PAYING TOO DEARLY FOR A WHISTLE: PROPERLY PROTECTING INTERNAL WHISTLEBLOWERS

*Leonardo Labriola**

In light of substantial disagreement among the circuits on which types of whistleblowers Dodd-Frank intends to protect, and newly proposed legislation which suggests a solution, this Note inspects Dodd-Frank's whistleblower protections in an effort to better explain which types of corporate whistleblowers should and should not be protected. This Note briefly outlines the United States's repeated history of increased regulation following financial crises, culminating in the Sarbanes-Oxley and Dodd-Frank Acts. It then describes the goals that motivated these acts and how whistleblowers play an outsized role in accomplishing those goals. It also examines the critical statute for corporate whistleblower protection—Dodd-Frank's section 922—and describes the SEC's interpretation of that text. This Note then contrasts the competing interpretations of section 922 and compares the policy results of those interpretations. It also looks at how existing structures within the Securities and Exchange Commission and the protections from other related whistleblower regimes might inform Dodd-Frank's protections. Finally, this Note proposes a cohesive solution that protects internal whistleblowers, respects corporate decision making, and furthers Sarbanes-Oxley's and Dodd-Frank's goals.

* J.D. Candidate, 2018, Fordham University School of Law; B.A., 2012, University of Colorado. I would like to thank the *Fordham Law Review*, Ethan J. Leib, Alexis Jesup, and my family and friends for their steadfast support.

INTRODUCTION

Over fifteen years ago, on December 2, 2001, Enron filed for bankruptcy.[1] Enron, once ranked among the "most admired" companies in the world by

1. Michael W. Peregrine, *Enron Still Matters, 15 Years After Its Collapse*, N.Y. TIMES: DEALBOOK (Dec. 1, 2016), http://www.nytimes.com/2016/12/01/business/dealbook/enron-still-matters-15-years-after-its-collapse.html [https://perma.cc/7YDQ-8XQT].

Fortune magazine, was an energy giant.[2] Mutual funds, private investors, and Enron employees padded their accounts with Enron stock options as protections against risk. Then, after years of outperforming the market,[3] Enron suddenly filed for bankruptcy. After Enron had fraudulently misreported its finances for years, the chickens had finally come home to roost.[4] Enron stock, "which peaked at $90 in August 2000,"[5] fell to just $0.26 per share by the end of November the following year.[6] In just three of those months, Enron's stock had fallen from $36 per share to less than $0.50 per share.[7] The company had collapsed. Darvin Mitchell, an Enron employee, was three years from retiring when he was laid off.[8] He had his family's retirement savings in Enron stock.[9] He was forced to survive on social security.[10] Anne Beliveaux, who worked for eighteen years as an assistant in Enron's tax department, was forced to live on $1,600 per month after her retirement savings were similarly wiped out.[11] When Enron's CEO Jeffery Skilling was sentenced to 292 months in prison, Dawn Powers Martin took the opportunity to tell Skilling that she and her daughter would be clipping grocery coupons despite her twenty-two years working at Enron.[12] Ten thousand similarly situated employees lost their jobs and $1.2 billion in life savings.[13]

Fifteen years later, there are still lessons to be learned from Enron.[14] Several whistleblowers inside Enron had alerted top management of the financial reporting violations that Enron was committing.[15] Rather than heed the warnings of those whistleblowers, Enron's top executives chose instead to fire them.[16] If those whistleblowers had legal recourse for their firing, and

2. Malcolm Gladwell, *Open Secrets: Enron, Intelligence, and the Perils of Too Much Information*, NEW YORKER (Jan. 8, 2007), http://www.newyorker.com/magazine/2007/01/08/open-secrets-3 [https://perma.cc/PJ3A-DUQ9].

3. *See* DUANE GRUBERT & DAVID WIDEMAN, ENRON: BRUISED BUT STRONG, UPGRADED TO OUTPERFORM 3 (2001), http://www.rbcpa.com/enron/ene_sanford_20010921.pdf [https://perma.cc/2VST-RK7P].

4. Jeffrey Toobin, *End Run at Enron*, NEW YORKER (Oct. 27, 2003), http://www.newyorker.com/magazine/2003/10/27/end-run-at-enron [https://perma.cc/R77G-5LE6].

5. *401(k) Investors Sue Enron*, CNN MONEY (Nov. 26, 2001, 2:36 PM), http://money.cnn.com/2001/11/26/401k/q_retire_enron_re/ [https://perma.cc/D8HZ-28T3].

6. *Enron Corporation (ENRN Q) Common Stock Historical Price Table*, GILARDI & CO. LLC 32, http://www.gilardi.com/pdf/enro13ptable.pdf (last visited Apr. 14, 2017) [https://perma.cc/YK47-C6ZV].

7. *Id.* at 31–32.

8. Analee Bivins, *Church Members Not Immune from Enron Woes*, CHRISTIAN CHRON. (Mar. 2002), http://www.christianchronicle.org/article/church-members-not-immune-from-enron-woes [https://perma.cc/4SXL-B79S].

9. *Id.*

10. *Id.*

11. Gladwell, *supra* note 2.

12. *Id.*

13. Toobin, *supra* note 4.

14. *See* Peregrine, *supra* note 1.

15. *See infra* notes 61–62 and accompanying text.

16. *See infra* notes 63–64 and accompanying text.

a federal audience for their claims, perhaps Enron's collapse might have been avoided.[17]

In an attempt to encourage whistleblowing and prevent another such catastrophe, the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") sought to protect and reward whistleblowers.[18] However, in Dodd-Frank, Congress created an arguable ambiguity leaving room for courts to disagree on the extent of this whistleblower protection.[19]

This Note argues that the solutions to this ambiguity are, so far, inadequate. Either they fail to adequately protect internal whistleblowers or fail to accord the proper degree of discretion to corporate compliance regimes. Failing in the former ignores the pragmatic realities of corporate whistleblowing. Failing in the latter ignores the goals of Sarbanes-Oxley. Both face potentially insurmountable interpretive and policy challenges. This Note recommends a more coherent solution that looks to the extant structures within and without Dodd-Frank to relieve certain internal whistleblowers of the burden of proof to show retaliatory action while still requiring that burden of proof for other internal whistleblowers.

Part I briefly outlines the United States's repeated history of increased regulation following financial crises, culminating in the Sarbanes-Oxley and Dodd-Frank Acts. It then describes the goals that motivated these Acts and how corporate whistleblowers play an outsized role in accomplishing those goals. Part II examines the critical statute for corporate whistleblower protection—Dodd-Frank's section 922—and describes the SEC's interpretation of that text. Next, Part III contrasts the Second and Fifth Circuits' competing interpretations of section 922 and compares the policy results of those interpretations. It also looks at how existing structures within the Securities and Exchange Commission (SEC or "the Commission") and the protections from other related whistleblower regimes might inform Dodd-Frank's protections. Finally, Part IV proposes a cohesive solution that better protects internal whistleblowers, respects corporate decision making, and furthers Sarbanes-Oxley's and Dodd-Frank's goals.

I. WHISTLEBLOWERS GUARD AGAINST CRISIS

Congress has long met financial crises with increased financial regulation. Two of the most recent and significant of these regulations are Sarbanes-Oxley and Dodd-Frank. These two acts, in relevant part, create protections and rewards for corporate whistleblowers so as to better discover securities violations and thereby better enforce securities laws.

A. The Repeated History of Financial Crisis

Whistleblower protections and rewards have only recently developed as congressional solutions to financial crises. However, financial crises are not

17. *See infra* Part I.C.1.
18. 15 U.S.C. § 78u-6 (2012); 18 U.S.C. § 1514A.
19. *See infra* Part II.B.

new phenomena in American history. Whenever America has been faced with wide-scale financial crises, Congress has responded by passing broad legislation that uses the tools of financial regulation to alleviate the crisis and, purportedly, to prevent any similar future crises.[20] This stretches as far back as the Civil War, which itself could be viewed as the most direct federal-level labor regulation in American history. Ultimately, the war left the American South decimated and in rapid economic decline.[21] In response, Congress passed the National Bank Act[22] in an effort to centralize and regulate the American banking system, if not begin in earnest to establish a national bank.[23] After the "Panic of 1907," which caused a rippling 25 percent loss in the New York Stock Exchange over the course of just two months,[24] Congress passed the Aldrich-Vreeland Act, which created the National Monetary Commission[25] that ultimately established the Federal Reserve under the Federal Reserve Act of 1913.[26] The Great Depression that followed Black Tuesday motivated Congress to create arguably the largest regulatory regime in American history. This "New Deal" yielded the Banking Act of 1933,[27] the Securities and Exchange Act of 1934,[28] the Social

20. William D. Cohan, *Introduction* to DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (*UNINTENDED*) CONSEQUENCES, at xi (2011) (paraphrasing Yale economist Arthur Okun as stating that "a rip-roaring financial crisis is bound to result in a new swath of financial reglation"); Zizi Petkova, Comment, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act*, 18 U. PA. J. BUS. L. 573, 574 (2016) (pointing out the "long-standing pattern of remedial Congressional action following major systemic [economic] failures").

21. *See generally* JEREMY ATACK & PETER PASSELL, A NEW ECONOMIC VIEW OF AMERICAN HISTORY: FROM COLONIAL TIMES TO 1940, at 378–80 (2d ed. 1994) (asserting that "many have accepted war damage as the primary source of the southern economic decline").

22. Ch. 106, 13 Stat. 99 (1864); *see also* 12 U.S.C. § 38; Jonathan L. Levin, *In Search of the National Bank Act*, 97 BANKING L.J. 741, 742–44 (1980).

23. *See* JAMES ELIOT MASON, THE TRANSFORMATION OF COMMERCIAL BANKING IN THE UNITED STATES, 1956–1991, at 24 (1997) (calling the National Bank Act of 1863 "the nation's first comprehensive effort to establish a national banking system and a unified monetary system").

24. Carola Frydman et al., *Economic Effects of Runs on Early "Shadow Banks": Trust Companies and the Impact of the Panic of 1907*, 123 J. POL. ECON. 902, 917 (2015).

25. Sayre Ellen Dykes, *The Establishment and Evolution of the Federal Reserve Board: 1913–23*, 75 FED. RES. BULL. 227, 227 (1989); *see also* J. Laurence Laughlin, *The Aldrich-Vreeland Act*, 16 J. POL. ECON. 489, 492–93 (1908) ("In the last session of Congress, following the panic of 1907, the demand for new legislation contained the crude expectation that the law would prevent the possibility of future panics.").

26. Ch. 6, 38 Stat. 251 (codified in scattered sections of 12 U.S.C.) (establishing "a more effective supervision of banking in the United States"); *see* Dykes, *supra* note 25, at 227.

27. Ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.) (establishing the Federal Deposit Insurance Corporation and formally separating any national banks and their state member banks from issuers of securities). Parts of this act are more familiarly known as "the Glass-Steagall Act." Cohan, *supra* note 20, at xii.

28. Ch. 404, § 2, 48 Stat. 881, 881–82 (codified at 15 U.S.C. § 78 (2012) (establishing the SEC).

Security Act,[29] the National Labor Relations Act,[30] and the Fair Labor Standards Act.[31]

However, these historical responses to financial crises served only as the vanguards for Congress's more recent actions in similar contemporary crises. As the economy reeled from the dot-com crash in 2002,[32] Enron, MCI WorldCom, and Tyco, all financial behemoths,[33] were discovered to have committed wide-scale fraud at the executive level,[34] causing unrecoverable drops in thousands of Americans' mutual and retirement funds, 401(k)s, and, in some cases, their entire life savings.[35] To prevent this institutionalized fraud from happening again, Congress passed Sarbanes-Oxley,[36] which

29. Ch. 531, 49 Stat. 620 (1935) (codified at 42 U.S.C. § 301) (establishing the Social Security Board).

30. Ch. 372, § 3, 49 Stat. 449, 451 (1935) (codified at 29 U.S.C. § 151) (establishing the National Labor Relations Board).

31. Ch. 676, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201).

32. Petkova, *supra* note 20, at 574.

33. Enron was the seventh largest publicly traded company in the United States when it declared bankruptcy on December 2, 2001. FREDERICK D. LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 70 (2012). MCI WorldCom was the "second-largest long-distance provider and a major carrier of Internet traffic." Simon Romero, *Turmoil at WorldCom: The Overview; WorldCom Facing Charges of Fraud; Inquiries Expand*, N.Y. TIMES (June 27, 2002), http://www.nytimes.com/2002/06/27/business/turmoil-worldcom-overview-worldcom-facing-charges-fraud-inquiries-expand.html [https://perma.cc/FU64-HAGC].

34. *See* Richard A. Oppel Jr. & Kurt Eichenwald, *Enron's Collapse: The Overview; Arthur Andersen Fires an Executive for Enron Orders*, N.Y. TIMES (Jan. 16, 2002), http://www.nytimes.com/2002/01/16/business/enron-s-collapse-overview-arthur-andersen-fires-executive-for-enron-orders.html [https://perma.cc/FN3G-ZUEA]; Simon Romero & Floyd Norris, *New Disclosures from WorldCom May Add to Accounting Scandal*, N.Y. TIMES (July 2, 2002), http://www.nytimes.com/2002/07/02/business/new-disclosures-from-worldcom-may-add-to-accounting-scandal.html [https://perma.cc/PB93-JDKY]; Andrew Ross Sorkin & Alex Berenson, *Corporate Conduct: The Overview; Tyco Admits Using Accounting Tricks to Inflate Earnings*, N.Y. TIMES (Dec. 31, 2002), http://www.nytimes.com/2002/12/31/business/corporate-conduct-overview-tyco-admits-using-accounting-tricks-inflate-earnings.html [https://perma.cc/5UUV-QN3P]. However, this is not an exhaustive list of the companies found to have committed wide-scale fraud during this time or even representative of the types of fraud being committed. *See* Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915, 924–25 (2003) (naming other companies that contributed to the financial misfeasance of the Enron era including Qwest Communications, Adelphia Communications, Global Crossing, AOL-Time Warner, Xerox, Rite Aid, and even the corporation whose CEO allegedly fed insider information to Martha Stewart).

