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Anti-Retaliation Protection for Internal Whistleblowers under Dodd-Frank Following the Fifth Circuit Decision in Asadi.

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RECENT DEVELOPMENT

ANTI-RETALIATION PROTECTION FOR INTERNAL WHISTLEBLOWERS UNDER DODD–FRANK FOLLOWING THE FIFTH CIRCUIT'S DECISION IN *ASADI*

TAPAS AGARWAL*

I. INTRODUCTION

The Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) was enacted by Congress in 2010 in response to the United States' financial crisis in the late 2000s.[1] At the time of enactment, Congress described the purpose of the Dodd–Frank as "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive

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

financial services practices, and for other purposes."[2] One way Dodd–Frank endeavors to "improv[e] accountability and transparency in the financial system" is through enhanced protections for employees who report securities violations, or "whistleblow."[3]

Dodd–Frank creates a private cause of action for employees who are fired or otherwise discriminated against in retaliation for whistleblowing.[4] A whistleblower who prevails in such an action against their employer shall be reinstated to their position (if fired) and receive twice the amount of back pay due along with litigation costs, including reasonable attorney's fees.[5] When effectual, these provisions deter employers from retaliating against employee-whistleblowers; however, federal courts have disagreed as to who qualifies under the statutory scheme. Some jurisdictions hold that those who report securities violations directly to their employer or supervisor (otherwise known as "internal" whistleblowing) qualify for Dodd–Frank anti-retaliation protection. The only federal appellate court to consider the issue thus far, the Fifth Circuit, held that employees must report securities violations directly to the Securities and Exchange Commission (SEC) to qualify for anti-retaliation protection under Dodd–Frank.[6]

This paper identifies the statutory language giving rise to the dichotomy in case law, discusses the *Asadi* decision in depth, examines jurisprudence post-*Asadi* and concludes with brief advice to employees contemplating whistleblowing.

II. THE STATUTORY TEXT

The language of two Dodd–Frank provisions, one providing a definition for whistleblower and the other delineating activities that qualify for anti-retaliation protection, sets the framework for the split in the federal courts.

"Whistleblower" is defined in 15 U.S.C. § 78u-6(a)(6) as "any individual who provides, or 2 or more individuals acting jointly who provide,

2. H.R. Res. 4173, 111th Cong. (2010) (enacted).

3. *Id.*

4. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(h)(1)(B)(i) (2012) ("An individual who alleges discharge or other discrimination . . . may bring an action under this subsection in the appropriate district court of the United States . . . .").

5. *Id.* § 78u-6(h)(1)(C).

6. *See* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 630 (5th Cir. 2013) ("We conclude 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.").

information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission."[7] Standing alone, the definition indicates that one who does not report a securities violation directly to the SEC is not considered a whistleblower for purposes of the statute.[8]

Meanwhile, the anti-retaliation provision of Dodd–Frank, found at 15 U.S.C. § 78u-6(h)(1)(A), seems to extend protection beyond the statutory definition of whistleblower to several different categories of persons:

> 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 § 78j-1(m) of this title, § 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[9]

The third of these categories, § 78u-6(h)(1)(A)(iii), includes Dodd–Frank anti-retaliation protection for those making disclosures "required or protected" under a law subject to the SEC's jurisdiction.[10] As Section 806 of the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley) protects employees against retaliation by employers for reporting alleged securities violations *within* publicly traded companies to one with "supervisory authority over the employee,"[11] the argument follows that by including Sarbanes–Oxley disclosures in 15 U.S.C. § 78u-6(h)(1)(A)(iii), Dodd–Frank extends its superior protection scheme to those individuals making internal disclosures pursuant to Sarbanes–Oxley.[12] Opponents counter that by

7. Dodd–Frank Act, 15 U.S.C. § 78u-6(a)(6) (emphasis added).

8. *See* Genberg v. Porter, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013) (noting that the plain language of 15 U.S.C. § 78u-6(a)(6) "mandates that in order to qualify as a whistleblower, one must provide information to the SEC regarding an alleged federal securities law violation").

9. Dodd–Frank Act, 15 U.S.C. § 78u-6(h)(1)(A).

10. *Id.* § 78u-6(h)(1)(A)(iii).

