22.

[128] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 779 (2018).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Brief for the SEC, *supra* note 111, at 23.

[133] *Id.*

[134] *Id.* at 24.

continued . . .

reasonable interpretation. The interpretation is reasonable because it is based on "a permissible construction of the statute."[135] In its amicus brief, the SEC listed four reasons that its interpretation is reasonable.[136] First, the interpretation "effectuates the broad employment anti-retaliation protections that clause (iii) contemplates."[137] Secondly, it "avoid[s] disincentivizing individuals from reporting internally first in appropriate circumstances."[138] Thirdly, "if internal compliance and reporting procedures 'are not utilized or working, our system of securities regulation will be less effective.'"[139] Fourthly, "it enhances the [SEC's] ability to bring enforcement actions when employers take adverse employment actions against employees for reporting securities law violations internally."[140]

The Supreme Court did not address the reasonableness of the SEC's interpretation,[141] but the Fifth Circuit in *Asadi* argued that the SEC's interpretation of its rule is not reasonable because the regulation itself is inconsistent in defining "whistleblower."[142] While the provisions regarding whistleblower status and retaliation protection under § 21F-2(b)(1) adopt the broad whistleblower definition,[143] the procedures for submitting reports under 9(a) require that:

> To be considered a whistleblower . . . you must submit your information about a possible securities law violation by either of these methods: (1) Online, through the *Commission's* Web site . . . or (2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) . . . *to the SEC* Office of the Whistleblower.[144]

---

[135] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[136] Brief of the SEC, *supra* note 111, at 30–31.

[137] *Id.* at 30.

[138] *Id.* (alteration in original).

[139] *Id.* at 30–31.

[140] *Id.* at 31 (alteration in original).

[141] *See generally*, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) (lacking discussion of "reasonableness").

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

[143] 17 C.F.R. § 240.21F–2(b) (2017) ("For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act, (15 U.S.C. 78u–6(h)(1)), you are a whistleblower if: (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and; (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u–6(h)(1)(A)). (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.").

[144] 17 C.F.R. § 240.21F–9(a) (emphasis added).

continued . . .

Therefore, according to the Fifth Circuit, the SEC's regulation inconsistently still "requires that an individual submit information about a possible securities law violation to the SEC."[145]

However, the SEC has since addressed this conflict. In a 2015 release, the SEC clarified that:

> [A]n individual may qualify as a whistleblower for purposes of Section 21F's employment retaliation protections irrespective of whether he or she has adhered to the reporting procedures specified in Rule 21F-9(a). Rule 21F–2(b)(1) alone governs the procedures that an individual must follow to qualify as a whistleblower eligible for Section 21F's employment retaliation protections.[146]

Therefore, the SEC's interpretation is consistent. *Asadi* raised no further objections to the reasonableness of the SEC's interpretation.[147] However, since the Supreme Court held that the statute was unambiguous, it did not address the reasonableness of the SEC's interpretation.

D. Policy Considerations

Finally, the Supreme Court's decision failed to address several important policy considerations. First, extending Dodd-Frank's anti-retaliation protection to whistleblowers who only report wrongdoing internally under clause (iii) supports companies' internal reporting mechanisms. These mechanisms are the "cornerstones of effective compliance policies because they permit companies to discover instances of potential wrongdoing, to investigate underlying facts, and to take remedial action."[148] Businesses will prefer these methods afforded by internal reporting because they allow organizations to deal with violations internally without bad publicity or litigation.[149]

However, "internal corporate compliance programs will be crippled" as a result of this decision requiring whistleblowers to report

---

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

[146] Interpretation of the SEC's Whistleblower Rules Under Section 21F, Exchange Act Release No. 34–75592, 112 SEC Docket 376 (Aug. 7, 2015).

[147] *See generally Asadi*, 720 F.3d. 620 (lacking discussion of reasonableness).

[148] Jordan A. Thomas & Vanessa De Simone, *Opinion: Employers May Come to Regret Seeking Narrow Definition of 'Whistleblower'*, NAT'L L. J. (Apr. 9, 2014, 11:46 AM), http://www.nationallawjournal.com/id=1397049044573/Opinion-Employers-May-Come-to-Regret-Seeking-Narrow-Definition-of-Whistleblower?slreturn=20160114214914.

[149] Pellino, *supra* note 3, at 935.

continued . . .

to the SEC before receiving anti-retaliation protection.[150] In order to protect themselves under Dodd-Frank, employees seeking to report misconduct will resort to bypassing internal compliance altogether and simply report straight to the SEC.[151] This risks creating a work environment which impedes a company's ability to detect misconduct, as employees are unwilling to report suspected wrongdoing to management.[152] The consequences will also impact investors who rely on a number of different types of internal disclosures while making their investment decisions.[153]

Furthermore, the overall policy trend since the 1934 Act has been to encourage whistleblowing and expand protection for whistleblowers.[154] The previously discussed failures of the 1934 Act and Sarbanes-Oxley in part stemmed from inadequate protections and incentives relating to whistleblowers.[155] Dodd-Frank itself was designed to encourage whistleblowers to report securities violations.[156] In particular, its bounty provision reveals Congress's intent to incentivize whistleblowers.[157] So it makes little sense to apply a narrow interpretation of the (h)(1)(A) provision.

Although not an argument taken up by the Supreme Court, the Fifth Circuit previously maintained that policy considerations favor the narrower interpretation, since the broad interpretation risks rendering Sarbanes-Oxley moot.[158] Potential plaintiffs would supposedly favor filing a claim under Dodd-Frank instead of Sarbanes-Oxley when given the choice.[159] However, in reaching this conclusion the Fifth Circuit relies only on the higher back pay awards, longer statute of limitations, and direct federal claim in district court.[160]

This argument also ignores the two advantages that make Sarbanes-Oxley more attractive for some plaintiffs.[161] First, certain claims under Sarbanes-Oxley are heard in an administrative forum by the Department of Labor.[162] This would potentially drastically reduce the costs of

[150] Stephen Kohn, *Digital Realty Trust V. Somers May Kill Corporate Compliance*, LAW360 (Sept. 21, 2017, 1:14 PM), https://www.law360.com/articles/964208/digital-realty-trust-v-somers-may-kill-corporate-compliance.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See* Pellino, *supra* note 3, at 915–19.

[155] *Id.* at 919.

[156] *Id.*

[157] *See supra* text accompanying notes 42–43.

[158] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 628 (5th Cir. 2013).

[159] *Id.* at 628–29.

[160] *Id.* at 629.

[161] *Id.*

[162] *Id.*

continued . . .

litigation.[163] Secondly, even though the back pay award for Dodd-Frank is twice that of Sarbanes-Oxley, the total recovery might still be greater under Sarbanes-Oxley.[164] Section 806 provides for "all relief necessary to make the employee whole" and for "compensation for any special damages."[165]

V. CONCLUSION

Dodd-Frank was enacted in the wake of one of the worst economic disasters in American history.[166] It was a deliberate piece of legislation aimed at addressing corporate excess through a number of methods, one of which was by encouraging whistleblowers to disclose securities misconduct.[167] For a time, the exact extent of the protection offered to whistleblowers under the statute was unclear. The Fifth Circuit and a scattering of district courts held that whistleblowers must report to the SEC in order to receive protection.[168] The Second and Ninth Circuit disagreed, and held that internal reporting can still be protected by Dodd-Frank.[169] With the SEC's regulation offering a reasonable interpretation to resolve the dispute, the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*[170] came down to a determination of whether or not the statutory language of the (a)(6) definition and clause (iii) of the (h)(1)(A) provision make the statute ambiguous or not.[171]

The clear tension and the inability to reconcile the two provisions should have called for a finding of ambiguity. Applying standard canons of construction, the Court should have found ambiguity regarding congressional intent, necessitating deference to the SEC's regulation. For the foregoing reasons the Supreme Court was incorrect in *Digital Realty Trust, Inc. v. Somers* and as a result, failed to provide critical protection for whistleblowers who report internally under Dodd-Frank.

---

[163] Brief of the SEC, *supra* note 111, at 26.

[164] *Id.* at 27.

[165] 18 U.S.C. §§ 1514A(c)(1)–(2)(C) (2012).

[166] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, pmbl., 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

[167] Pellino, *supra* note 3, at 919.

[168] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 623 (5th Cir. 2013).

[169] *See* Somers v. Dig. Realty Tr. Inc., 850 F.3d 1045, 1050 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017), *rev'd & remanded*, 138 S. Ct. 767 (2018); Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015).

[170] Somers v. Dig. Realty Tr. Inc., 138 S. Ct. 767 (2018).

[171] *Id.* at 781–782.