35. *See, e.g.*, *401(k) Investors Sue Enron*, *supra* note 5; *see also* Geoffrey Colvin, *You're on Your Own: That Enron Workers Lost Life Savings Is Just Another Sign That the Short Era of Economic Security Is Over*, FORTUNE (Feb. 4, 2002), http://archive.fortune.com/magazines/fortune/fortune_archive/2002/02/04/317527/index.htm [https://perma.cc/4U26-CHV4]; Christopher Ketcham, *Enron's Human Toll: How Employees of the Energy Trader Got Sucked into Stock Market Euphoria—And Catastrophe*, SALON (Jan. 23, 2002), http://www.salon.com/2002/01/23/enron_toll/ [https://perma.cc/4QRW-2RL3].

36. Pub. L. No. 107-204, 116 Stat. 745 (2002); *see* STEPHEN M. KOHN ET AL., WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES, at xi (2004) (describing how, when urging Congress to pass Sarbanes-Oxley, Representative Mike Enzi said, "It had to be earthshaking because we are trying to counteract the tremors from the volcanic action of the mountaintop being blown off such companies as Enron, WorldCom, Global Crossing, and others").

created institutional incentives for corporations to improve their internal compliance and reporting mechanisms.[37] Then, despite nearly a century of increasing regulation,[38] America experienced the worst economic crisis since the Great Depression.[39] Between October 2007 and October 2009, unemployment doubled, the S&P 500 lost over half its value, and 45 percent of the world's total wealth was destroyed.[40] To prevent such a crisis from happening again, Congress passed Dodd-Frank in 2010.[41] Dodd-Frank includes provisions that overlap with the previous financial reporting incentives and requirements established by Sarbanes-Oxley.[42] Among other

37. *See* Lawson v. FMR LLC, 134 S. Ct. 1158, 1162 (2014); *see also* ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 152 (2012) ("The whistleblower provision of [Sarbanes-Oxley] was the most comprehensive private-sector whistleblower law ever enacted in the United States.").

38. A notable legislative interruption in the otherwise swelling tide of increased securities regulation was the Gramm-Leach-Bliley Financial Modernization Act, which repealed many of Glass-Steagall's protective provisions. *See* Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (1999). Some have called into question the wisdom of Gramm-Leach-Bliley and late twentieth-century financial deregulation more generally, blaming these models for exacerbating the 2008 financial crisis. *See generally* Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008–2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371 (2010).

39. SKEEL, *supra* note 20, at 1; *see also* GEORGE SOROS, THE NEW PARADIGM FOR FINANCIAL MARKETS: THE CREDIT CRISIS OF 2008 AND WHAT IT MEANS, at vii (2008) (describing the 2008 financial crisis as "the worst . . . since the 1930s"). In brief, the 2008 financial crisis was caused when a 2006 slump in the housing market revealed massive instability among lenders due to wide-scale subprime mortgage lending. *Crash Course: The Origins of the Financial Crisis*, ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article [https://perma.cc/TG48-UQKV].

The sub-prime lending itself was at least partially incentivized by the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government National Mortgage Association (Ginnie Mae) "continu[ing] to directly bear credit risk by guaranteeing mortgage-backed securities." Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND. L.J. 213, 219 (2013). This underlying risk came largely as a surprise to lenders because Standard & Poor's and Moody's over-rated triple-A tranches of collateralized debt obligations backed by the pooled subprime mortgages and mortgage-backed securities. *See Crash Course: The Origins of the Financial Crisis*, *supra*. For a comprehensive analysis, see generally Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91 (2012).

40. Jeff Vogt, Note, *Don't Tell Your Boss?: Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank*, 67 OKLA. L. REV. 353, 353 (2015).

41. Pub. L. No. 111-203, 124 Stat. 1376 (2010); Henry Klehm III et al., *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis With a Call for Greater International Cooperation, but Where Will That Lead*, 13 U. PA. J. BUS. L. 927, 936 (2011) (noting that the 2008 crisis "triggered ambitious legislative reform by the United States Congress, culminating in the historic [Dodd-Frank Act]"); *see also* Cohan, *supra* note 20, at xiv.

42. *See, e.g.*, 7 U.S.C § 26 (2012) (adopting a definition of "monetary sanctions" in the context of commodities whistleblower protections that includes monies in a disgorgement fund pursuant to Sarbanes-Oxley in 15 U.S.C. § 7246(b)); 15 U.S.C. § 78u-6(h)(1)(A)(iii) (integrating Sarbanes-Oxley's whistleblower reporting protections in section 922); *see also infra* Part I.C (discussing the significant ways in which Dodd-Frank builds on, modifies, and overlaps with Sarbanes-Oxley). Sarbanes-Oxley, crafted in the wake of wide-scale accounting fraud, sought to improve financial accountability in large public corporations, and by many

things, it provides extensive protections and rewards for corporate insiders who "blow the whistle" when they discover corporate securities violations within their organizations.[43]

These two acts protect and reward whistleblowers for good reason: employee tips constitute the single most effective way to expose corporate fraud, constituting over 40 percent of all cases.[44] This method accounts for more reports than the next three highest methods—managerial review, internal audit, and accidental discovery—combined.[45] From the enforcement side, only 8.8 percent of reports come from external audit, surveillance or monitoring, and police notification.[46] Put another way, tips from whistleblowers are thirteen times more effective than all external methods of exposing possible violations.[47] Decentralizing financial enforcement mechanisms by appropriately protecting and rewarding whistleblowers will play a crucial role in stopping America's long historical trend of experiencing financial crises.[48]

B. What Is a Whistleblower?

This section provides a broad definition of the term "whistleblower." This Note ultimately shows that defining "whistleblower" is more difficult than one may initially imagine. For general purposes, however, a whistleblower is any person within an organization who acts to make public some information related to "possible or actual nontrivial wrongdoing" within that organization.[49] The term's positive connotations evoke images of an

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measures it has been successful in doing so. *See* Jesse Eisinger, *To Envision Dodd-Frank's Future, Look to Its Predecessor*, N.Y. TIMES: DEALBOOK (Feb. 8, 2012), http://dealbook.nytimes.com/2012/02/08/to-envision-dodd-franks-future-look-to-its-predecessor/ ("[Sarbanes-Oxley] was a response to an epidemic in corporate accounting fraud that swept American business in the late 1990s and early 2000s. . . . The [2008] financial crisis included accounting problems. . . . But at its heart, the financial crisis wasn't an accounting scandal. . . . [C]orporate America weathered the worst of the downturn without a series of major accounting frauds.") [https://perma.cc/NLY3-CRC4]. Dodd-Frank, on the other hand, was aimed more directly at the concentrated financial services industry and sought generally to protect securities investors. *Id.*

43. *See* 15 U.S.C. § 78u-6. This Note uses the term "protection" to refer to a whistleblower's legislated right of action against an employer who retaliates against the whistleblower for making her report. *See infra* Part II.A.3. This Notes uses the terms "reward" and "bounty" interchangeably to refer to the monetary award given to a whistleblower when her report leads to a successful enforcement action against the organization. *See infra* Part II.A.2.

44. LIPMAN, *supra* note 33, at 2.

45. *Id.* at 3 fig.I.1. Managerial review accounts for 15.4 percent of cases, internal audit accounts for 13.9 percent of cases, and accidental discovery accounts for 8.3 percent of cases. *Id.*

46. *Id.*

47. S. REP. NO. 111-176, at 110–11 (2010).

48. *See infra* Part I.C.

49. ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS—AND WHY 3–4 (2003). When Congress passed the Civil Service Reform Act of 1978 to protect government whistleblowers' freedom of speech, the wrongdoing it envisioned was "[illegality], or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101, 92 Stat. 1111, 1114 (amending 5 U.S.C. § 2301(b)(9)(A)–(B)).

impartial referee calling fouls on the field to stop the action[50] or an old-time London bobby alerting officers and onlookers of a crime in progress.[51] For the purposes of this Note, there are two critically different types of whistleblowers within an organization: internal whistleblowers (who report suspected wrongdoing to an authority *within* the organization) and external whistleblowers (who report suspected wrongdoing to an enforcement authority *outside* the organization).[52]

C. Why Dodd-Frank Protects Whistleblowers

Dodd-Frank is an ambitious set of reforms, but it did not start from scratch.[53] While Sarbanes-Oxley and Dodd-Frank were ostensibly aimed at different targets, they used similar tools to enforce their compliance mechanisms.[54] Both created regulatory regimes to achieve their goals.[55] Both relied, in part, on forcing corporate boards of directors to establish various internal committees.[56] And both provide significant incentives for corporate insiders to blow the whistle on financial malfeasance and securities law violations.[57] However, because Sarbanes-Oxley's protections proved insufficient to adequately incentivize whistleblowing, Dodd-Frank added monetary rewards for whistleblowers when their reports resulted in successful enforcement actions.[58]

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50. *See* Alan F. Westin, *Introduction: Why Whistleblowing Is on the Rise*, *in* WHISTLE BLOWING!: LOYALTY AND DISSENT IN THE CORPORATION 1–2 (Alan F. Westin ed., 1981).

51. *See* JOHNSON, *supra* note 49, at 4. Arguably, Ralph Nader coined the term in the 1970s in an attempt to improve the reputation of insiders who expose scandal. *See* Naseem Faqihi, *Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation*, 82 FORDHAM L. REV. 3341, 3346 (2014); David Bollier, *Chapter 4: Let the Information Flow*, NADER BLOG (Jan. 5, 2004), https://blog.nader.org/2004/01/05/chapter-4-let-the-information-flow/ [https://perma.cc/XL6T-A6LJ]; *see also* Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting,"* 45 CONN. L. REV. 483, 491 (2012) (describing the way in which policymakers used to refer to whistleblowers only in negative terms such as "rats" and "snitches"); Geneva Campbell, Comment, *Snitch or Savior?: How the Modern Cultural Acceptance of Pharmaceutical Company Employee External Whistleblowing Is Reflected in Dodd-Frank and the Affordable Care Act*, 15 U. PA. J. BUS. L. 565, 566 & n.4 (2013) (giving a brief and interesting history of the term "snitch").

52. This Note also describes "simultaneous" reporting, which is a scenario in which a whistleblower makes both external and internal reports of the same incident. *See infra* notes 207–11 and accompanying text. This Note does not consider the other common type of external whistleblower—the whistleblower who reports suspected wrongdoing to the public through news media or information-leaking organizations.

53. *See infra* Part I.C.1.

54. *See supra* note 42 and accompanying text.

55. While Dodd-Frank creates an entire administrative agency (the Bureau of Consumer Financial Protection), 12 U.S.C. § 5491(a) (2012), and Sarbanes-Oxley creates a nonprofit corporation (the Public Company Accounting Oversight Board), 15 U.S.C. § 7211(a), both adopt enforcement responsibilities within their respective acts.

56. Sarbanes-Oxley forced certain corporate boards of directors to establish and effectively maintain an audit committee. 15 U.S.C. § 78j-1(m)(1)(A). Dodd-Frank forced certain corporate boards of directors to establish and effectively maintain a compensation committee. 15 U.S.C. § 78j-3(a)(1).

57. *See* 15 U.S.C. 78u-6; 18 U.S.C. § 1514a; *infra* Part I.C.1–2.

58. *See infra* Part II.C.3.

1. Sarbanes-Oxley Set a National Standard for Corporate Whistleblower Protection

> [Sarbanes-Oxley] was a direct response to the financial collapse of two major multinational corporations, Enron and WorldCom, and a reaction to the "fraud and greed" that was blamed for these failures. Congress intended that the law would "play a crucial role in restoring trust in the financial markets" by ensuring that "corporate fraud and greed" would be "better detected, prevented and prosecuted."[59]

Only after millions of investors and pensioners had lost billions of dollars did the public learn that employees both at Enron and WorldCom had previously identified the fraud and were silenced when they tried to report it.[60] During its investigations into the Enron scandal and in passing Sarbanes-Oxley, the Senate Judiciary Committee found that senior Enron Vice President Sherron Watkins had previously "attempted to report or 'blow the whistle' on fraud"[61] directly to Enron's Joint Chief Executive Officer and Chairman of the Board Kenneth Lay.[62] Rather than address the underlying issue, Enron executives immediately went to their outside counsel to inquire as to the "risks associated with discharging . . . employees who report allegations of improper accounting practices."[63] Presented with the same choice on several occasions, Enron chose to fire employees who reported fraud rather than fire the accounting firm that committed the fraud.[64]

In complex corporate fraud schemes, corporate insiders are the only witnesses to fraud who can report "who knew what, and when."[65] For this reason, the Senate Judiciary Committee found that a "'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity."[66] While the law at the time already protected government employees who acted "in the public interest by reporting wrongdoing,"[67] "employees of publicly traded companies who blow the whistle on fraud and protect investors" were

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59. KOHN ET AL., *supra* note 36, at xi.

60. *See id.* Time Magazine subsequently named two such whistleblowers, Sherron Watkins and Cynthia Cooper, "Persons of the Year" in 2002. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30; *see supra* notes 32–35 and accompanying text.

61. S. REP. NO. 107-146, at 5 (2002).

62. VAUGHN, *supra* note 37, at 151; *see also Text of Letter to Enron's Chairman After Departure of Chief Executive*, N.Y. TIMES (Jan. 16, 2002), http://www.nytimes.com/2002/01/16/business/text-of-letter-to-enron-s-chairman-after-departure-of-chief-executive.html [https://perma.cc/7754-SD36].

63. S. REP. NO. 107-146, at 5.

64. *See id.* (citing *New York Times* and *Houston Chronicle* reports that a top risk management official at Enron and a partner at Andersen (Enron's accounting firm), among others, suffered negative employment actions as a result of reporting concerns over Enron's accounting practices).

65. *Id.* at 10.

66. *Id.* at 5.