11. 18 U.S.C. § 1514A(a)(1)(C) (2012).

12. The broad language of § 78u-6(h)(1)(A)(iii) is not limited to Sarbanes–Oxley and includes disclosures made under other legislation that falls under the purview of the SEC as long as the

virtue of using the statutorily-defined word whistleblower, 15 U.S.C. § 78u-6(h)(1)(A) is limited to those "who provide[] information relating to a violation of the securities laws to the Commission" under 15 U.S.C. § 78u-6(a)(6).[13] The SEC interprets § 78u-6(h)(1)(A) in its rule to "apply to three different categories of whistleblowers, and the third category [§ 78u-6(h)(1)(A)(iii)] includes individuals who report to persons or governmental authorities *other than the Commission.*"[14]

Some foresaw the issue presented by the wording of the text.[15] The tension in the text was brought into focus when the Fifth Circuit held in *Asadi v. G.E. Energy, LLC*[16] that "the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws *to the SEC* to qualify for protection from retaliation under § 78u-6(h)."[17] Prior to the *Asadi* decision, five federal district courts found the text of the statute unclear, and held protection against retaliatory action does extend, in some cases, to those that report securities violations other than directly to the SEC.[18] This split has

disclosure is "required or protected."

13. *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspect Violations to the SEC*, 124 HARV. L. REV. 1829, 1831 (2011).

14. SEC Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300-01, at 34304, 2011 WL 2293084 (2011) (emphasis added). *See* 17 C.F.R. § 240.21F–2(b)(iii) (2011) ("The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and condition to qualify for an award.").

15. *See* Chinyere Ajanwachuku, *An In-House Counsel's Decision to Whistleblow*, 25 GEO. J. LEGAL ETHICS 379, 390 (2012) (citation omitted) ("[J]udicial circuits may choose to read the retaliation provision narrowly . . . apply[ing] the protection only to employees who report information directly to the SEC. Therefore 'a whistleblower who is primarily worried about retaliation . . . has every incentive to report directly to the SEC . . . to avoid being without sufficient retaliation protection.'"); *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1831–32 (2011) ("This once obscure section of Dodd–Frank may in fact turn out to be one of the most influential. Perhaps due to a drafting error or perhaps by intentional design, Congress has written section 922 so that its retaliation protections apply only to those who report information externally . . . .").

16. Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (5th Cir. 2013).

17. *Id.* at 629.

18. *See* Murray v. UBS Sec., LLC, No. 12 Civ. 5914, 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013) (holding disclosures must either be provided directly to the SEC, or fall under one of the four categories listed in § 78u–6(h)(1)(A)(iii)); Genberg v. Porter, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013) (finding that § 78u–6(h)(1)(A)(iii) is an exception to the definition of whistleblower in § 78u–6(a)(6)); Kramer v. Trans-Lux Corp., No. 3:11cv1424, 2012 WL 4444820, at *3–5 (D. Conn. Sept. 25, 2012) (quoting *Egan* and finding the SEC's rule allowing the extension of anti-retaliatory protections beyond the definition of whistleblower found in § 78u–6(a)(6) to be a permissive construction of the Dodd–Frank Act); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 993–94 (M.D. Tenn. 2012) (holding that § 78u–6(h)(1)(A)(iii) does not require direct contact with the SEC to qualify for protection if the disclosure was "required or protected"); Egan v. TradingScreen, Inc., No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011) ("Plaintiff must either allege

important implications, particularly for internal compliance systems of businesses in the financial sector.[19]

III. THE *ASADI* DECISION

A review of the case law regarding the interplay between § 78u–6(a)(6) and § 78u-6(h)(1)(A)(iii) reveals that courts believe the question to be one of statutory interpretation and generally follow one of two paths to reach an accord. If a court considers the statutory language of the provisions to be unclear, the court will generally show *Chevron*[20] deference to the SEC rule, allowing protection for those who report other than directly to the SEC.[21] If, however, a court finds the provisions to be unambiguous (because of use of the term whistleblower in § 78u-6(h)(1)(A)(iii)), the

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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. [§] 78–u6(h)(1)(A)(iii) that do not require such reporting . . . .").