67. *Id.* at 10.

completely without protection.[68] With half of all Americans invested in public companies, such a disparity "fails to serve the public good."[69]

By enacting Sarbanes-Oxley, Congress set a "national floor for employee protections in the context of publicly traded companies"[70] in order to unify the "patchwork and vagaries of . . . state laws"[71] protecting employees who reported fraud. In response to the Senate conference committee report that recommended additional whistleblower protections, Senator Patrick Leahy stated: "[T]hese corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court . . . . There is no way we could have known about [the high-level corporate fraud at Enron] without that kind of whistleblower."[72]

To encourage the reporting of illegal activity, Sarbanes-Oxley integrated extensive "top-down" internal control measures that forced securities issuers and public companies to create and maintain internal compliance mechanisms.[73] However, while creating avenues to report wrongdoing within a corporation may be necessary to prevent corporate fraud, it is not sufficient if no one makes use of them.[74] One roadblock to establishing a successful whistleblowing regime is the very real threat of retaliation that whistleblowers face.[75] Therefore, Sarbanes-Oxley takes an additional step in an attempt to assuage these fears: it protects whistleblowers against retaliation when they choose to report information that they "reasonably believe[] constitutes a violation of . . . any rule or regulation of the [SEC] . . . [to] a person with supervisory authority over the employee (or such other person working for the employer who has the authority to

68. *Id.*

69. *Id.*

70. *Id.* at 20.

71. *Id.* at 19.

72. 148 CONG. REC. S7358 (daily ed. July 25, 2002) (statement of Sen. Leahy).

73. *See, e.g.*, 15 U.S.C. § 7241 (2012) (requiring an "executive officer" and a "financial officer" to sign their corporation's annual or quarterly report to the Commission certifying that they "are responsible for establishing and maintaining internal controls; have designed such internal controls to ensure that material information relating to the [company] is made known to such officers . . . ; have evaluated the effectiveness of the [company's] internal controls . . . ; and have presented in the report their conclusions about the effectiveness of their internal controls . . . ."); 15 U.S.C. § 78j-1(m)(4) (requiring that public companies' audit committees "establish procedures for . . . the confidential, anonymous submission by employees of the [company] of concerns regarding questionable accounting or auditing matters" or be forcibly unlisted from the national securities exchanges and national securities associations). For a general overview on the corporate governance systems encouraged by the Dodd-Frank Amendments to Sarbanes-Oxley, see Nick M. Beermann, *Understanding SOX Whistleblower Protections*, *in* UNDERSTANDING SOX WHISTLEBLOWER PROTECTIONS: LEADING LAWYERS ON WHISTLEBLOWER PROTECTIONS AND RECOGNIZING/PREVENTING CONDUCT THAT LEADS TO CLAIMS 27 (2016).

74. Even as early as 2001, the New York Stock Exchange had already instituted widely adopted rules requiring publicly listed companies to institute substantially similar board-level financial auditing mechanisms, and, in fact, Enron's 2001 proxy statement was "a pristine example of compliance" with these rules. William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1334–35 (2002).

75. *See infra* notes 159–61 and accompanying text.

investigate, discover, or terminate misconduct)."[76] It also sets a procedure by which a whistleblower may seek relief for a discriminatory action or discharge[77] and entitles a prevailing whistleblower to compensatory damages.[78]

Unfortunately, however, Sarbanes-Oxley's measures have been insufficient to encourage the whistleblowing that the SEC relies on for successful enforcement.[79] In fact, there is no evidence that the whistleblower protection provided by Sarbanes-Oxley has had any effect on the total percentage of frauds brought to light.[80] Even at its most effective, Sarbanes-Oxley sought narrowly to prevent accounting fraud[81] but was inadequate to protect against widespread financial manipulation and to prevent financial crisis.[82] The crisis of 2008 made this deficiency all the more apparent.[83] Sarbanes-Oxley could not stand alone if Congress wished to ensure structural integrity in the American financial market.

2. Dodd-Frank Raised That Standard

Dodd-Frank describes itself as "[a]n Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system."[84] Not surprisingly, because corporate insiders remain the only firsthand witnesses to corporate malfeasance who can report "who knew what, and when,"[85] encouraging whistleblowing is a critical mechanism for accomplishing Dodd-Frank's lofty goals.

The financial crisis in 2008 that gave birth to Dodd-Frank "create[d] a greater reliance on whistleblowers and whistleblowing laws."[86] And yet, while Sarbanes-Oxley protected whistleblowers against retaliation, it did not give them any financial incentive to report wrongdoing.[87] To create these

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76. 18 U.S.C. § 1514A(a)(1).

77. *Id.* § 1514A(b)(2)(A) (adopting the existing procedures in 49 U.S.C. § 42121(b)).

78. *Id.* § 1514A(c)(1)–(2). Such damages include back pay and special damages including litigation costs, expert witness fees, and reasonable attorney fees. *Id.*

79. *See infra* note 87 and accompanying text.

80. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2216 (2010).

81. *See supra* note 42.

82. *Compare* Thomas C. Pearson & Gideon Mark, *Investigations, Inspections, and Audits in the Post-SOX Environment*, 86 NEB. L. REV. 43, 45–46 (2007) (defining three of Sarbanes-Oxley's "four major goals" as self-regulatory mechanisms: improving corporate governance, strengthening financial reporting and disclosure, and improving corporate internal controls and auditor performance), *with* Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 92 (2012) ("[The 2008 crisis] made painfully clear what should have been apparent all along: that financial institutions cannot be left to regulate themselves.").

83. *See supra* note 42.

84. Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). Others have rephrased this plain description, preferring instead to say Dodd-Frank intends "to limit the risk of contemporary finance . . . [and] to limit the damage caused by the failure of a large financial institution." SKEEL, *supra* note 20, at 4.

85. S. REP. NO. 107-146, at 10 (2002) (commenting on Sarbanes-Oxley's whistleblower protections).

86. VAUGHN, *supra* note 37, at 157.

87. *See infra* note 95 and accompanying text.

incentives, and thereby increase whistleblowing and corporate compliance, Dodd-Frank included section 922.[88]

Undoubtedly, Dodd-Frank seeks to provide general protection and rewards for whistleblowers.[89] However, federal district and circuit courts, the SEC, and various scholars disagree on whether Dodd-Frank specifically protects only external whistleblowers who report to the SEC or if Dodd-Frank also protects internal whistleblowers who report to their own supervisors.[90]

II. DODD-FRANK SECTION 922

Section 922 begins by defining a whistleblower generally[91] and then defines those whistleblowing acts it intends to protect and reward.[92] In light of arguable ambiguity in these definitions, the SEC has issued a rule to clarify Dodd-Frank's definition of whistleblower.[93]

A. Section 922's Language and Structure

Section 922 outlines specific criteria by which an employee with relevant information may qualify as a whistleblower. Additionally, it outlines the ways in which she may avail herself of the SEC's financial rewards and employment protection when she discloses potentially illegal activity.

1. The Statutory Definition of Whistleblower

In section 922(a)(6), Dodd-Frank explicitly defines whistleblower as "any individual 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."[94] After defining whistleblowers generally, the statute creates a system of incentives and protections for whistleblowers who otherwise may have been reluctant to share their information.[95]

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88. *Compare* 15 U.S.C. § 78u-6 (2012) ("Securities Whistleblower *Incentives* and Protection" (emphasis added)), *with* 18 U.S.C. § 1514A ("Whistleblower *Protection* for Employees of Publicly Traded Companies" (emphasis added)).

89. *See infra* Part II.

90. *Compare infra* Part II.B, *with infra* Part III.A, *and infra* Part III.B.

91. *See infra* Part II.A.1.

92. *See infra* Part II.A.2–3.

93. *See infra* Part II.B.

94. 15 U.S.C. § 78u-6(a)(6) (2012). When a whistleblower makes her report to the Commission or to another authority outside the organization of which she is a part, she is referred to as an "external whistleblower." *See infra* note 115 and accompanying text (describing an internal whistleblower—an employee who reports a violation to a supervisor or someone else *within* the organization).

95. A common complaint of the securities whistleblower regime under Sarbanes-Oxley was that it failed to provide monetary rewards and professional protections adequate to incentivize whistleblowers to actually report violations. *See* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1773 (2007); *see also* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 27 (2012) ("Unfortunately, even if Sarbanes-Oxley encouraged employees to report more frequently, the Act often failed to protect them from reprisals and failed to compensate them consistently for the retaliation they suffered.").

2. For Bounties: Originality of Information

One significant addition Dodd-Frank made to Sarbanes-Oxley was the way in which it provides financial rewards to whistleblowers.[96] Instead of merely protecting the whistleblower against financial loss in case of retaliation, it also provides the whistleblower an opportunity for financial gain.[97] If a whistleblower meets certain criteria and her report results in the SEC imposing sanctions[98] against the violating organization, the SEC will "award"[99] that whistleblower 10–30 percent of the total sanction it collects from the violating organization.[100]

One criterion for the collection of a monetary reward is originality of information. To collect a bounty under Dodd-Frank, a whistleblower must voluntarily provide "original information" to the Commission.[101] The statute defines original information as "information that is derived from the independent knowledge or analysis of a whistleblower; is not known to the Commission from any other source . . . and is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental

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96. *See* 15 U.S.C. § 78u-6(b).

97. *Compare id.* (describing Dodd-Frank's whistleblowing rewards), *with* Part I.C.1 (describing Sarbanes-Oxley's retaliation protection).

98. The sanctions must total more than $1 million for a whistleblower to collect a bounty based on Dodd-Frank's definition of a "covered judicial or administrative action." 15 U.S.C. § 78u-6(a)(1).

99. Many scholars refer to this award more fittingly as a "bounty." *See, e.g.*, Jennifer M. Pacella, *Inside or Out?: The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 727 (2014) (referring to Dodd-Frank's whistleblower award system as a "bounty scheme").

100. 15 U.S.C. § 78u-6(b)–(c). The award or bounty amount is increased or decreased according to factors under 15 U.S.C. § 78u-6(c)(1)(B). Because the SEC imposes incredibly high sanctions for major securities violations, these bounties have been accordingly astronomical. *See* Amelia Toy Rudolph, *If a Whistle Blows In-House Does It Still Make a Sound?: Issues Regarding Internal Whistleblowers Under Dodd-Frank* (pt. 1), PRAC. LAW. Aug. 2016, at 57, 57 ("Under this program, the SEC has authorized over 30 monetary awards to whistleblowers through May 2016, including one award in 2014 for over $30 million and another award in 2015 for the statutory maximum of 30% . . . . In May 2016 alone, the SEC announced three whistleblower awards totaling between $9 and $10 million, each to corporate insiders."); Press Release, SEC, SEC Awards More Than $14 Million to Whistleblower (Oct. 1, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UoYfjo0mwl0 (reporting a $14 million whistleblower award, the SEC's highest award as of October 2013) [https://perma.cc/QQ6G-TLYG]; Ed Beeson, *Three Little Words: Confusion over Dodd-Frank Is Leaving Whistleblowers Exposed*, LAW360 (Sept. 19, 2016, 8:43 AM), https://www.law360.com/articles/838091 (reporting a $22 million award given in August 2016, a $17 million award given in June 2016, and a total of $107 million in rewards given since the program's inception) [https://perma.cc/6EV7-7BDC]. Whether the SEC's aggressive reward system will continue under President Donald Trump remains to be seen. *See* Carmen Germaine, *Big SEC Whistleblower Bounties Won't Change with Trump*, LAW360 (Nov. 14, 2016, 9:02 PM), https://www.law360.com/articles/862235/big-sec-whistleblower-bounties-won-t-change-with-trump [https://perma.cc/TT9Z-77DF]. *But see* C. Ryan Barber, *Could Donald Trump's SEC Soften Enforcement of Severance Agreements?*, NAT'L L.J. (Nov. 16, 2016), http://www.nationallawjournal.com/id=1202772529048/Could-Donald-Trumps-SEC-Soften-Enforcement-of-Severance-Agreements?slreturn=20170026141958 [https://perma.cc/E7CV-G792].

101. 15 U.S.C. § 78u-6(b)(1).

report, hearing, audit, or investigation."[102] The SEC subsequently refined this definition by issuing rules to define "independent knowledge" and "independent analysis," which are not defined in the statute.[103] "Independent knowledge" is "factual information . . . not derived from publicly available sources."[104] Additionally,

> [a] whistleblower who learns about possible violations only through a company's internal investigation will ordinarily be excluded from claiming "independent knowledge" by . . . Rules 21F-4(b)(4)(i), (ii), and (iii) (relating to attorneys, auditors, and other persons who may be involved in the conduct of internal investigations), or by Rule 21F-4(b)(4)(vi) (excluding information learned from such individuals).[105]

Combining these rules on independent knowledge and original information with the bounty provisions of the statute means that corporate officers, compliance personnel, and attorneys would usually be precluded from collecting a bounty for reporting potential violations to the SEC when they learn of such information in their capacity as internal investigators.[106]

However, in order to extend protection against retaliatory employment actions, the statute states that "[n]o employer may [retaliate[107]] against[] a whistleblower . . . because of any lawful act done by the whistleblower—in providing *information* to the Commission in accordance with this section."[108] Based on this close reading, the Commission stated in Rule 21F-2(b)(1)(iii) that the retaliation protections apply to whistleblowers irrespective of whether they are ultimately entitled to an award.[109] Such a reading, according to the Commission, is "compelled by the text of [section 922(h)(1)]."[110]

Therefore, nothing in the language of Dodd-Frank prevents the SEC from extending protection to a whistleblower who provides information to the SEC, even when that information is not original information that qualifies for a bounty.

3. For Protection: Who Hears the Whistle Blow

In its antiretaliation provision, section 922 stipulates that an employer may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower" because the whistleblower has "provid[ed] information to the Commission in accordance

102. *Id.* § 78u-6(a)(3)(A)–(C).
103. Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-4 (2016).
104. *Id.* § 240.21F-4(b)(2).
105. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,311 (June 13, 2011).
106. *See infra* Part III.C.2.
107. For the purposes of Dodd-Frank's whistleblower protections and this Note generally, to retaliate includes to "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower." 15 U.S.C. § 78u-6(h)(1)(A).
108. *Id.* § 78u-6(h)(1)(A)–(A)(i) (emphasis added) (noting that only "information" is required for protection, not original information).
109. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,304.
110. *Id.*

with [section 922]; . . . initiat[ed], testif[ied] in, or assist[ed] in any investigation or judicial or administrative action of the Commission based upon or related to such information; or [has made] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002."[111]

Therefore, Dodd-Frank's antiretaliation protections apply to three classes of complaint: "information provided to the SEC, involvement with an SEC investigation and disclosures that are protected under [the] Sarbanes-Oxley Act of 2002."[112] Ambiguity surrounding the final class—disclosures protected under Sarbanes-Oxley—has caused disagreement among circuit courts. This disagreement is the focus of this Note.[113]

As discussed above,[114] the "disclosures that are protected under Sarbanes-Oxley" include disclosures wherein an employee "provide[s] information" related to an SEC rule violation to "a Federal regulatory or law enforcement agency; any Member of Congress . . . ; or *a person with supervisory authority over the employee* (or other such person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[115] By including these disclosures, Sarbanes-Oxley conceives of a wider class of whistleblowers than Dodd-Frank does. Dodd-Frank references only "the Commission" anywhere it mentions a recipient of whistleblower information and, unlike Sarbanes-Oxley, does not directly acknowledge whistleblower reports to employers.[116]

B. The SEC's Interpretation of Section 922

By integrating Sarbanes-Oxley protections into Dodd-Frank, the legislature created an ambiguity. Sarbanes-Oxley protects whistleblowers when they report to their supervisors—that is, *not to the SEC*.[117] But to qualify as a whistleblower in the first place, Dodd-Frank requires that the individual report *to the SEC*.[118] Faced with these conflicting provisions,[119] the SEC issued a rule to define whistleblower,[120] pursuant to its authority

111. 15 U.S.C. § 78u-6(h)(1)(A).

112. R. Scott Oswald & David L. Scher, Berman v. Neo@Ogilvy *Creates Circuit Split on Dodd-Frank's Whistleblower Protections*, WESTLAW J. EMP., Nov. 10, 2015, at 1, 2. *But see infra* notes 203–04 and accompanying text.

113. *See supra* note 90 and accompanying text.

114. *See supra* Part I.C.1.

115. 18 U.S.C. § 1514A(a)(1)(A)–(C) (emphasis added).

116. *See, e.g.*, 15 U.S.C. § 78u-6(a)(6) (defining "whistleblower" as an individual who provides "information . . . to the Commission"); *id.* § 78u-6(h)(1)(A)(i) (prohibiting retaliation against an employee who "provid[es] information to the Commission"); *id.* § 78u-6(h)(2) (prohibiting the Commission from disclosing any information "provided by a whistleblower to the Commission"); *id.* § 78u-6(a)(3)(B) (requiring that the Commission not know "information" for that information to be "original").

117. 18 U.S.C. § 1514(A)(a)(1)(C).

118. 15 U.S.C. § 78u-6(a)(6).

119. *Compare id.* § 78u-6(a)(6), *with id.* § 78u-6(h)(1)(A)(iii), *and* 18 U.S.C. § 1514(A)(a)(1)(C).

120. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (interpreting § 922(h)(1)(A)(iii) as providing antiretaliation protection when "employees report to . . . a person with supervisory authority over the employee or such other

under Dodd-Frank and the Securities Exchange Act.[121] After undergoing notice and comment,[122] the SEC clarified that because Dodd-Frank's retaliation protections integrate Sarbanes-Oxley's retaliation protections, Dodd-Frank must extend its protection to internal whistleblowers—those employees of public companies who report violations to their supervisor or "such other person working for the employer who has authority to investigate, discover, or terminate misconduct" as specified in Sarbanes-Oxley.[123] Unlike the aforementioned interpretation that section 922(h)(1)(A)(i), (ii), and (iii) apply to three *classes of complaint*,[124] the SEC interpreted them as applying to "three different *categories of whistleblowers*."[125] The third category "includes individuals who report to persons . . . *other than the Commission.*"[126]

III. COMPETING INTERPRETATIONS OF SECTION 922

The Second, Fifth, and Ninth Circuits, the SEC, and various scholars disagree as to whether section 922 only protects external whistleblowers who report to the SEC or whether it also protects internal whistleblowers who report to their supervisors. The Third, Sixth, Seventh, and Eleventh Circuits may soon issue opinions concurring either with the Second or the Fifth Circuit.[127] Where the Second Circuit has recognized ambiguity within the statute and therefore deferred to the SEC's more expansive interpretation,[128] the Fifth Circuit, finding no such ambiguity, has not deferred to the SEC and therefore has taken the narrower interpretation.[129]

person working for the employer who has authority to investigate, discover, or terminate misconduct").

121. 15 U.S.C. § 78u-6(j) (granting the Commission authority to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of [section 922] consistent with the purposes of [section 922]").

122. *See* Proposed Rules for Implementing Dodd-Frank's Whistleblower Provisions, 75 Fed. Reg. 70,488 (Nov. 17, 2010).

123. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,304.

124. *See supra* note 112 and accompanying text.

125. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,304 (emphasis added).

126. *Id.*

127. *See infra* note 131.

128. *See infra* Part III.A.1.

129. *See infra* Part III.B.1.

A. The Courts That Find Ambiguity Defer to the SEC and Protect All Internal Whistleblowers

The Second Circuit[130] and a majority of district courts[131] have deferred to the SEC's interpretation[132] and concluded that Dodd-Frank protects whistleblowers who report violations within their corporation.[133] The Second Circuit's decision is grounded in interpretive and policy justifications, but it faces significant challenges. The Whistleblower Augmented Reward and Nonretaliation Act of 2016 is congruous with the Second Circuit's decision. Among other things, the act provides protection for all internal whistleblowers.

1. Why the Second Circuit Deferred to the SEC

Courts will defer to an agency's interpretation where the organic statute is ambiguous and the agency has been charged with making rules to interpret that ambiguity.[134] The Second Circuit looked to the U.S. Supreme Court's recent ruling in *King v. Burwell*[135] to find this requisite ambiguity and defer to the SEC.[136]

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130. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) (finding the definition of "whistleblower" under Dodd-Frank sufficiently ambiguous to "defer to the reasonable interpretive rule adopted by the appropriate agency").

131. Kristin Goodchild, *Securities/Administrative Law—Internal Reporters Who Blow the Whistle: Are They Protected Under the Dodd-Frank Act's Anti-Retaliation Provision?*, 38 W. NEW ENG. L. REV. 1, 23 n.155 (2016) (listing the courts that have heard the issue). The Third Circuit is set to issue an opinion on the issue. *See* Danon v. Vanguard Grp., Inc., No. 15-6864, 2016 WL 2988987 (E.D. Pa. May 23, 2016), *appeal filed*, No. 16-2881 (3d. Cir. June 22, 2016). However, because the lower court found that "issue preclusion forestall[ed] any analysis of whether Plaintiff's activities were 'protected' under Dodd-Frank" it is uncertain whether the Third Circuit will address the issue. *Id.* at *5 n.5. The Sixth Circuit recently had the opportunity to weigh in but dismissed the complaint instead because it did not allege "enough facts to state a claim to relief that is plausible on its face." Verble v. Morgan Stanley Smith Barney, LLC, No. 15-6397, 2017 WL 129040, at *5 (6th Cir. Jan. 13, 2017). However, the Sixth Circuit will have another opportunity to rule on the issue in *Deykes v. Cooper-Standard Automotive, Inc.*, No. 16-cv-11828, 2016 WL 6873395 (E.D. Mich. Nov. 22, 2016), *appeal filed*, No. 16-2740 (6th Cir. Dec. 16, 2016). The Seventh Circuit will also soon have the chance to weigh in. *See* Verfuerth v. Orion Energy Sys., Inc., No. 14-C-352, 2016 WL 4507317 (E.D. Wis. Aug. 25, 2016), *appeal filed*, No. 16-3502 (7th Cir. Sept. 23, 2016). In the Eleventh Circuit, a plaintiff has appealed his internal whistleblower claims after losing in the court below. Duke v. Prestige Cruises Int'l, Inc., No. 14-23017-CIV-KING, 2015 WL 4886088 (S.D. Fla. Aug. 14, 2015), *appeal filed*, No. 16-15426, 2015 WL 4886088 (11th Cir. Aug. 11, 2016).

132. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011).

133. Very recently, the Ninth Circuit issued an opinion concurring with the Second Circuit and affirming the decision of the Northern District of California. *See* Somers v. Dig. Realty Tr., Inc., No. 15-17352, 2017 WL 908245 (9th Cir. Mar. 8, 2017). Instead of simply deferring to the SEC, the Ninth Circuit found that section 922 "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." *Id.* at *9. However, the Court added that "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the [SEC] has resolved any ambiguity and its regulation is entitled to deference." *Id.* at *12.

134. *See infra* Part III.A.1.a.

135. 135 S. Ct. 2480 (2015).

136. *See infra* Part III.A.1.b.

To determine ambiguity courts look to a term's context within a statute and the implications a distinct interpretation will have on the other parts of the statute.[137] A court is more inclined to defer to an agency "whenever decision as to the meaning or reach of a statute [involves] reconciling conflicting policies."[138] This is especially so when the interpretation has "depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[139] If the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," a court will not upend that interpretation unless "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[140]

In *Berman v. Neo@Ogilvy*,[141] the Second Circuit addressed the tension between the whistleblower definition and whistleblower-protected acts in light of *King*.[142] In *King*, the Supreme Court considered a provision in the Affordable Care Act (ACA) that makes income tax subsidies available only to those who purchased health insurance on "an [e]xchange established by the State."[143] Ultimately, the Court determined that "the operation of the entire statute would be undermined" if such a limiting provision did not include subsidies for those who purchase health insurance on exchanges "established by the State or by the Federal Government."[144] In doing so, the Court implicitly added "or by the Federal Government" into the statute.[145]

Even though the Court in *King* did not face a question of deference—because the ACA did not implicitly delegate authority[146]—the Second Circuit still used *King*'s reasoning in *Berman*.[147] In *Berman*, the Second Circuit recognized that within section 922 there is no "absolute conflict"

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137. Yates v. United States, 135 S. Ct. 1074, 1081–82 (2015) ("[T]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which the language is used, and the broader context of the statute as a whole" (second and third alterations in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))). Because "[a]mbiguity is a creature not of definitional possibilities but of statutory context," Brown v. Gardner, 513 U.S. 115, 118 (1994), "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). Even when the question is not one of ambiguity or deference and a court has clear authority to interpret a statute's language, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989).

138. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

139. *Id.* (quoting *Shimer*, 367 U.S. at 382).

140. *Id.* at 845 (quoting *Shimer*, 367 U.S. at 383).

141. 801 F.3d 145 (2d Cir. 2015).

142. *Id.* at 150.

143. King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (quoting 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (2012)).

144. *Berman*, 801 F.3d at 150 (interpreting the *King* decision).

145. *Id.*

146. *King*, 135 S. Ct. at 2488–89.

147. *Berman*, 801 F.3d at 150. The Second Circuit even found that the issue in *King* was "far more problematic" than the issue faced in *Berman*. *Id.* ("In our case, . . . the issue is not whether [the] phrase means something other than what it literally says.").

between the whistleblower definition's Commission reporting requirement and the absence of such a requirement in the Sarbanes-Oxley integration in section 922(h)(1)(A)(iii).[148] Tension remains, however, "between the [whistleblower] definition . . . and the limited protection provided by sub[section] (iii) . . . if it is subject to that definition."[149] Therefore, the Second Circuit held, in accordance with the Supreme Court's holding in *King*, that there was at least sufficient ambiguity within section 922, in light of "the sharply limiting effect of a Commission reporting requirement,"[150] to trigger *Chevron* deference to the SEC's interpretation.[151] The Second Circuit, with the majority of district courts,[152] protects internal whistleblowers based on this deference.

2. Interpretive Merits of Internal Protection

Part of the tension in Dodd-Frank's whistleblower protection provisions stems from the fact that a Commission reporting requirement would render the third protected category—those who report wrongdoing to their supervisors—effectively moot.[153] Subsection (iii), which integrates Sarbanes-Oxley, only provides protection above and beyond subsection (i) and (ii) for people who report violations internally.[154] But those people would not constitute whistleblowers, because they have not reported the violation to the SEC.[155] If subsection (iii) was not meant to bring internal

148. *Id.* at 150–51 ("Although the simultaneous employer/Commission reporting example avoids an absolute contradiction between the [provisions], a significant tension within [section 922] nevertheless remains."); *see infra* notes 207–11 and accompanying text (describing the Fifth Circuit's competing interpretation in which the provisions are not deemed ambiguous, because a simultaneous reporting scenario avoids absolute contradiction).

149. *Berman*, 801 F.3d at 155.

150. *Id.* at 152.

151. Such an agency rule enjoys *Chevron* deference from the courts so long as the provision is ambiguous and the rule is a permissible interpretation of the provision. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984) ("If . . . Congress has not directly addressed the precise question at issue" and "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."). As a threshold matter, *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). Here, the SEC issued Rule 21F pursuant to an explicit authorization in 15 U.S.C. § 78u-6(j) (2012) to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of [section 922]" and with 15 U.S.C. § 78w(a)(1) granting general rulemaking authority to the SEC on all matters related to Securities Exchanges. And, the SEC promulgated this legislative rule through notice-and-comment procedures. *See* Proposed Rules for Implementing Dodd-Frank's Whistleblower Provisions, 75 Fed. Reg. 70,488 (Nov. 17, 2010). So the SEC's Rule 21F has the force of law and may qualify for deference under *Chevron*.