19. Many commenters have noted the benefits and popularity of internal whistleblowing.

> [T]here has been a shift toward encouraging internal whistleblowing and away from the almost exclusive legislative emphasis on reporting outside the organization. This represents a change in emphasis away from a primary focus on punishment by governmental bodies toward earlier and more complete cessation of wrongdoing. It also saves public funds. There are many other advantages to internal reporting. It accords with the actions of most whistleblowers, is less harmful to the organization and the employee, and is considered more ethical.

Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace*, 35 VAND. J. TRANSNAT'L L. 457, 463 (2002) (citations omitted). Some worry promoting external whistleblowing "may actually increase retaliation against whistleblowers by creating intrafirm adversarialism where none previously existed." Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd–Frank Act "Bounty Hunting,"* 45 CONN. L. REV. 483, 487 (2012). Others suggest that incentivizing external whistleblowing "provides a much-needed check for the type of corporate fraud that is least likely to be reported internally, and provides balance to the focus on self-regulation." Justin Blount & Spencel Markel, *The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd–Frank Act's Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1043 (2012). The SEC acknowledged the importance of healthy inter-entity reporting during the notice-and-comment period. *See generally* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 FR 70488-01, at *70496 (Nov. 17, 2010) (codified at 17 C.F.R. pts. 240 and 249).

20. When an agency's interpretation of a statute is to be given effect is determined by the "now-canonical" formula offered by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See* City of Arlington v. F.C.C., 133 S. Ct. 1863, 1868 (2013) (promoting the *Chevron* standard as black-letter law). According to *Chevron*, courts must defer to an agency's reasonable interpretation of a statute the agency administers when the statute in question in ambiguous. *Chevron*, 467 U.S. at 842–43. Analysis under *Chevron* is a two-step inquiry. *Id.* First, courts must determine whether the "unambiguously expressed intent of Congress" is clear from the statute itself or circumstances surrounding its enactment. *Chevron*, 467 U.S. at 843. If not, courts then must find the agency did not act "arbitrar[ily], capricious[ly], or manifestly contrary to the statute" in promulgating its' rule. *Id.* at 844.

21. *See* cases cited *supra* note 18.

court usually will not defer to the SEC rule and refuse to extend Dodd–Frank protection.[22] Courts considering the issue naturally refer to *Asadi*, the first federal circuit decision on the matter.

Khaled Asadi served as G.E. Energy's Executive for Iraq starting in 2006.[23] This position entailed "coordinat[ing] with Iraq's governing bodies in order to secure and manage energy service contracts for GE."[24] In June 2010, a government insider informed Asadi that G.E. Energy had hired Iman Mahmood, "a woman 'closely associated' with the Senior Deputy Minister of Electricity," Raad Al Haris, with whom G.E. was negotiating a joint venture agreement.[25] Worried such a hiring was made to curry favor with Al Haris, thus violating the Foreign Corrupt Practices Act, Asadi reported the hiring to his supervisor.[26] Asadi also filed a report with the ombudsperson for G.E., who later interviewed Asadi.[27] Following this interview Asadi faced intense pressure to accept a reduced role or come to a severance agreement with G.E.[28] On June 24, 2011, G.E. abruptly stopped communicating with Asadi and terminated his employment.[29]

Following his termination, Asadi filed suit under the anti-retaliation provision of the Dodd–Frank Act.[30] Asadi did not allege that he reported the potential violation to the SEC, but rather that he qualified for protection under 15 U.S.C. § 78u-6(h)(1)(A)(iii).[31] Asadi made two arguments using 15 U.S.C. § 78u-6(h)(1)(A)(iii): (1) He made required disclosures protected by the Sarbanes–Oxley Act when he reported an alleged violation of the Foreign Corrupt Practice Act to Anix and the G.E. ombudsperson; and (2) he made disclosures protected by the Foreign Corrupt Practices Act, which he argued was another "law, rule, or regulation" subject to the SEC's jurisdiction and therefore fell under the

22. *But see* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 729, 733 (D. Neb. 2014) (holding Dodd–Frank unambiguously protects disclosures required or protected by a rule subject to the jurisdiction of the SEC).

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

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.* at *3 ("Congress enacted Dodd–Frank in 2010, in the wake of the 2008 financial crisis, to improve accountability and transparency of the financial system.").

31. *See id.* ("The Anti-Retaliation Provision prohibits an employer from retaliating against a whistleblower 'because of any lawful act done by the whistleblower . . . .'").

last exception provided in 15 U.S.C. § 78u-6(h)(1)(A)(iii).[32] When considering G.E.'s motion, the district court avoided analysis of the conflicting provisions by finding the anti-retaliatory provision of the Dodd–Frank Act did not apply extraterritorially.[33] The court went on to analyze whether Dodd–Frank incorporated extraterritorial components of SOX or FCPA. The court found that the SOX provision itself did not apply extraterritorially, and while the FCPA provision did, the disclosure was not *required or protected* per the language in 15 U.S.C. § 78u-6(h)(1)(A)(iii).[34] Asadi appealed the district court's ruling to the Fifth Circuit.

Unlike the district court, the Fifth Circuit panel conducted an analysis of the pertinent provisions.[35] The panel answered what it deemed "a relatively straightforward question" by finding that Congress had unambiguously mandated one qualify as a whistleblower under § 78u-6(a)(6) prior to receiving the protections afforded by § 78u-6(h)(1)(A).[36] The court criticized previous decisions as "rest[ing] on a misreading of the operative provisions of § 78u-6."[37]

The Fifth Circuit found that 15 U.S.C. § 78u-6(h)(1)(A) unambiguously limited who was protected through use of the term whistleblower.[38] The panel addressed Asadi's claim of a conflict by finding that there was harmony between the provisions unless 15 U.S.C. § 78u-6(h)(1)(A)(iii) was read to include additional avenues to anti-retaliatory protection.[39] The court found use of the term whistleblower in 15 U.S.C. § 78u-6(h)(1)(A) as opposed to "employee" or "individual" compelling.[40] The panel also noted use of the term whistleblower in the heading of subsection (h).[41] The court contended its interpretation of these provisions as unambiguous gave effect to Congress's use of this language.[42]

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32. *See id.* at *3 n.31 (detailing the allegations made by Asadi in his amended complaint).

33. *See id.* at *4.

34. *Id.* at *5–7.

35. *See* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623–30 (5th Cir. 2013) (holding the plain language of the statute mandates one report directly to the SEC to qualify for the protections offered by the anti-retaliation provision).

36. *Id.* at 623.

37. *Id.* at 625.

38. *See id.* (emphasis added) ("Under Dodd–Frank's plain language and structure, there is only one category of whistleblowers . . . .").

39. *See id.* at 626 ("[T]here are not conflicting definitions of 'whistleblower' and § 78u-6(h)(1)(A)(iii) is not superfluous.").

40. *See id.*

41. *See id.* at 627.

42. *See id.*

The court went on to address the argument that its reading of the statute rendered § 78u-6(h)(1)(A)(iii) superfluous by offering the following scenario:

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a whistleblower as defined in Dodd–Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes–Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd–Frank whistleblower-protection provision because he was a whistleblower and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.[43]

The panel stated it is actually Asadi's interpretation that renders part of the statute superfluous by ignoring the "to the Commission" language in § 78u-6(a)(6).[44]

The court went on to say that Asadi's construction would essentially render the anti-retaliation provisions of the Sarbanes–Oxley Act moot, as a plaintiff would be unlikely to bring an action under the Act due to the benefits of bringing the claim under Dodd–Frank.[45] According to the court, three important benefits Dodd–Frank has over Sarbanes-Oxley make this inevitable: (1) The Dodd–Frank act allows for two times back pay due while the Sarbanes–Oxley Act only allows for back pay due; (2) the Sarbanes–Oxley Act requires complainants to submit a claim with the Secretary of Labor first and wait 180 days for a final decision prior to filing in federal court, the Dodd–Frank Act has no such requirement; and (3) the statute of limitations for a claim under the Dodd–Frank Act is years longer

43. *Id.* at 627–28. *But see* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 732 (D. Neb. 2014) ("[T]his hypothetical exposes the *Asadi* court's interpretation as unwieldy.").

44. *See id.* at 628.