152. *See Berman*, 801 F.3d at 153 (naming the Northern District of California, Southern District of New York, District of New Jersey, District of Kansas, District of Massachusetts, District of Colorado, Middle District of Tennessee, and District of Connecticut as courts that defer).

153. *Id.* at 152.

154. *Compare* 15 U.S.C. § 78u-6(h)(1)(A)(iii), *with id.* § 78u-6(h)(1)(A)(i)–(ii).

155. *See supra* Part II.A.

whistleblowers under Dodd-Frank's protection, a court would be unlikely to find a reason why Congress included it.[156]

3. Policy Benefits of Internal Protection

Many scholars, going beyond statutory interpretation, advocate protecting internal whistleblowers on policy grounds. The SEC's decision to protect internal whistleblowers was aimed at motivating them to come forward without fear of retaliation so that the benefits of internal compliance mechanisms, as conceived by Sarbanes-Oxley, could be realized.[157] In this, Dodd-Frank has been largely successful—internal reporting after its passage consistently set and surpassed "all-time highs."[158] Yet, a 2010 study of employee-whistleblowers showed that in 82 percent of cases, employees who reported violations were retaliated against—they either were terminated, quit under duress, or had significantly altered responsibilities.[159] Additionally, whistleblowers' fear of retaliation is not merely financial. Internal whistleblowers also face the very real social threats of "ostracism, isolation, blacklisting, defamation, job stagnation, and personal consequences such as depression and family problems."[160] Perhaps unsurprisingly, "[w]hen

156. Courts will not interpret Congress as drafting meaningless provisions. Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1177 (2013) ("[T]he canon against surplusage 'assists only where a competing interpretation gives effect to every clause and word of a statute.'" (quoting Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011))). *But see infra* notes 207–11 and accompanying text (discussing the Fifth Circuit's "simultaneous reporting" hypothetical that appears to give subsection (iii) meaning even with a Commission reporting requirement).

157. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,359 (June 13, 2011).

158. *See, e.g.*, Yin Wilczek, *Employees' Internal Fraud Reports Rise Even in Wake of SEC Whistleblower Program*, DAILY LAB. REP. (BNA) A-8, A-9 (Apr. 10, 2012). Ninety-seven percent of whistleblowers choose to report internally rather than externally in the first instance. ETHICS RES. CTR., INSIDE THE MIND OF A WHISTLEBLOWER: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY 13 (2012). And, more than 80 percent of whistleblowers seeking bounties from the SEC have first reported internally. *See* Ben Protess & Nathaniel Popper, *Hazy Future for Thriving S.E.C. Whistle-Blower Effort*, N.Y. TIMES: DEALBOOK (Apr. 23, 2013, 9:04 PM), http://dealbook.nytimes.com/2013/04/23/hazy-future-for-s-e-c-s-whistle-blower-office/ [https://perma.cc/WV5C-2YBN]; *see also* Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1250 (2009) (arguing that "internal protections are particularly crucial in view of research findings that . . . employees are more likely to choose internal reporting systems").

159. Dyck et al., *supra* note 80, at 2216.

160. Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 97–98 (2013); *see also* AUGUST B. MUNDEL, ETHICS IN QUALITY 132 (1991) ("Many [whistleblowers] find it extremely difficult to find new positions at equivalent levels giving rise to the view that influential people . . . have acted to blackball the individuals."); Faqihi, *supra* note 51, at 3350 ("Whistleblowers commonly fear . . . that they will have to 'live their lives in misery, shunned by employers.'" (quoting Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 124 (2007))); John Carreyrou, *Theranos Whistleblower Shook the Company—And His Family*, WALL ST. J. (Nov. 18, 2016, 11:17 AM), http://www.wsj.com/articles/theranos-whistleblower-shook-the-companyand-his-family-1479335963 (telling the story of Theranos whistleblower Tyler Shultz and how his internal report caused the estrangement of his

employees perceive that they will be subject to retaliation for which they have no recourse in the courts, they are less likely to report to their supervisors any instances of wrongdoing."[161]

When internal whistleblowers are protected, corporations themselves stand to gain from the resulting increase in internal reporting. Some scholars have argued that in a system highly protective of internal whistleblowers, corporations are better positioned to address compliance issues before they become serious or perhaps even before they grow into sanctionable offenses.[162] Effective internal compliance mechanisms, as another scholar argues, provide companies with "enormous benefits."[163] These mechanisms better assure companies that they are adhering to the laws and regulations governing their actions; instill in employees a "culture of compliance"[164] that combats any resistance, gaming, or self-interest that may otherwise control employee action;[165] and may even diminish overall regulatory burdens.[166]

When the SEC considered internal protections in Dodd-Frank, commenters emphasized the need to encourage internal whistleblowing.[167] They argued that this inclusion would enable corporations to avoid resource-intensive litigation by discovering and resolving potential violations earlier.[168] They also argued that corporations that are able to demonstrate an effective internal compliance program may receive mitigated penalties if held criminally liable for a securities violation.[169]

Additionally, the SEC stands to gain significantly if whistleblowers can confidently report internally before subjecting the SEC to potentially frivolous tips. Scholars and courts routinely point out that the tips reported to the SEC significantly improve in quality when internal reporting precedes external reporting.[170] Upon releasing the SEC's rule as to internal

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grandfather, former Secretary of State and Theranos board member George Schultz) [https://perma.cc/3LQH-3TSJ].

161. Pacella, *supra* note 99, at 756–57.

162. *See* Lauren J. Resnick et al., *Anyone Can Whistle*, 28 CORP. COUNS. 1, 1 (2013).

163. Pacella, *supra* note 99, at 760.

164. James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121, 1163.

165. *Id.* at 1160–62.

166. Pacella, *supra* note 99, at 760.

167. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,359 (June 13, 2011).

168. *Id.*

169. Pacella, *supra* note 99, at 757.

170. *See, e.g.*, Dressler v. Lime Energy, No. 14-CV-07060(FLW)(DEA), 2015 WL 4773326, at *13 n.7 (D.N.J. Aug. 13, 2015) ("[I]nternal reporting prevents the SEC from receiving reports of mere misunderstandings . . . so that the Commission would receive fewer and higher quality reports . . . . '[External only protection] encourages reports to the SEC that could be more efficiently handled internally, thus wasting government resources.'" (quoting Bussing v. Cor Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014))); *Bussing*, 20 F. Supp. 3d at 733 ("[internal reporting] will help vet the tips to the SEC, so that the SEC receives fewer and higher quality reports"); Caroline E. Keen, Note, *Clarifying What Is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 234 (2015) (explaining that bypassing internal reporting would result in lower quality tips and could cause "significant waste of corporate and government resources"). *But see* Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO

whistleblowers, then-SEC Chairwoman Mary L. Schapiro said that "[w]hile the SEC has a history of receiving a high volume of tips and complaints, the quality of the tips we have received has been better since Dodd-Frank became law."[171]

4. Policy Challenges to Protecting All Internal Whistleblowers

Protecting internal whistleblowers may be justified on certain policy grounds, but providing protection to all internal whistleblowers does, to a certain degree, prevent companies from controlling the compliance regimes that Sarbanes-Oxley requires. Protecting all internal whistleblowers prevents a company from regulating its internal compliance department's performance and threatens the quality of reports.[172] For example, under an interpretation that protects all internal whistleblowers, an ineffective compliance officer who has failed to report a glaring securities violation to her supervisor may still receive protection when she finally does, albeit irresponsibly late, report the violation and is fired for doing so.[173] Such a company may also find itself stifled by its inability to terminate a whistleblower even for legitimate, nonretaliatory reasons. Such reasons may include employee redundancy, the need to close particular plants or offices, or because the whistleblower's job performance is below expectation.[174]

Furthermore, "overprotection may encourage bad-faith reporting and exaggerated, or even false, accusations" for those employees who fear job loss for other, unrelated reasons.[175] Some scholars believe that

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ST. ENTREPRENEURIAL BUS. L.J. 123, 127 (2011) (expressing doubt as to whether increased quality will accompany expanded protection); Andrew Walker, Note, *Why Shouldn't We Protect Internal Whistleblowers?: Exploring Justifications for the* Asadi *Decision*, 90 N.Y.U. L. REV. 1761, 1772 (2015) (finding "a bit too optimistic" the idea that internal whistleblowing protection will "increase the *quality* of information that the SEC receives").

171. Press Release, SEC, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2011), http://www.sec.gov/news/press/2011/2011-116.htm [https://perma.cc/535Z-UG4G].

172. Robert M. Bowen et al., *Whistle-Blowing: Target Firm Characteristics and Economic Consequences*, 85 ACCT. REV. 1239, 1240 (2010) ("[S]keptics argue that . . . ineffective workers misuse their protected 'whistle-blower' status to avoid discharges or disciplinary proceedings.").

173. Matthias Schmidt, *"Whistle Blowing" Regulation and Accounting Standards Enforcement in Germany and Europe—An Economic Perspective*, 25 INT'L REV. L. & ECON. 143, 158 (2005) ("Protection from retaliation could be utilized by employees to fend off legitimate criticism or disciplinary measures since they are principally able to claim the status of a whistle blower.").

174. LIPMAN, *supra* note 33, at 132.

175. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1177 (2010); *see also* LIPMAN, *supra* note 33, at 5 (noting that some employees, "in an attempt to manipulate the system," blow the whistle on legal company activities "when they believe that their employment is about to be terminated"); W. Michael Hoffman & Robert E. McNulty, *A Business Ethics Theory of Whistleblowing: Responding to the $1 Trillion Question*, *in* WHISTLEBLOWING: IN DEFENSE OF PROPER ACTION 45, 53 (Marek Arszulowicz & Wojciech W. Gasparski eds., 2011) ("[W]histleblowing is sometimes done out of vengeance."); Ebersole, *supra* note 170, at 145 n.179 (noting that section 922(a) "only requires that an

"troublemakers could potentially misuse their whistle-blower status to avoid being suspended or dismissed from employment."[176] Because of "the enormous trouble that can result from disciplining a whistle-blower, supervisors and managers might find it easier to tolerate an unproductive and ineffective employee rather than dismiss or demote the employee."[177] Therefore, even when "rewards are not provided," as for Sarbanes-Oxley whistleblowers, "controlling for such retaliation might nonetheless induce opportunistic behavior."[178] Dodd-Frank, which does provide whistleblowing rewards, may be at an even greater risk of inducing such opportunism.

If whistleblower protections were limited only to those who report externally, a company could avoid enforcement costs by encouraging effective internal reporting mechanisms, thereby minimizing the number of external reports.[179] Because 97 percent of whistleblowers choose to report internally rather than externally in the first instance,[180] protecting all internal whistleblowers could significantly decrease corporate efficiency because companies would be forced to retain inefficient employees. This would be especially true for the internal compliance departments Sarbanes-Oxley depends on to facilitate institutional compliance.[181]

5. The WARN Act: A Proposed Codification of Internal Protection

Currently before Congress is the Whistleblower Augmented Reward and Nonretaliation Act of 2016 ("the WARN Act").[182] Introduced February 25, 2016, by Representative Elijah Cummings, the WARN Act proposes a federal solution to the present circuit split by, among other things, legislating the SEC's interpretation of section 922 and protecting all internal whistleblowers.[183] In doing so, however, this bill threatens to further complicate Dodd-Frank's whistleblower protections.

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employee report information, not that the employee report accurate information, to obtain whistleblower protection").

176. Bowen et al., *supra* note 172, at 1244 (citing a 1996 study by Frank Anechiarico and James B. Jacobs that found "several municipal employees in New York City chose to blow the whistle in order to fall under state protection as a pre-emptive measure to being fired").

177. *Id.*

178. Schmidt, *supra* note 173, at 158.

179. For a holistic analysis on what causes a whistleblower to report externally instead of internally, see generally Bishara et al., *supra* note 160.

180. *See* ETHICS RES. CTR., *supra* note 158, at 13.

181. Vogt, *supra* note 40, at 375–76 ("Internal reporting and compliance programs are at the heart of Sarbanes-Oxley . . . . In [its] wake . . . companies expended considerable time and effort to set up strong internal compliance programs in order to encourage employees to report violations internally."); *see also* Shannon Kay Quigley, Comment, *Whistleblower Tug-of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 264–65 (2012); Walker, *supra* note 170, at 1780 ("If businesses do respond to [an external reporting requirement] by taking stronger ex ante measures to prevent wrongdoing, such measures will not only prevent undesirable external whistleblowing but will also ensure that socially destructive wrongdoing never occurs in the first instance.").

182. *See* S. 2591, 114th Cong. (2016); H.R. 4619, 114th Cong. (2016).

183. *See* H.R. 4619.

The WARN Act begins by removing the entire definition of "whistleblower" from section 922(a)(6).[184] It does this despite the fact that merely striking the words "to the Commission" from the original definition likely would be sufficient to institute the SEC's interpretation.[185] The WARN Act then removes the word "whistleblower" from Dodd-Frank's retaliation protection provisions.[186] Instead, where Dodd-Frank simply uses the term "whistleblower," WARN replaces the term with a general description of the classes of individuals that might become whistleblowers.[187] For example, section 4(c)(1) of the WARN Act strikes "any lawful act done by the whistleblower" and inserts:

> any lawful act done by the applicant, employee, or former employee or perceived to have been done by the applicant, employee, or former employee (or any person acting pursuant to the request of the applicant, employee, or former employee), whether at the initiative of the applicant, employee, or former employee or in the ordinary course of the duties of the applicant, employee, or former employee.

The WARN Act also supplements Dodd-Frank section 922(h)(1)(a)'s subsections (i), (ii), and (iii) by creating two more protected classes of whistleblower actions. The first is a protection for an applicant, employee, former employee, or "other such person"—whether whistleblower or not—who objects or refuses to participate in an act reasonably believed to be a violation of an SEC law, rule, order, or policy.[188] The second is a statutory protection for internal whistleblowing when reported by an applicant, employee, former employee, or "other such person."[189]

The WARN Act fails to account for the detrimental effects of protecting all internal whistleblowers, as discussed above.[190] Additionally, it creates internal inconsistencies. For example, section 922's subsection (iii), which integrates Sarbanes-Oxley, appears unnecessary with the addition of WARN's proposed subsections (iv) and (v). Furthermore, it is not entirely clear what meaning "other such person" adds to the already included categories of applicants, employees, and former employees.[191] Because of

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184. *Id.* § 4(a).

185. *See id.* § 4(c). The phrase "to the Commission" alone causes the tension with subsection (iii) that gives rise to the circuit split. *See supra* notes 117–18 and accompanying text. Striking "to the Commission" would make Dodd-Frank's definition of whistleblower read, "any individual who provides . . . information relating to a violation of the securities laws in a manner established, by rule or regulation, by the Commission." Because the SEC has issued a rule clarifying that reports can be made internally, internal whistleblowers could be protected merely by striking "to the Commission" from the definition. *See supra* Part II.B.

186. The WARN Act also could have protected internal whistleblowers by striking only the definition of whistleblower but leaving the term throughout Dodd-Frank. Because the term would have been left undefined, it likely would have been up to the SEC to fill the gap. *See generally* United States v. Mead Corp., 533 U.S. 218 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994).

187. *See, e.g.*, H.R. 4619 §§ 4(c)(1), (c)(4), 5(c)(1).

188. *Id.* § 4(c)(1)(4)(iv) (proposing a section 922(h)(1)(a)(iv) to Dodd-Frank).

189. *Id.* § 4(c)(4) (proposing a section 922(h)(1)(a)(v) to Dodd-Frank).

190. *See supra* Part III.A.4.

191. *See supra* note 156.

its confusing structure and its inability to solve the problems created by blanket internal whistleblower protection, the WARN Act is inadequate as a legislative solution to this issue.

B. Courts That Find No Ambiguity Protect No Internal Whistleblowers

The Fifth Circuit[192] and a minority of district courts[193] have concluded that Dodd-Frank only protects whistleblowers who report securities law violations directly to the SEC. While this interpretation finds support both in text and policy, it also faces significant challenges.

1. Why the Fifth Circuit Did Not Defer to the SEC

For the Fifth Circuit and courts following its interpretation, Dodd-Frank's explicit whistleblower definition in section 922(a)(6) marks the critical foundation for—if not the end of—the requisite analysis.[194] In *Asadi v. G.E. Energy (USA), L.L.C.*,[195] the Fifth Circuit confidently declared that any "perceived conflict between [the whistleblower definition] and [the whistleblower protections] rests on a misreading of the operative provisions of [section 922]."[196] It determined that the definition of the term whistleblower,[197] "standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower'" under the whistleblower protection provision.[198]

Neither of the parties contested this interpretation, nor did Asadi claim to qualify as a whistleblower under section 922(a)(6).[199] Asadi did argue, in line with the interpretation described above,[200] that section 922(h)(1)(A)(iii) conflicts with this definition because "an individual can take actions falling

192. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 629 (5th Cir. 2013) (holding that Dodd-Frank unambiguously "requires individuals to provide information . . . *to the SEC*" to qualify as a whistleblower and thereby "qualify for protection").

193. Goodchild, *supra* note 131, at 18 n.109 (collecting cases); *see, e.g.*, Verble v. Morgan Stanley Smith Barney, L.L.C., 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015), *aff'd on other grounds*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017); Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014); Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *7–8 (M.D. Fla. May 12, 2014); Banko v. Apple, Inc., 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013); Wagner v. Bank of Am. Corp., No. 12-cv-00381-RBJ, 2013 WL 3786643, at *1, *6 (D. Colo. July 19, 2013), *aff'd on other grounds*, 571 F. App'x 698 (10th Cir. 2014).

194. The *Asadi* decision first stated the rule that "[i]f the statutory text is unambiguous, our inquiry begins and ends with the text." *Asadi*, 720 F.3d at 622 (citing BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004)). The court then held, "We start and end our analysis with the text." *Id.* at 623.

195. 720 F.3d 620 (5th Cir. 2013).

196. *Id.* at 624–25.

197. 15 U.S.C. § 78u-6(a)(6) (2012).

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

199. *Id.* at 624.

200. *See supra* Part III.A.1.

within this category and, if he does not report information to the SEC, fail to qualify as a 'whistleblower' under [section 922(h)(1)(A)(iii)]."[201]

The court, however, refused to find ambiguity in the statute. It interpreted section 922(a)(6) as the only definition of "whistleblower"[202] and stated that conflict would exist "only if we read the three categories of protected activity as additional definitions of three types of whistleblowers."[203] Instead, it read section 922(a)(6) as an answer to the question, "Who is protected?" In contrast, it read sections 922(h)(1)(A)(i)–(iii) as answering the slightly different question, "What actions by protected individuals constitute protected activity?"[204]

The Fifth Circuit bolstered this interpretation with an appeal to the rule against surplusage. It reasoned that extending protection to a whistleblower who does not report "to the Commission" would read that phrase out of the statute.[205] The Fifth Circuit then went even further, saying that if the statute *were* ambiguous, the court would not be inclined to interpret that ambiguity in a way that creates such obvious surplusage.[206]

Finally, the court also presented a hypothetical situation in which subsection (iii) would add to the whistleblower protections even while remaining limited to the Commission reporting requirement in the whistleblower definition. The court reasoned that without subsection (iii), a whistleblower who is fired after reporting simultaneously to her supervisor *and* to the SEC may be without protection.[207] For example, if a supervisor never knew about an employee's SEC report, the supervisor could not have retaliated against the employee "because of" the lawful act done "in providing information to the Commission" under subsection (i).[208] Rather, such a supervisor would be retaliating based on the internal report but would be doing so against an employee who also made an external report.[209] The court reasoned that subsection (iii)'s Sarbanes-Oxley integration protects the internal whistleblower who also qualifies as a definitional whistleblower by "provid[ing] . . . information . . . to the Commission."[210] Therefore, Congress may have included subsection (iii) to protect whistleblowers in the case of simultaneous reporting.[211]

201. *Asadi*, 720 F.3d at 626.

202. *Id.* at 623 ("When . . . a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning." (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 226 (2012))).

203. *Id.* at 626.

204. *See id.* at 625.

205. *Id.* at 628.

206. *Id.* ("It is a cardinal principle of statutory construction 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." (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001))).

207. *Id.* at 627–28.

208. 15 U.S.C. § 78u-6(h)(1)(A) (2012); *see also supra* Part II.A.

209. *Asadi*, 720 F.3d at 627–28.

210. *Id.*; *see also* 15 U.S.C. § 78u-6(a)(6).

211. *Asadi*, 720 F.3d at 627–28.

2. Interpretive Merits of External-Only Protection

Looking to the rest of Dodd-Frank rules out the possibility that failing to include explicit internal whistleblower protections was due to congressional error. If Dodd-Frank only contained one provision related to whistleblowers, some may defer to the SEC on the grounds that Congress failed to explicitly protect internal whistleblowers only as an oversight.[212] Indeed, the integration of Sarbanes-Oxley's whistleblower protection was a last-minute addition to Dodd-Frank that came out of the final conference without any record of discussion on the issue.[213] This reasoning served as one of the justifications used by the Northern District of California in finding that "given the belated addition of subsection (iii), it is at least reasonable to assume that Congress intended for the scope of [Dodd-Frank's] whistleblower-provisions to be broader than in earlier versions of the bill."[214]

However, taking a wider view of Dodd-Frank[215] actually bolsters the narrower *Asadi* interpretation. There are two other provisions in the statute that relate to protecting whistleblowers: commodities whistleblowers in section 748[216] and whistleblowers who provide information related to consumer financial protection in section 1057.[217]

212. Berman v. Neo@Ogilvy, L.L.C., 801 F.3d 145, 154 (2d Cir. 2015) ("When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like [this one], it is not at all surprising that no one noticed that the new sub[section] and the definition of 'whistleblower' do not fit together neatly."); Somers v. Dig. Realty Tr., Inc., 119 F. Supp. 3d 1088, 1103 (N.D. Cal. 2015) (suggesting that the "newly-added (and very broad) subsection (iii) and the narrow whistleblower definition that was consistently present in every version of the bill from its first introduction in Congress . . . could well have been a legislative oversight"); Ebersole, *supra* note 170, at 127 (positing that Dodd-Frank's whistleblower provisions may have been "lost" in the "2000 pages" of legislation). *But see* SKEEL, *supra* note 20, at 4 (noting Dodd-Frank's page length is "[a] mere 800 or so when the margins and spacing have been squeezed"); Zach Deloy, Note, *Whistle While You Work: Whistle-Blower Protection Under Dodd-Frank*, 62 WAYNE L. REV. 107, 110 (2016) (characterizing Dodd-Frank's drafting as "fastidious" and its "language pertaining to whistle-blowers" as "extremely detailed").

213. *Compare* H.R. 4173, 111th Cong. § 922(h)(1)(A)(i)–(ii) (as passed by Senate, May 20, 2010), *with* 15 U.S.C. § 78u-6(h)(1)(A)(i)–(iii). However, a good statute interpreter is careful not to read too much into even a complete dearth of preenactment legislative discussion. *See* Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.").

214. *Somers*, 119 F. Supp. 3d at 1103.

215. *See* John Hancock Mut. Life Ins. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 94–95 (1993) ("[W]e examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'" (second alteration in original) (quoting Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 51 (1987))). Looking at an entire law to gain clarity on a particular provision is not new. *See* United States v. Boisdoré's Heirs, 49 U.S. 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

216. 7 U.S.C. § 26.

217. 12 U.S.C. § 5567.

The first of these two provides little assistance here because section 748 copies section 922's language almost word for word.[218] The two are nearly identical except section 748 replaces the SEC with the Commodities Futures Trading Commission[219] (CFTC) and does not include a third protected category akin to section 922's Sarbanes-Oxley integration.[220] Most importantly, though, it omits the confounding provision.

The second whistleblower provision is more illuminating. Under Title X of Dodd-Frank, Congress passed the Consumer Financial Protection Act of 2010.[221] This act created the Bureau of Consumer Financial Protection (CFPB), which, as its name implies, is responsible for regulating "the offering and provision of consumer financial products or services."[222] In the effort to accomplish this goal, the CFPB provides whistleblower protection by prohibiting any person covered by consumer financial laws from terminating or discriminating against an employee who has "provided . . . information *to the employer*, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to any violation of . . . any rule, order, standard, or prohibition prescribed by the Bureau."[223]

To find that Dodd-Frank implicitly provides internal whistleblower protection in Title IX (section 922) after it explicitly provided the same protection in Title X would violate a core tenant of statutory interpretation, *expressio unius est exclusio alterius*.[224] In other words, if Congress had not made its intention sufficiently clear when it repeated external-only language in the CFTC provision, the CFPB provision made it crystal clear that if

218. *Compare* 7 U.S.C. § 26(h)(1)(A)(i)–(ii), *with* 15 U.S.C. § 78u-6(h)(1)(A)(i)–(iii). Obviously, section 922 follows after the "Commodity whistleblower incentives and protection" language in section 748, but, for the purposes of this Note, it is unimportant which was drafted first and which copied from the other. If the Sarbanes-Oxley integration had been used even in the earliest versions of Dodd-Frank—which did not include a correlative commodities whistleblower protection—courts would still face the issue currently under discussion. *See* H.R. 4173, 111th Cong. § 7203(g)(1)(A) (as introduced in House, Dec. 2, 2009) (tying whistleblower protection to information provided "to the Commission"). Interestingly, the only other relevant way in which securities and commodities whistleblower protections differ in Dodd-Frank is that securities whistleblowers are afforded protection for "*initiating, testifying in, or assisting in* any investigation or judicial or administrative action of the [SEC]." 15 U.S.C. § 78u-6(h)(1)(A)(i)–(ii) (emphasis added). Commodities whistleblowers, on the other hand, are only afforded protection for "*assisting in* any investigation or judicial or administrative action of the [Commodities Futures Trading Commission]." 7 U.S.C. § 26(h)(1)(A)(i)–(ii) (emphases added). One is led to wonder how a court will handle the first commodities whistleblower who suffers a retaliatory firing after initiating or testifying in a CFTC investigation but who does not otherwise assist in that investigation. *See supra* note 212 (describing the "fastidious" way in which Dodd-Frank was drafted).

219. 12 U.S.C. § 5301(5).

220. *See* 7 U.S.C. § 26(h)(1)(A)(i)–(ii).

221. Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010).

222. 12 U.S.C. § 5491(a).

223. *Id.* § 5567(a)(1) (emphasis added).

224. *See* Loughrin v. United States, 134 S. Ct. 2384, 2390 (2014) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another[,]' . . . this Court 'presume[s]' that Congress intended a difference in meaning." (fourth alteration in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

Congress had wished to include internal whistleblowers, it knew how to do so.[225]

3. Interpretive Challenges to Protecting Only External Whistleblowers

Pragmatically speaking, the Fifth Circuit's textual interpretation also may be flawed. The court reasoned that subsection (iii) adds additional protection to section 922 in the anomalous situation where a whistleblower has reported to the SEC *and* reported internally.[226] If the whistleblower's supervisor has no knowledge of the SEC report and fires the whistleblower for the internal report, the whistleblower still meets section 922(a)(6)'s definition of a whistleblower (someone who reports to the SEC) and is protected under subsection (iii)'s Sarbanes-Oxley integration (having been fired for reporting a violation to a supervisor).[227] On such a reading, without subsection (iii), this whistleblower may not have been protected because the supervisor, not privy to the SEC report, could not have fired the whistleblower because of the SEC report.[228]

However, this hypothetical ignores critical whistleblower realities that render it all but impossible. Those who choose to report internally usually do so because they know and trust their direct supervisors.[229] Alternatively, employees choose to report externally if "the overall culture or the ethics of their top managers or supervisors is perceived to be weak"—that is, if they do not know and trust their direct supervisors.[230] Whistleblowers are also inclined to report externally as the severity of the violation increases.[231]

These practicalities of whistleblower decision making make it unlikely that a whistleblower would choose to report externally (motivated in part by distrust in her supervisor) before then reporting internally to a supervisor.[232] Similarly, if the severity of the violation motivates the whistleblower to report externally, it is unlikely she would take the drastic step of reporting externally, then "take the less drastic step of reporting internally."[233]

Furthermore, according to a 2011 survey, only 3 percent of whistleblower reports are made externally rather than internally.[234] Necessarily, an even

225. The CFTC has used this very whistleblowing protection to grant whistleblower awards in excess of $10 million. Bryan B. House et al., *Review of Recent Whistleblower Developments: SEC, CFTC, Amicus Brief*, Verble v. Morgan Stanley, NAT'L L. REV. (Apr. 12, 2016), http://www.natlawreview.com/article/review-recent-whistleblower-developments-sec-cftc-amicus-brief-verble-v-morgan [https://perma.cc/VUB2-AZ4H].

226. *See supra* notes 207–11 and accompanying text.

227. *See supra* notes 207–11 and accompanying text.

228. *See supra* notes 207–11 and accompanying text.

229. ETHICS RES. CTR., *supra* note 158, at 11.

230. *Id.* at 13.

231. *Id.* at 14.

232. Vogt, *supra* note 40, at 368–69; *see also* Berman v. Neo@Ogilvy, 801 F.3d 145, 151 (2d Cir. 2015) ("[A]lthough there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number.").

233. Vogt, *supra* note 40, at 369.

234. ETHICS RES. CTR., *supra* note 158, at 13.

smaller percentage are made internally *after* being made externally. Therefore, the reading proposed by the court in *Asadi* interprets Congress as adopting all of Sarbanes-Oxley's protections to protect the fewer than 3 percent of whistleblowers who make internal reports after making external reports.[235] Because a Commission reporting requirement would effectively reduce subsection (iii)'s robust Sarbanes-Oxley integration to a protection used only in an exceptionally rare circumstance,[236] it is "doubtful" that Congress expected subsection (iii) to have such an "extremely limited scope."[237] Because of this ambiguity, the Fifth Circuit may have been mistaken in not relying on the SEC's reasonable interpretation.[238]

4. Policy Challenges to Protecting Only External Whistleblowers

An interpretation that protects only external whistleblowers would result in increased cost for the SEC and impossible requirements of corporate counsel.

a. Protecting Only External Whistleblowers Would Be More Expensive for the SEC

Scholars recognize that protecting only external whistleblowers, even if correct as a matter of statutory interpretation, will result in increased reports to the SEC and decreased internal reports.[239] Some have posited that increased SEC reporting would swell the SEC's coffers due to an increase in the total number of fines collected.[240] This conclusion is a natural result of the presumption that "[i]nternal whistleblowing protects organizational interests *at the expense* of the public treasury."[241] Relatedly, others have argued that in circumstances where the need for external enforcement persists even after the illegal conduct has ended, an internal reporting model would

235. *See Berman*, 801 F.3d at 152 ("In light of these realities . . . the question becomes whether Congress intended to add sub[section] (iii) to subsection [922](h)(1)(A) only to achieve such a limited result.").

236. *Id.* ("[A]part 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 sub[section] (iii) with any scope.").

237. *Id.* at 155.

238. *Id.*

239. Pacella, *supra* note 99, at 725; Deloy, *supra* note 212, at 116 (arguing that external-only protection may cause "increase[d] reporting to the SEC" while "internal reporting would be greatly reduced"); Heidi L. Hansberry, Comment, *In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster*, 102 J. CRIM. L. & CRIMINOLOGY 195, 206 (2012) (arguing that Dodd-Frank's "[s]tronger whistleblower protections and incentives will likely cause an increase in . . . reporting"); Keen, *supra* note 170, at 234 (noting the "greater number of disclosures" to the SEC in an system where employees "bypass[] internal reporting").

240. Walker, *supra* note 170, at 1778.

241. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 335 (1992) (emphasis added).

insulate companies from their acts' negative externalities at the expense of the public at large.[242]

However, such an understanding ignores the fact that if compliance is the goal, requiring ex post enforcement is necessarily more expensive than ex ante compliance.[243] As the SEC itself has made clear, the internal whistleblower protection in Rule 21F was at least partly motivated by a concern that "the Commission will 'incur costs to process and validate' whistleblower 'tips of varying quality' if companies are not allowed 'to investigate and respond to potential securities laws violations prior to reporting them to the Commission.'"[244] Internal reporting "help[s] vet the tips to the SEC, so that the SEC receives fewer and higher quality reports from whistleblowers."[245] For this reason, an external-only protection model "is over-inclusive, as it encourages reports to the SEC that could be more efficiently handled internally."[246] Directing all such reports to the SEC threatens to "wast[e] government resources generally and divert[] resources from cases that need the SEC's full attention."[247]

The SEC's goal under Sarbanes-Oxley and Dodd-Frank is to shrink the need for enforcement actions in the first place by creating sufficient disincentives for noncompliance and effectively instilling a culture of compliance within corporations and among employees.[248] The purpose of the SEC's enforcement should not be to support a complex regulatory ecosystem that diverts corporate earnings to better monitor corporations. By giving whistleblowers protection and awarding them bounties when they do not report internally, the external-only model threatens to increase total cost. Employees may be incentivized to sit on a fraudulent scheme and only report to the SEC when it has grown large enough to warrant a bounty.[249] The same employee in a model that protects internal whistleblowing would be incentivized from internally reporting the fraud the moment it is detected. In theory, this would prevent the fraud from growing and thus preempt the need for enforcement action by the SEC.[250]

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242. *See* Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1656 (2008) (explaining that in circumstances where the damage caused by a violation is ongoing, as in environmental regulations, behavior change resulting from an internal report may result in underenforcement).

243. *See* Bishara et al., *supra* note 160, at 76.

244. Somers v. Dig. Realty Tr., Inc., 119 F. Supp. 3d 1088, 1106 (N.D. Cal. 2015) (quoting Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,516 (Nov. 17, 2010)); *see also* Lobel, *supra* note 158, at 1250 (arguing "internal protections are particularly crucial in view of research findings that . . . employees are more likely to choose internal reporting systems").

245. Bussing v. Cor Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014) ("[Internal reporting] allows companies to remedy improper conduct at an early stage, perhaps before it rises to the level of a violation.").

246. *Id.*

247. *Id.*

248. *See* Pacella, *supra* note 99, at 760.

249. *See Bussing*, 20 F. Supp. 3d at 733; Ebersole, *supra* note 170, at 153–54.

250. Stephanie Klein, Comment, *Interpreting the Definition of a Whistleblower Under Dodd-Frank's Anti-Retaliation Provision: How and Why Public Policy Should Guide the*

b. Protecting Only External Whistleblowers Forces Corporate Counsel to Act Irrationally

A broad interpretation of section 922 may, at worst, diminish a company's discretion over its own compliance officers and internal auditors.[251] However, a narrow interpretation creates a situation in which corporate counsel cannot rationally comply with both Dodd-Frank and the other SEC provisions specifically regulating securities companies' attorneys.

Under Sarbanes-Oxley, Congress explicitly required in-house counsel to disclose illegal activity internally. In section 307, Sarbanes-Oxley requires all attorneys "appearing and practicing before the Commission in any way" to "report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company . . . to the chief legal counsel or the chief executive officer of the company."[252] If the chief legal counsel or executive officer then fails to adopt "appropriate remedial measures," the attorney may report directly to a compliance committee of the board of directors.[253] If the attorney suffers discharge, demotion, suspension, threat, harassment, or discrimination because of her report, section 806 provides protection and affords the attorney the right to back pay, with interest, special damages, and reinstatement at the same seniority status that she would have had, but for the discrimination.[254]

In addition to this congressional requirement that attorneys report violations to their own companies, the SEC has requirements for when attorneys are permitted to report violations to the SEC. The SEC promulgated 17 C.F.R. § 205 ("Rule 205") pursuant to Sarbanes-Oxley.[255] Rule 205 permits in-house counsel to report certain confidential information to the SEC in violation of the traditional attorney-client privilege.[256] However, under Rule 205, the attorney must first report to the corporation's chief counsel, who must "in turn report up the corporate ladder."[257] Then, only if such internal mechanisms fail to produce compliance, the attorney may report confidential information to the SEC.[258] This general protocol is often referred to as an "up, then out" reporting procedure.[259]

Under Sarbanes-Oxley and the SEC's rules promulgated thereunder, corporate counsel is obligated to report "up, then out" and only by reporting

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Courts in Finding That Whistleblowers Do Not Need to Report to the SEC, 10 FLA. INT'L U. L. REV. 279, 315 (2014) (concluding that an internal protection model allows companies to "remedy violations . . . before they become a larger problem").

251. *See supra* Part II.A.2.a.

252. 15 U.S.C. § 7245 (2012).

253. *Id.*

254. 18 U.S.C. § 1514A(c)(2).

255. 17 C.F.R. § 205 (2016).

256. *Id.*

257. Faqihi, *supra* note 51, at 3378. For general information on attorney reporting requirements, see LATHAM & WATKINS LLP, ATTORNEYS AS SEC WHISTLEBLOWERS: CAN AN ATTORNEY BLOW THE WHISTLE ON A CLIENT AND GET A MONETARY AWARD? (2013), http://www.lw.com/thoughtLeadership/SEC-whistleblowers [https://perma.cc/8CL6-M8QN].

258. Faqihi, *supra* note 51, at 3378.

259. *Id.* at 3390.

in this way will the attorney receive protection against retaliatory firing.[260] However, with external-only protection under Dodd-Frank, attorneys acting in compliance with Sarbanes-Oxley and Rule 205 may be without recourse under the Dodd-Frank Act.[261]

C. Dodd-Frank and Related Statues Protect, but Distinguish, Internal Whistleblowers

For the purposes of retaliation protection, the Second and Fifth Circuit Courts and the WARN Act only distinguish whistleblowers based on whether their report is internal or external. Other systems within the SEC also distinguish between whistleblowers on these grounds. However, SEC rules and related whistleblower protection regimes go one step further to distinguish between different types of internal whistleblowers.

1. Related Whistleblower Regimes

Whistleblower protections in closely related corporate regulations, such as the American Reinvestment and Recovery Act, Dodd-Frank's Consumer Financial Protection Act, and Sarbanes-Oxley, may shed light on better solutions to Dodd-Frank's internal-external whistleblower conundrum.

a. The American Reinvestment and Recovery Act

Congress passed the American Recovery and Reinvestment Act[262] ("the Stimulus") alongside Dodd-Frank in response to the 2008 financial crisis.[263] The Stimulus was passed to provide funds for state and local governments in an effort to stimulate the economy and mitigate the damage done by the recession on a localized level.[264] Like Dodd-Frank, it contains broad whistleblower protections.[265] However, in less uncertain terms than Dodd-Frank, the Stimulus provides whistleblower protection for any nonfederal employees of employers "receiv[ing] stimulus funds"[266] who make a protected disclosure to a variety of state and federal enforcement and regulatory agents or "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[267] This language is,

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260. *See id.* at 3380 n.401 ("Under [Sarbanes-Oxley] and Part 205, attorneys are first required to report misconduct internally, whereas the Fifth Circuit ruling requires attorneys to report to the SEC in order to be afforded whistleblower protection under Dodd-Frank.").

261. *Id.* at 3380–81; *see also* Keen, *supra* note 170, at 230 ("It does not make sense that Congress and the SEC would intend to incentivize reporting yet leave employees in situations where 'individuals who take socially-desirous actions fail to be granted protection.'" (quoting Banko v. Apple Inc., 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013))).

262. Pub. L. No. 111-5, 123 Stat. 115 (2009).

263. VAUGHN, *supra* note 37, at 155–56.

264. *Id.*

265. American Recovery and Reinvestment Act of 2009, § 1553, 123 Stat. at 297.

266. VAUGHN, *supra* note 37, at 156. This includes employees of organizations that receive the stimulus funds, are paid by the stimulus funds, and state and local governments. *Id.*

267. American Recovery and Reinvestment Act of 2009, § 1553, 123 Stat. at 297.

perhaps not surprisingly, identical to the language used in Sarbanes-Oxley's whistleblower protection statute.[268] Applying the Stimulus's structure to the present issue would suggest the SEC should protect internal whistleblowers under Dodd-Frank.

b. The Consumer Financial Protection Act

While the Stimulus was not part of Dodd-Frank, Dodd-Frank provides other potentially informative whistleblower protections outside section 922. Interestingly, the "longest lasting legacy" of Dodd-Frank may not be its many complex regulations of banks and securities companies but rather its establishment of the CFPB.[269] In creating the CFPB, Dodd-Frank afforded the bureau its own whistleblower protections.[270] These include protections for employees who report potential violations to the CFPB or to their employer.[271]

As discussed above, the explicit protections for internal whistleblowers in the CFPB provisions likely weigh against an interpretation that reads similar implicit provisions into the SEC's protections.[272] However, the same CFPB whistleblower provisions may suggest how to more effectively craft a better rule on section 922. Alternatively, it may suggest to courts how to interpret section 922, or it may instruct Congress on how to effectively craft a revised version of section 922. Because the CFPB provides general protection for internal whistleblowers, if the SEC applies the CFPB's whistleblower structure to the present issue, it should similarly protect internal whistleblowers under Dodd-Frank.

c. The Sarbanes-Oxley Act

This Note has made clear that Dodd-Frank's whistleblower protections integrate Sarbanes-Oxley's whistleblower protections and, in doing so, have caused much confusion about internal and external whistleblowers under Dodd-Frank. However, this explicit interconnection between the two acts gives the SEC and lawmakers all the more reason to look to Sarbanes-Oxley as they search for an effective way to delineate between and among external and internal whistleblowers under Dodd-Frank. As described above, Sarbanes-Oxley mandates and incentivizes companies to establish and maintain internal monitoring controls.[273] These controls include establishing internal whistleblowing channels[274] and protecting internal whistleblowers

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268. *See* 18 U.S.C. § 1514A(a)(1) (2012) ("[W]hen the information or assistance is provided to . . . a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .").

269. Eric J. Mogilnicki & Melissa S. Malpass, *The First Year of the Consumer Financial Protection Bureau: An Overview*, 68 BUS. LAW. 557, 557 (2013).

270. *See supra* note 223 and accompanying text.

271. *See supra* note 223 and accompanying text.

272. *See supra* notes 223–24 and accompanying text.

273. *See supra* Part III.A.4.

274. *See supra* note 73 and accompanying text.

against retaliation.[275] Even if Sarbanes-Oxley confuses Dodd-Frank as an interpretive matter, it may inform Dodd-Frank as a matter of policy. Sarbanes-Oxley provides protection for internal whistleblowers, and, as a policy prescription, it would encourage Dodd-Frank to do the same.

Importantly, in looking at all the other federal whistleblower protections within the U.S. Code, neither the Second Circuit's interpretation, protecting all internal whistleblowers, nor the Fifth Circuit's interpretation, protecting only external whistleblowers, holds a majority within the whole code.[276] Applying the related statutes mentioned above would suggest that internal whistleblowers should be protected, but the whole code does not suggest consensus.

2. Existing SEC Structures That Recognize a Difference Among Internal Whistleblowers

Corporate securities auditors and attorneys must follow existing SEC procedures to report wrongdoing to the SEC.[277] Under these rules, auditors and attorneys are not allowed to report wrongdoing to the SEC until they have already done so to their employer.[278] Under the Securities Exchange

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275. *See supra* note 75 and accompanying text.

276. The word "whistleblower" is used throughout the U.S. Code. Many of these statutes have made a distinction between internal and external whistleblowers. *See* Tax Relief and Healthcare Act of 2006, 26 U.S.C. § 7623(b)(1) (2012) (providing awards to whistleblowers who *externally* report violations of the internal revenue code when such reports result in an enforcement action); Housing and Community Development Act of 1992, 31 U.S.C. § 5328 (providing protection for *external* whistleblower brokers and whistleblower dealers who provide information to "the Secretary of the Treasury, the Attorney General, or any Federal supervisory agency" in furtherance of the act); VA Patient Protection Act of 2016, 38 U.S.C. §§ 731–32 (allowing *internal* veterans' benefits whistleblowers to file a "whistleblower complaint" with the "immediate supervisor of the employee" and protecting such whistleblowers against adverse employment actions); Energy Policy Act of 1992 § 2902, 42 U.S.C. § 5851 (prohibiting an employer from retaliating against an *internal* whistleblower because the employee "notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954"); Fixing America's Surface Transportation Act, 49 U.S.C. § 30172 (adopting the "Motor Vehicle Safety Whistleblower Act," which provides a reward for an automobile industry whistleblower unless the reported organization has an internal reporting mechanism that the whistleblower failed to use); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(a) (prohibiting any "air carrier" from retaliating against any *internal or external* whistleblower); National Defense Authorization Act for Fiscal Year 2000 § 3164, 50 U.S.C. § 2702 (protecting *internal* whistleblowers within the Department of Energy's defense activities who report a violation to, among others, the Inspector General of the Department of Energy). This is not an exhaustive list of the relevant whistleblower protections within the U.S. Code, because Congress may protect whistleblowers without explicitly stating so. One example is the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1790b(a)(1). Congress initially titled a subsection of the act "Prohibition against discrimination against whistleblowers" but later changed the section title to "In general." *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 251(b)(1), 105 Stat. 2236, 2331–32. Congress left untouched the substance of the law, which never uses the word "whistleblower" but prohibits insured credit unions from discriminating against employees who blow the whistle by *externally* reporting potential violations to certain relevant authorities. *See* 12 U.S.C. § 1790b(a).

277. *See supra* Part III.B.4.b.

278. *See supra* notes 257–59 and accompanying text.

Act, auditors of a public company are required to "inform the appropriate level of the management" of illegal acts unless those acts are inconsequential.[279] If management fails to take appropriate remedial action, auditors are required to report to the corporation's board of directors.[280] An auditor may only report illegal acts to the Commission if management or the board fails to take appropriate remedial action.[281]

Under the SEC's "standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers," attorneys are required to report material violations of securities laws to the corporation's chief legal counsel or CEO.[282] If neither the corporation's legal counsel nor CEO take appropriate remedial action, the attorney is required to report the violation to the audit or other appropriate committee of the board of directors.[283] Rule 3 of the SEC's standards of professional conduct "contemplates an attorney reporting to the Commission only after internal reporting."[284] Because of these requirements imposed on auditors and attorneys, "any retaliation would almost always precede Commission reporting."[285] Therefore, it is unlikely that either would gain protection under Dodd-Frank if the act only protects reports made to the Commission.[286]

Similarly, when the SEC interpreted Dodd-Frank's bounty provisions, it delineated along similar lines those corporate personnel who usually would not be eligible for whistleblowing awards.[287] The SEC made this distinction by defining the criteria for original information.[288] Such employees usually include corporate officers and directors who have learned of the violation in connection with the company's compliance processes,[289] internal and

279. 15 U.S.C. § 78j-1(b)(1)(B).

280. *Id.* § 78j-1(b)(2).

281. *Id.* § 78j-1(b)(3).

282. *Id.* § 7245.

283. *Id.* § 7245(2).

284. Berman v. Neo@Ogilvy, 801 F.3d 145, 152 (2d Cir. 2015) (citing 17 C.F.R. § 205.3(d)(2) (2016)).

285. *Id.* at 151.

286. *Id.* at 152. However, this has not prevented attorneys from trying. In *Danon v. Vanguard Grp., Inc.*, No. 15-6864, 2016 WL 2988987 (E.D. Pa. May 23, 2016), an "experienced tax attorney" sued his former employer, Vanguard, under whistleblower protection claims. *Id.* at *1.

287. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,317 (June 13, 2011) ("[W]e have identified by title or function specific categories of personnel to whom the rules apply.").

288. Rules 21F-4(b)(4)(iii)(A)–(C) describe "three categories of persons" whom the SEC "will not treat as having 'independent knowledge' . . . for purposes of a whistleblower submission . . . ." *Id.* "Independent knowledge" is required to qualify for a whistleblowing award. *See supra* Part II.A.2.

289. 17 C.F.R. § 240.21F-4(b)(4)(iii)(A). However, the rule does not preclude officers from obtaining an award "in all circumstances." *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,318–19 (clarifying the exceptions to 17 C.F.R. 240.21F-4(b)(iii)). The rule also clarifies in subsection (vi) that the bar will extend to the recipients of an officer's information such as her assistant. *Id.* at 34,321. However, this rule has not kept corporate officers from trying to receive protection. *See* Verfuerth v. Orion Energy Sys., Inc., No. 14-C-352, 2016 WL 4507317, at *1 (E.D. Wis. Aug. 25, 2016) (noting that the

contracted employees who are responsible for internal compliance,[290] anyone who learns information through a communication subject to attorney-client privilege,[291] and nearly all other persons retained to perform internal investigations or inquiries into possible violations of the law.[292] In doing so, the SEC aimed to prevent individuals from using a whistleblower submission in a way that "might undermine the proper operation of internal compliance systems."[293] Therefore, these personnel who provide nonoriginal information make up the group of internal whistleblowers who likely would never receive protection from Dodd-Frank in an external-only interpretation.[294] But they also make up the group of internal whistleblowers who cannot be granted full protection without frustrating the goals of Sarbanes-Oxley and Dodd-Frank.[295]

IV. WHETHER, WHICH, AND HOW INTERNAL WHISTLEBLOWERS SHOULD BE PROTECTED

As of yet, courts, politicians, and scholars alike have recognized only three possible solutions to the present circuit split: (1) either the statute should be interpreted as ambiguous and courts should defer to the SEC's interpretation protecting all internal whistleblowers,[296] (2) the statute should be interpreted as unambiguous and courts should protect only those external whistleblowers who report directly to the SEC,[297] or (3) Congress should enact legislation adopting the SEC's interpretation and adding more protections to additional classes of whistleblowers.[298]

The solutions presented by the SEC, the Second and Fifth Circuits, and the WARN Act all fail to overcome insurmountable interpretive flaws.[299] Additionally, each presents policy challenges that betray the original purposes behind Sarbanes-Oxley and Dodd-Frank because they provide all-

plaintiff's compliant arises out of "his termination from the position of CEO of Defendant Orion Energy Systems"), *appeal filed*, No. 16-3502 (7th Cir. Sept. 23, 2016).

290. 17 C.F.R. § 240.21F-4(b)(4)(iii)(B)–(C); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,318 (including "employees whose principle duties involve compliance or internal audit responsibilities, as well as employees of outside firms that are retained to perform compliance or internal audit work for an entity").

291. 17 C.F.R. § 240.21F-4(b)(4)(i)–(ii). The SEC "inten[ded] that all attorneys—whether specifically retained or working in-house—are eligible for awards only to the extent that their disclosures to [the SEC] are consistent with their ethical obligations and . . . Rule 205.3." Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,315; *see supra* notes 282–84 and accompanying text. Prohibiting the use of attorney-client privileged information for whistleblowing rewards "send[s] a clear, important signal . . . that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations." Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,315.

292. 17 C.F.R. § 240.21F-4(b)(4)(iii)(C)–(D).

293. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,317.

294. *See supra* note 286 and accompanying text.

295. *See supra* Part III.A.4.

296. *See supra* Part III.A.

297. *See supra* Part III.B.

298. *See supra* Part III.A.5.

299. *See supra* Part III.A.5, B.2, B.3.

or-nothing protections for internal whistleblowers.[300] However, whistleblower regulations under the Securities Exchange Act, the American Reinvestment and Recovery Act, the Consumer Financial Protection Act, and Sarbanes-Oxley suggest not only that internal whistleblowers should be protected but that certain internal whistleblowers should be protected differently.[301]

This Note proposes the following solution: (1) when an employer terminates an external whistleblower, the employer should bear the burden of proving that the termination was not retaliatory; (2) when an employer terminates an internal whistleblower who has provided original information, the employer should bear the burden of proving that the termination was not retaliatory; and (3) when an employer terminates an internal whistleblower who has provided nonoriginal information, the internal whistleblower should bear the burden of proving that the termination was retaliatory.[302]

As demonstrated above, the Sarbanes-Oxley integration within Dodd-Frank makes section 922 sufficiently ambiguous to warrant deference to the SEC's interpretation.[303] The reasoning behind the SEC's interpretation, however, is internally inconsistent and runs counter to the goals motivating Sarbanes-Oxley and Dodd-Frank.[304]

The case for external whistleblowers is unequivocal and their protection is undisputed. Whether the information provided is "original" or not, 15 U.S.C. § 78u-6(h)(1)(A)(i) protects a whistleblower who provides "information" to the SEC.[305] For this reason, external whistleblowers are explicitly granted protection under the act and the burden of proof should remain with their employers to demonstrate a nonretaliatory justification for terminating such a whistleblower.

However, 15 U.S.C. § 78u-6(h)(1)(A)(iii), where Dodd-Frank integrates Sarbanes-Oxley, says nothing about the type of information that earns protection.[306] While Sarbanes-Oxley protects a whistleblower who provides "information" to "a person with supervisory authority over the employee,"[307] it never distinguishes between information and original information in the way Dodd-Frank does.[308]

In 17 C.F.R. § 240.21F-4, the SEC distinguishes between information and original information for the purposes of whistleblower rewards in an effort to prevent individuals from using whistleblowing in a way that circumvents the

300. *See supra* Part III.A.4, A.5, B.4.
301. *See supra* Part III.C.
302. For readability, this Note uses the word "terminate," but under Sarbanes-Oxley and Dodd-Frank, "terminate" is treated as equivalent to "discharge, demote, suspend, threaten, harass . . . or in any other manner discriminate against [a whistleblower]." *See* 15 U.S.C. § 78u-6(h)(1)(A) (2012); 18 U.S.C. § 1514A(a)(1).
303. *See supra* Part III.A.1–3.
304. *Compare supra* Part III.A.2–3, *with* Part III.C.1.
305. *See supra* Part II.A.3.
306. *See supra* note 112 and accompanying text.
307. 18 U.S.C. § 1514A(a)(1); *see supra* note 77 and accompanying text.
308. *Compare supra* Part II.A.2, *with supra* note 77 and accompanying text.

goals of Sarbanes-Oxley and Dodd-Frank.[309] However, protection against termination is a reward in itself.[310] Without similarly distinguishing in the case of whistleblower protections, the SEC's rule may still allow certain internal whistleblower reports to circumvent the goals of Sarbanes-Oxley and Dodd-Frank.[311]

Therefore, based on the motives guiding Sarbanes-Oxley and Dodd-Frank,[312] and the related structures mentioned above,[313] the best interpretation of 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s internal whistleblower protections must treat those who provide original information differently from those who provide nonoriginal information.

Whether as a matter of judicial interpretation, administrative rulemaking, or legislative lawmaking, internal whistleblowers who provide original information should bear no burden to demonstrate that their termination was retaliatory. Internal whistleblowers who do not provide original information should bear the burden of proving that their termination was in retaliation for their internal whistleblower report. Treating these types of internal whistleblowers differently is an interpretation guided by related whistleblower regimes,[314] reflects the existing structures within the SEC,[315] and more effectively accomplishes the goals of Sarbanes-Oxley and Dodd-Frank by balancing necessary whistleblower protections[316] with the deference corporations need to manage effective internal compliance systems.[317]

309. *See supra* notes 104–07 and accompanying text.
310. *See supra* notes 175–78 and accompanying text.
311. *See supra* notes 173–82 and accompanying text.
312. *See supra* Part I.C.
313. *See supra* Part III.C.
314. *See supra* Part III.C.1.
315. *See supra* Part III.C.2.
316. *See supra* Part I.C.
317. *See supra* Parts I.C, III.A.4.