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

than the applicable statute of limitation for the Sarbanes–Oxley Act.[46]

Finally, the court considered Asadi's claim that the court should defer to the SEC's regulation[47] on the matter.[48] The court conceded the regulation supports Asadi's construction of the statute, but ultimately dismissed the regulation as inconsequential due to the statute being unambiguous.[49] The court also noted what it perceives as inconsistent drafting on the SEC's behalf by citing to 17 C.F.R. § 240.21F–9, the regulation which defines whistleblower. Section 240.21F–9 states:

> To be considered a whistleblower under section 21F of the Exchange Act (15 U.S.C. [§] 78u-6(h)), you must submit your information about a possible securities law violation by either of these methods:
>
> (1) Online, through the Commission's Web site [located at http://www.sec.gov]; or
>
> (2) By mailing or faxing a Form . . . to the SEC Office.[50]

According to the court, this language conflicts with 17 C.F.R. §240.21F–2(b), the regulation covering the anti-retaliation provision, as it explicitly requires that an individual submit information about a possible securities law violation to the SEC.[51]

Another interesting argument was acknowledged by the court but not elaborated upon. G.E. claimed the legislative history indicates Congress purposely rejected a broader wording of the anti-retaliatory provisions.[52] Specifically, G.E. points out the version of the bill passed by the House on December 11, 2009 allows for "employees, contractors, or agents" to receive anti-retaliation protection, but the version promulgated by the Senate on May 20, 2010 uses the term 'whistleblower' instead.[53] The court reaches its decision, however, by relying solely on the plain language

46. *See id.* at 629.

47. *Id.* at 627 n.10.

48. *See id.* at 629.

49. *See id.*

50. *Id.* at 630.

51. *See id.* at 629.

52. *See id.* at 626 n.9.

53. *See id.* at 626–27 n.9 (noting that G.E. Energy says that Congress rejected a broad description of those eligible to raise claims under the whistleblower-protection provision). One court notes that the Senate version of the bill presented on May 20, 2010 "lacked an equivalent to subsection (iii).... [T]here was no reason to anticipate that any conflict would arise from the replacement of the phrase 'employee, contract or, agent' with the term 'whistleblower.'" Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 729, 731 (D. Neb. 2014). As the whistleblower provisions were "a small part of a very large piece of legislation," the circumstances strongly indicate "Congress was not aware of any potential conflict." *Bussing*, 20 F. Supp. 3d at 729, 731.

of the statutory text.[54]

IV. JURISPRUDENCE POST-*ASADI*

Since the *Asadi* decision, courts have been clearly divided regarding how to interpret the anti-retaliation provisions. Federal district courts in Missouri, New York, Wisconsin, Florida, California, and Colorado have agreed with the Fifth Circuit, finding the statute to unambiguously mandate that one must qualify as a whistleblower under § 78u-6(a)(6).[55] Meanwhile, federal district courts in Massachusetts, New York, New Jersey, Nebraska, and California have disagreed with the *Asadi* court.[56] All such courts have found the provisions in question to be ambiguous and show deference to the SEC rule with the exception of one.[57] The

54. *See Asadi*, 720 F.3d at 623 ("We start and end our analysis with the text of the relevant statute . . . .").

55. *See* Lutzeier v. Citigroup Inc., 4:14CV183, 2015 WL 892565, at *2 (E.D. Mo. Mar. 2, 2015) ("The Court agrees with the reasoning of the Fifth Circuit [in *Asadi*]."); Berman v. Neo@Ogilvy LLC, 1:14-CV-523, 2014 WL 6860583, at *4 (S.D.N.Y. Dec. 5, 2014) ("In this Court's view, the approach of the Fifth Circuit is more appropriate than the judicial creation of a 'narrow exception' to an unambiguous text."); Verfuerth v. Orion Energy Sys., Inc., No. 14-C-352, 2014 WL 5682514, at *3–4 (E.D. Wis. Nov. 4, 2014) (dismissing courts which find ambiguity in the statute as engaging in judicial policymaking); Englehart v. Career Educ. Corp., No. 8:14-CV-444-T-33, 2014 WL 2619501, at *7–9 (M.D. Fla. May 12, 2014) ("The fact that numerous court have interpreted the same statutory language differently does not render the statute ambiguous . . . ."); Banko v. Apple Inc., 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013) ("[T]he statute is not ambiguous . . . ."); Wagner v. Bank of Am. Corp., No. 12–cv–00381, 2013 WL 3786643, at *5–6 (D. Colo. July 19, 2013) ("I agree [with *Asadi*] entirely.").

56. *See* Connolly v. Remkes, No. 5:14-CV-01344, 2014 WL 5473144, at *4–6 (N.D. Cal. Oct. 28, 2014) ("[T]his Court adopts the majority view . . . ."); *Bussing*, F. Supp. 3d at 734 (reading the statute to unambiguously allow anti-retaliation protection to those who make disclosures under § 78u-6(h)(1)(A)(iii)); Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) ("[T]he two provisions read in conjunction create a potential conflict . . . the SEC's interpretation . . . is a reasonable reading of the statute that resolves the ambiguity."); Khazin v. TD Ameritrade Holding Corp., No. CIV.A. 13-4149, 2014 WL 940703, at *4–6 (D.N.J. Mar. 11, 2014) ("This Court agrees with the majority of district courts' view that the Dodd–Frank Act is ambiguous . . . ."); Rosenblum v. Thomson Reuters (Markets) LLC, 984 F. Supp. 2d 141, 147–48 (S.D.N.Y. 2013) ("When considering the DFA as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. Thus, the governing statute is ambiguous."); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 44–46 (D. Mass. 2013) ("The SEC's construction is the more persuasive. It is apparent . . . that Congress intended that an employee terminated for reporting Sarbanes–Oxley violations to a supervisor . . . have a private right of action under Dodd–Frank whether or not the employer wins the race to the SEC's door with a termination notice."); *see also* Ahmad v. Morgan Stanley & Co., 2 F. Supp. 3d 491, 496 n.5 (S.D.N.Y. 2014) (deferring to SEC's interpretation, but deciding case on other grounds); Azim v. Tortoise Capital Advisors, LLC, No. 13-2267, 2014 WL 707235, at *2–3 (D. Kan. Feb. 24, 2014) (holding an employee's Dodd–Frank claim was not futile considering the state of the law).

57. *See Bussing*, 20 F. Supp. 3d at 733 ("As a practical matter, this interpretation reaches the same result as the SEC's regulation. But the result flows from the statute itself, and it is not

same court finding the statute to unambiguously protect disclosures made internally (without deferring to the SEC rule), the U.S. District Court for the District of Nebraska, has certified the question to the Eight Circuit on interlocutory appeal.[58]

V. CONCLUSION

In light of the deeply divided jurisprudence surrounding the issue following the *Asadi* decision, employees who want Dodd–Frank's anti-retaliation scheme to apply to them have every incentive to report to the SEC directly. Those who choose not to should argue both that the statute unambiguously allows internal reporting (as the *Bussing* court found), and that the SEC rule is an acceptable interpretation of an ambiguous statute. Employees who do not report directly to the SEC, but hope to qualify for Dodd–Frank protection under § 78u-6(h)(1)(A)(iii), should make sure they follow the guidelines to qualify for anti-retaliation protection (if any is offered) under the underlying law.[59] For example, one reporting a securities violation under Sarbanes–Oxley should take care to abide by the requirement to report to the Secretary of Labor first, the shorter statute of limitations and other requirements of Sarbanes–Oxley, even if seeking the more favorable relief of Dodd–Frank. This hypothetical whistleblower could then plead alternative theories of recovery under both Dodd–Frank and Sarbanes–Oxley.[60] Until further clarification is received from the courts (beginning, presumably, with the Eight Circuit's decision in *Bussing*), such an approach allows for a fallback option if a court denies extending Dodd–Frank protection to the employee.

necessary to determine if deference to the SEC's construction of the statute is warranted.").

58. *Id.* at 740.

59. *Cf. Banko*, 20 F. Supp. 3d at 756 ("Dodd–Frank . . . is not the only protection available to individuals who believe they are being retaliated against for revealing securities fraud . . . the plaintiff could have filed a complaint with the Secretary of Labor under Sarbanes–Oxley . . . .").

60. *See* FED. R. CIV. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically . . . .").