DODD-FRANK WHISTLEBLOWER PROVISION: DETERMINING WHO QUALIFIES AS A WHISTLEBLOWER

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I. INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was implemented by Congress in 2010, in response to the 2007-2009 financial crisis, in an attempt to promote financial stability by improving transparency and accountability in the financial system.[1] A key piece of this legislation was the Whistleblower Provision, which provides protection to individuals who report potential securities violations.[2] Whistleblower actions have been steadily

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[1]Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, at 1, 111th Cong. (2nd Sess. 2010).

[2]*See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6 (2010).

increasing year over year since Dodd-Frank's inception.[3] In 2013 the SEC reported that it received over 3,200 whistleblower tips, and a record $14 million was awarded.[4] The following year, in 2014, the SEC received over 3,600 whistleblower tips.[5] That same year, the SEC announced that a single whistleblower received an unprecedented award of more than $30 million, more than double the amount of the award given in 2013.[6] Continuing in this fashion, 2015 was a year of many firsts.[7] Courts granted whistleblower awards to a wide variety of plaintiffs, including the first award to a whistleblower where compliance personnel learned of fraudulent activity but failed to act; "the first award to a whistleblower alleged to have been retaliated against for making a complaint; and the first enforcement action against a company for language in its confidentiality agreements that could impede the whistleblowing process."[8] It is evident, with whistleblower claims growing in number and awards reaching record amounts, the Dodd-Frank Whistleblower Program has garnered a lot of attention and controversy.

Two pivotal cases interpreting the Dodd-Frank Whistleblower Provision ("DFWP") have led to a split in the circuits on the question of whether a whistleblower can report securities violations internally to an employer, or whether they must report violations directly to the SEC in order to claim protection under Dodd-Frank's Anti-Retaliation Protection Provision.[9] In *Asadi v. GE Energy*, the United States Court of Appeals for the Fifth Circuit held that the plain language of Dodd-Frank's § 78u–6 was unambiguous, and therefore the employee of GE did not qualify as a "whistleblower" under the provision.[10] Conversely, in *Berman v.*

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[3]*See* GIBSON DUNN, 2015 MID-YEAR SECURITIES ENFORCEMENT UPDATE, at 1 (2015); Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011), http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/ ("The [SEC] settled three securities cases in July 2010 worth $550 million, $100 million, and $75 million . . . [then in 2011 the] SEC and the [DOJ] settled three cases involving claims of corruption under the Foreign Corrupt Practices Act[, which] settled for $450 million, $300 million, and $200 million.").

[4]OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM'N., 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, at 1 (2013).

[5]OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM'N., 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, at 3 (2014).

[6]*Id.* at 1; *see* Caroline E. Keen, Note, *Clarifying What is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 215 (2015).

[7]Gibson Dunn, *supra* note 3, at 2.

[8]*Id.* at 2-3.

[9]*See* Asadi v. G.E. Energy United States, L.L.C, 720 F.3d 620, 623 (5th Cir. 2013); Berman v. Neo@Ogilvy, L.L.C., 801 F.3d 145, 147 (2d Cir. 2015).

[10]*Asadi*, 720 F.3d at 629-30 (stating that "the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws *to the SEC* to qualify for protection from retaliation under § 78u–6(h)" and

Neo@Ogilvy LLC, the Second Circuit held that Dodd-Frank's § 78u–6 was ambiguous, and the employee was considered a "whistleblower" under the provision, even though he reported internally, and thus he was allowed to pursue a remedy for alleged retaliation.[11] This split has left unsettled whether the DFWP is ambiguous and who should qualify as a "whistleblower" under § 78u–6.[12] Because a court's duty is to apply an unambiguous statute as written, and not attempt to re-write it according to its opinions,[13] this Note argues that courts should follow the Fifth Circuit's approach.[14]

This Note proceeds in four parts. Part II traces the history of whistleblower laws from the Sarbanes-Oxley Act of 2002 to Dodd-Frank and examines how these two pieces of legislation intertwine.[15] Part III addresses the mechanics of statutory construction and interpretation.[16] Part IV discusses the circuit split arising from the DFWP decisions of the United States Courts of Appeals for the Fifth and Second Circuits.[17] Part V, in an attempt to resolve the ambiguity and solidify the circuits, assesses the reasoning used by the courts addressing the Whistleblower Provision, including the potential effects and criticisms of their decisions, and offers a practical resolution by suggesting that courts adopt the Fifth Circuit's approach.[18]

II. BACKGROUND: THE EVOLUTION OF RECENT FINANCIAL LEGISLATION

Third-party America is familiar with financial and economic crises.[19] Throughout history, Congress has enacted legislation in

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since Asadi did not report the alleged violations to the SEC he did not qualify as a whistleblower).

[11] *Berman*, 801 F.3d at 155.

[12] *Id.* at 146; *Asadi*, 720 F.3d at 621.

[13] *Berman*, 801 F.3d at 155.

[14] *See infra* Part V.

[15] *See infra* Part II.

[16] *See infra* Part III.

[17] *See infra* Part IV.

[18] *See infra* Part V.

[19] *See generally Stock Market Crash*, PBS.ORG, http://www.pbs.org/fmc/timeline/estockmktcrash.htm (explaining that "the stock market crash [of 1929] ushered in the Great Depression . . . [t]hroughout the 1920s a long boom took stock prices to peaks never before seen. . . . But in 1929, the bubble burst and stocks started down an even more precipitous cliff. In 1932 and 1933, they hit bottom, down about 80% from their highs in the late 1920s. . . . But perhaps the most important effect was chaos in the banking system as banks tried to collect on loans made to stock market investors whose holdings were now worth little or nothing at all. . . . [However], [u]nable to raise fresh funds from the Federal Reserve System, banks began failing by the hundreds in 1932 and 1933."); *1980-82 Early 1980s Recession*, BERKLEY.EDU, http://tinyurl.com/mx7og5l (describing that "between 1980 and 1982 the U.S. economy experienced a deep recession," that was the most significant since

response to economic and financial downturn.[20] Recently, in the aftermath of the collapse of several major corporations in 2000 and 2001,[21] Congress created the Sarbanes-Oxley Act of 2002 ("SOX")[22] to combat "an almost total lack of corporate accountability."[23] Congress believed that corporations should engage in fair and transparent dealings and be held accountable for their actions;[24] SOX was to achieve this end by increasing transparency and curbing abuse.[25]

Whistleblowers are central to policing improper corporate acts.[26] Section 806 of SOX protects corporate whistleblowers from employer

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the Great Depression, and it was brought on by the "disinflationary monetary policy adopted by the Federal Reserve" which dampened economic growth); *2007-09 Financial Crisis*, BERKLEY.EDU, http://tinyurl.com/mn3rleh (stating that "between 2007 and 2009 the U.S. witnessed a series of banking failures that led to a prolonged recession").

[20] *See generally* Jenny B. Davis, *Sorting Out Sarbanes-Oxley: Determining How to Comply with the New Federal Disclosure Law for Corporations Won't Be Easy*, 89 A.B.A. J. 44, 44 (2003) (stating that Congress crafted the Sarbanes-Oxley Act of 2002 "in the aftermath of financial collapses at corporations like Enron, Global Crossing and WorldCom, the new law establishes the framework for a new regime of accountability by public companies in the areas of financial reporting and disclosure, audits, conflicts of interest and governance."); Anthony Reyes, *The Financial Crisis Five Years Later: Response, Reform, and Progress In Charts*, TREASURY.GOV (Sept. 11, 2013), http://tinyurl.com/ptttj6f (explaining that in 2008, Congress enacted the Troubled Asset Relief Program "to address [the] rapidly deteriorating [financial situation brought on by the prior years financial crisis); Jill L. Rosenberg & Renee B. Phillips, *Whistleblower Claims Under the Dodd-Frank Wall Street Reform and Consumer Protection Ac: The New Landscape*, NYSBA.ORG, http://tinyurl.com/m6ouoxl (explaining that "on July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act. The legislation covers a wide range of topics in an effort to address the causes of the financial crisis of 2008 and 2009 that created vast turmoil and dislocations in the financial markets.").

[21] *See generally* Richard A. Oppel & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. TIMES (Nov. 29, 2001), http://tinyurl.com/7c787mt (discussing the collapse of Enron in 2001).

[22] Sarbanes-Oxley Act of 2002 (SOX) § 806, 18 U.S.C. § 1514A (2002).

[23] *See* Brian Kim, *Recent Developments: Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235, 236 (2003).

[24] *Id.*

[25] *Id.*

[26] *See* Rosenberg & Phillips, *supra* note 20, at 1 (citing the "Madoff whistleblower Henry Markopolos's congressional testimony that 'whistleblower tips were 13 times more effective than external audits' at uncovering 'fraud schemes in public companies.'"); Suzi Ring, *Companies Ignore Risks, Benefits of Whistle-Blowing*, BLOOMBERG.COM, (Nov. 30, 2014, 7:00PM), http://tinyurl.com/k95oufo (stating that "[w]histle-blowers have been key in uncovering wrongdoing in several high-profile cases"); *see generally* 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 4, at 1 (explaining that whistleblower reports help "current and future investors who were shielded from harm thanks to the information and cooperation provided by [the] whistleblowers."); 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 5, at 4 (stating that a "whistleblower program that will help the Commission identify and halt frauds early and quickly to minimize investor losses.").

retaliation.[27] It states: "[n]o company . . . or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee."[28] The scope of activity for which a whistleblower can receive protection includes, reporting violations of federal law regarding fraud against shareholders, or violations of rules established by the Securities and Exchange Commission ("SEC").[29] Section 806 of SOX intended to protect an employee who reports a securities violation either internally or to an outside entity.[30] Additionally, an employee who is successful in alleging employer retaliation under SOX is entitled to reinstatement, back pay, and special damages.[31]

Similarly, in the wake of the devastating financial crisis of 2008 and 2009, Congress enacted Dodd-Frank.[32] Congress stated that the Act's purpose was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[33] The financial crisis illustrated the need for transparency in financial markets.[34]

With the implementation of Dodd-Frank, Congress sought to help the SEC identify securities law violations through the Whistleblower Provision, Section 922.[35] The goal of the whistleblower provision is to

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[27]*See* Stephen M. Kohn, *Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers*, WHISTLEBLOWER.ORG, http://tinyurl.com/ljwrr7q; Sarah L. Reid & Serena B. David, *The Evolution of the SEC Whistleblower: From Sarbanes-Oxley to Dodd-Frank*, 129 BANKING L.J. 907, 908 (2012) (stating that SOX affords whistleblower protection from employer retaliation).

[28]SOX § 806(a), 18 U.S.C. § 1514A(a).

[29]*Id.*; *see* OCCUPATIONAL SAFETY AND HEALTH ADMIN. U.S. DEP'T OF LABOR, OSHA FACT SHEET: FILING WHISTLEBLOWER COMPLAINTS UNDER THE SARBANES-OXLEY ACT (Dec. 2011) (stating alleged violations include those related to: "mail fraud, wire fraud, bank fraud, securities fraud, violation(s) of SEC rules and regulations, or violation(s) of Federal law relating to fraud against shareholders.").

[30]Bradford K. Newman & Shannon S. Sevey, *Protections for Whistleblowers Under Sarbanes-Oxley*, 51 PRAC. LAW. 39, 41 (2005).

[31]Sarbanes-Oxley Act of 2002 (SOX) § 806(a), 18 U.S.C. § 1514A(c) (2002); *see also* Kohn, *supra* note 27, at 2 (stating that employees may receive attorneys fees and costs, and "non-economic damages, such as compensation for emotional distress.").

[32]*See* Kerschberg, *supra* note 3.

[33]Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, at 1, 111th Cong. (2d Sess. 2010).

[34]S. REP. NO. 111-176, at 2 (2010).

[35]*Id.* at 110; Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(h)(1)(A) (2010) (stating "[n]o employer may discharge,

encourage individuals to report securities violations to the SEC.[36] "There are three integral components of the [SEC] whistleblower program—monetary awards, retaliation protection, and confidentiality protection."[37] Additionally, unlike SOX, Dodd-Frank provides for a handsome bounty award.[38] Within the bounty provision, if a whistleblower's tip leads to a successful enforcement, then the individual can receive between 10% and 30% of the sanction imposed by the SEC.[39]

SOX and Dodd-Frank both arose out of a perceived need for transparency and accountability in the wake of an economic crisis.[40] Although these two Acts are similar in nature, Dodd-Frank is the more appealing legislation for whistleblowers.[41] There are three main distinctions between SOX and Dodd-Frank.[42] First, Dodd-Frank allows for greater monetary recovery because it permits double back pay, whereas SOX provides for only back pay.[43] Second, under Dodd-Frank an individual may bring a whistleblower-protection claim directly in federal district court.[44] Conversely, under SOX, an individual must first file with the Secretary of Labor and may only file in district court if no decision is issued within 180 days.[45] Third, the statute of limitations for a Dodd-Frank claim is between three and ten years.[46] A SOX claim,

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demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower.").

[36] *See* Reid & David, *supra* note 27, at 908.

[37] 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 5, at 1.

[38] *See* Megan Foscaldi, *Developments in Banking and Financial Law: Whistleblower Provisions of the Dodd-Frank Act*, 31 REV. OF BANKING & FIN. L. 486, 487 (2012); Rosenberg & Phillips, *supra* note 20, at 2.

[39] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(b)(1) (2010).

[40] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, at 1, 111th Cong. (2nd Sess. 2010); Kim, *supra* note 23, at 235-236.

[41] *See* Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 629 (5th Cir. 2013); Reid & David, *supra* note 27, at 908 (explaining that SOX "does not provide any financial incentive for the whistleblower, only protection from retaliation."); Rosenberg & Phillips, *supra* note 20, at 1 (stating that "Dodd-Frank includes significant new whistleblower incentives and protections . . . [and is] expansion of current whistleblower protections under the Sarbanes- Oxley Act of 2002, and a new whistleblower cause of action for employees performing tasks related to consumer financial products or services.").

[42] *See Asadi*, 720 F.3d at 629.

[43] *Id.*; *compare* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922 15 U.S.C. § 78u-6(h)(1)(C)(ii) (2010), *with* Sarbanes-Oxley Act of 2002 (SOX) § 806, 18 U.S.C. § 1514A(c)(2)(B) (2002).

[44] *Asadi* 720 F.3d at 629; Dodd-Frank § 922 15 U.S.C. § 78u-6(h).

[45] *Asadi* 720 F.3d at 629; SOX § 806, 18 U.S.C. § 1514A(b)(2)(D).

[46] *Asadi* 720 F.3d at 629; Dodd-Frank § 922 15 U.S.C. § 78u-6(h)(1)(B)(iii).

meanwhile, must be filed with the Secretary of Labor within 180 days after the employee becomes aware of the violation.[47]

Although Dodd-Frank is the preferred whistleblower law, the circuits are split as to who qualifies as a whistleblower under Dodd-Frank.[48] Some circuits have held that a whistleblower must report directly to the SEC, while other circuits allow a whistleblower to report internally, as is acceptable under SOX.[49] The alleged ambiguity arises out of subsections (a) and (h) of 15 U.S.C. § 78u–6.[50] Subsection (a) defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission [the "SEC"]."[51] Subsection (h), which is titled "Protection of Whistleblowers," provides a safeguard for whistleblowers who take certain listed steps and defines behaviors prohibited by an employer in retaliation against the whistleblower.[52] Section (h)(1), titled "Prohibition against retaliation[,]" states:

> (A) No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
> (i) in providing information to the Commission in accordance with this section;
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et

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[47] *Asadi*, 720 F.3d at 629; SOX § 806, 18 U.S.C. § 1514A(b)(1)(B).

[48] *See Asadi*, 720 F.3d at 622-23; Berman v. Neo@Ogilvy, 801 F.3d 145, 147 (2d Cir. 2015).

[49] *See Asadi* 720 F.3d at 622-23; *Berman*, 801 F.3d at 147. Numerous district courts have considered the question, as to whether the whistleblower provision of Dodd-Frank is ambiguous, and have found that the provision, as enacted, is either conflicting or ambiguous. *See* Kramer v. Trans–Lux Corp., No. 3:11CV1424 (SRU), 2012 WL 444820, at *7-8 (D. Conn. Sept. 25, 2012); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 992-94 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202, 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011).

[50] *Asadi*, 720 F.3d at 623-24; *Berman*, 801 F.3d at 146-47.

[51] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(a)(6) (2010).

[52] *Id.* § 78u-6(h); *Asadi*, 720 F.3d at 623.

> seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[53]

Courts are split as to whether Dodd-Frank would apply to whistleblowers that do not report to the SEC but rather report internally, as is acceptable under SOX.[54] Some plaintiffs have argued that they qualify as "whistleblowers" under Dodd-Frank even though they did not report to the SEC, because section (h)(1)(A)(iii) refers to SOX, which allows for internal reporting.[55] The Second Circuit and numerous district courts have agreed with these plaintiffs and found the language in subsections (a) and (h) directly conflict with one another.[56] These courts broadly interpret the term "whistleblower," applying it to individuals who report in a manner acceptable under SOX, like internal reporting.[57] However, the Fifth Circuit and other district courts have found the definition of whistleblower in 15 U.S.C. § 78u–6 to be clear and unambiguous, and therefore only applied the term whistleblower to those who report securities violations to the SEC.[58]

The SEC, in an attempt to clarify the DFWP, adopted rule 17 C.F.R. § 240.21F, which provides that a whistleblower will be protected regardless of whether he or she reports internally or to the SEC.[59] The agency wanted to expand the scope of who will qualify as a whistleblower, and agreed with the Second Circuit that the term whistleblower as contemplated by § 78u-6(a)(6) should include anyone

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[53]Dodd-Frank § 922, 15 U.S.C. § 78u-6(h)(1)(A).

[54]Catherine Foti, *If You See Something, Say Something, But Maybe Only to the* SEC, FORBES.COM (Jun. 18, 2014), http://tinyurl.com/mrc67z3.

[55]*Asadi*, 720 F.3d at 626; *See also* Sarbanes-Oxley Act of 2002 (SOX) § 806, 18 U.S.C. § 1514A(a)(1)(C) (2002) (stating that internal reporting consists of reporting information directly to the employee's company, such as, reporting 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)").

[56]*See* Berman v. Neo@Ogilvy, 801 F.3d 145, 155 (2d Cir. 2015); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 992-94 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202, 2011 WL 1672066, at *4-5 (S.D.N.Y. May 4, 2011); Rosenblum v. Thomson Reuters (Mkts.) L.L.C., 984 F. Supp. 2d 141, 146-49 (S.D.N.Y. 2013).

[57]*Berman*, 801 F.3d at 152-33; *see supra* note 56 (listing District Courts that broadly interpret the term whistleblower).

[58]*Asadi*, 720 F.3d at 629-630; *see* Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 643-46 (E.D. Wis. 2014); Banko v. Apple Inc., 20 F. Supp. 3d 749, 756-57 (N.D. Cal. 2013); Wagner v. Bank of Am. Corp., No. 12–cv–00381–RBJ, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013).

[59]Rosenberg & Phillips, *supra* note 20, at 11-12; Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b) (2011).

who discloses directly to the SEC or in a manner acceptable under SOX.[60] A majority of courts have agreed with the SEC and the Second Circuit's broad construction of the term whistleblower.[61] However, the Fifth Circuit and a minority of district courts have made a strong argument for narrowly construing the DFWP.[62]

III. STATUTORY INTERPRETATION

Two issues in *Asadi* and *Berman*, the Second and Fifth Circuits discussed statutory construction and interpretation at length.[63] A well-established principle of statutory construction is to first assess the statutory language at issue to determine whether it is clear and unambiguous.[64] If it is unambiguous, the statute must be applied according to its terms.[65] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[66] The court must assume that what the legislature wrote in the statute is what it meant.[67] The Supreme Court has stated that the plain meaning of a statue must be followed, except when text suggests an "absurd or futile result[,]" then the court may look to the purpose of the legislation.[68] Yet, if the language of a statute is "coherent and consistent" then a court's inquiry must end.[69]

Additionally, a court should give effect to each provision and word used by Congress in the statute.[70] This is known as the surplusage canon.[71] The Supreme Court held that a statute should be construed so

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[60]Rosenberg & Phillips, *supra* note 20, at 11-12; Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b) (2011).

[61]*See* Berman v. Neo@Ogilvy, 801 F.3d 145, 155 (2d Cir. 2015).

[62]*Asadi*, 720 F.3d at 625-30.

[63]*Id.* at 622–26; *Berman*, 801 F.3d at 147, 149-51.

[64]Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984)

[65]*Id.*

[66]Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); *See Asadi*, 720 F.3d at 622 (stating that if the language of a statute is clear and unambiguous, then a court's inquiry should end).

[67]Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

[68]U.S. v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940) (stating that if the "meaning has led to absurd or futile results [] this Court has looked beyond the words to the purpose of the act").

[69]*Robinson*, 519 U.S. at 340.

[70]Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 622 (5th Cir. 2013).

[71]Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L.R. 115, 121-22 (2010); *see also* Norman Singer & Shambie Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:3 (7th ed. 2015) (stating that courts are "obligated to ascertain and carry out the legislative intent; to consider the language of the

that no word, clause or sentence is rendered "superfluous, void, or insignificant."[72] However, in *John Hancock Mutual Life Insurance. Co. v. Harris Trust & Savings Bank*, the Court stated that when examining a statute they should be guided by the statute as a whole, rather than relying on a single sentence or group of sentences to determine the purpose or intent of the statute.[73] The meaning or ambiguity of a word or sentence may only become clear once it is reviewed in context, by looking at the statute as a whole.[74] Justice Alito stated in his dissent in *United States v. Monsanto* that when the Court is faced with a potential statutory ambiguity it is "not a license for the judiciary to rewrite language enacted by the legislature."[75] The Court has previously expressed its hesitation to interpret a statutory provision or word as superfluous, or interpret a provision in a way that would render another provision of the statute unnecessary.[76]

Moreover, a court should always attempt to "interpret provisions of a statute in a manner that renders them compatible, not contradictory."[77] Because a statute should be structured as a coherent whole piece of legislation, each part read together as one, it is fundamental that a court should read each word of a statute in the context of the whole, as an overall coherent piece of legislation.[78] Thus, a court must interpret a statute "'as a symmetrical and coherent regulatory scheme'[79] and 'fit, if possible, all parts into a harmonious whole.'"[80]

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enactment in its natural and ordinary signification; to not insert or omit words to make a statute express an intention not evidenced in its original form; and, if reasonably possible, absent a clear indication to the contrary, to read the statute so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory").

[72] *Id.* (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)).

[73] John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95 (1993); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (stating that "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation").

[74] *Food & Drug Admin*, 529 U.S. at 132.

[75] United States v. Monsanto, 491 U.S. 600, 611 (1989).

[76] PA Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990).

[77] Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 622 (5th Cir. 2013); *See also* Scialabba v. Cuellar de Osorio, 134 S.Ct. 2191, 2207 (2014) (showing an extreme situation where one subsection of a statute was contradictory to another clause in the same section and thus the Court afforded deference to the Board of Immigration Appeals' interpretation of a Congressional statute).

[78] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

[79] *Id.*

[80] *Id.*

A. *Chevron Deference*

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a rule, when interpreting statutory schemes that are allegedly ambiguous, which requires courts to give deference to the agency charged with enforcing the statute, unless the agency's interpretation is unreasonable.[81] This principle is known as *Chevron* deference.[82] *Chevron* sets forth a two-step process to determine if an agency's construction of an ambiguous statute is permissible.[83] First, the court asks, "whether Congress has directly spoken to the precise question at issue."[84] If Congress' intent is clear, then the analysis ends.[85] But, if the court determines that Congress has not addressed the precise question directly, then the court must ask a second question:[86] "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[87] The agency's construction must be reasonable.[88] However, the Court stated that the judiciary has the final say on issues of statutory interpretation, and if congressional intent is clear as to how a statue should apply, then the judiciary must reject an agency's construction.[89]

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[81]Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984); *See* David Kemp, *Chevron Deference: Your Guide to Understanding Two of Today's SCOTUS Decisions*, JUSTIA LAW BLOG (May 21, 2012), http://tinyurl.com/k4wjcfp; *see generally* Bradley George Hubbard, *Deference to Agency Statutory Interpretaions First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 457 (2013) (stating that Congress must delegate authority to the agency that gives them the power to interpret and enforce the statute in question).

[82]*See* Kemp, *supra* note 81.

[83]Justice Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, DUKE L.J. 511, 511 (1989); *Chevron*, 467 U.S. at 842-43.

[84]*Id.* at 842.

[85]*Id.* at 842-843 (stating that "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

[86]*Id.* at 843 (determining that if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of and administrative interpretation").

[87]*Chevron*, 467 U.S. at 843.

[88]*See* Kemp, *supra* note 81; *Chevron*, 467 U.S. at 844 (stating that if Congress left a gap then the administrative agency's interpretation is controlling unless they are "arbitrary, capricious, or manifestly contrary to the statute.").

[89]*Id.* at n.9 (asserting that "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect").

IV. ANALYSIS: WHO IS A WHISTLEBLOWER?

A. *Asadi v. G.E. Energy*

In *Asadi v. G.E. Energy*, the Fifth Circuit held that the DFWP § 78u-6 was clear and unambiguous, and plainly stated that a whistleblower was an individual who disclosed securities violations directly to the SEC.[90] Asadi, an employee of GE Energy, reported an alleged violation of the Foreign Corrupt Practices Act to his supervisor.[91] Shortly thereafter, Asadi received a negative performance review, was pressured to step down from his position, and was fired approximately one year later.[92] Asadi, believing he was terminated for his internal report, filed a complaint alleging GE violated the DFWP.[93] GE moved to dismiss the complaint, arguing that Asadi did not qualify as a whistleblower under Dodd-Frank's whistleblower provision because he reported internally and not to the SEC.[94] The Fifth Circuit affirmed the district court's dismissal of Asadi's claim on the grounds that he "did not provide any information to the SEC[, and] therefore, he [did] not qualify as a 'whistleblower.'"[95]

The court began and ended its analysis with the statutory construction of 15 U.S.C. § 78u–6.[96] The interplay between subsections (a) and (h), the court said, was the main issue assessed in the case.[97] The term "whistleblower" was defined in subsection (a), and the court found that, standing alone, the definition "expressly and unambiguously require[d] that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u–6."[98] Subsection (h), "Protection of whistleblowers," provides a legal remedy for whistleblowers against employers that retaliate after the whistleblower engaged in specified, protected actions.[99] Asadi admitted he did not provide information to the SEC, and therefore he did not qualify as a whistleblower under section 78u–6(a)(6).[100] However, Asadi contended that section 78u–6(h)(1)(A)(iii) provided him with protection because it allowed for a

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[90] Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).
[91] *Id.* at 621.
[92] *Id.*
[93] *Id*
[94] *Asadi*, 720 F.3d at 621.
[95] *Id.* at 630.
[96] *Id.* at 623; Keen, *supra* note 6, at 221.
[97] *Asadi*, 720 F.3d at 623.
[98] *Id.* at 623.
[99] *Id.*
[100] *Id.* at 624.

remedy even when the individual did not report to the SEC.[101] He believed there was a conflict between the definition of whistleblower in subsection (a) and the third class of protected individuals under subsection (h)(1)(a)(iii), which allowed for disclosures protected under SOX.[102] A number of district courts agreed with Asadi,[103] and the SEC even issued a regulation that expanded the scope of the term whistleblower.[104] Nevertheless, the court rejected Asadi's argument and found that the perceived conflict rested on a misreading of the whistleblower protection provision.[105]

The Fifth Circuit pointed out that Congress purposefully selected the term whistleblower, instead of another more general term such as "employee" or "individual."[106] This distinction is significant because Congress used the term whistleblower throughout subsection (h), and the subcategories of protected activity followed the phrase "no employer may discharge . . . a *whistleblower* . . . because of a lawful act done by the *whistleblower*."[107] If Congress had chosen a term like "employee" or "individual," then Asadi may have qualified as a protected person.[108] However, Congress chose and defined the word "whistleblower," and the court must give that language weight.[109]

The court held that, under Dodd-Frank, the only individual who qualified as a whistleblower was one who provided information regarding a securities violation directly to the SEC.[110] The court found that Congress' definition of whistleblower and the description of protected activity was plain and unambiguous.[111] Still, Asadi asserted and the court agreed, that under the statute's structure, an individual could engage in protected activity and yet still not qualify as a whistleblower.[112] However, the court said that this alone "[did] not render § 78u–6(h)(1)(A)(iii) conflicting or superfluous."[113] The court

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[101] *Asadi*, 720 F.3d at 624.

[102] *Id.*

[103] Some district courts have concluded that the whistleblower provision of Dodd-Frank, § 78u–6, is ambiguous and conflicting. *See* Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4-5 (S.D.N.Y. May 4, 2011).

[104] Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b)(i) (2011).

[105] *Asadi*, 720 F.3d at 625.

[106] *Id.* at 626.

[107] *Id.*

[108] *Id.*

[109] *Asadi*, 720 F.3d at 627.

[110] *Id.* at 625.

[111] *Id.*

[112] *Id.* at 626.

[113] *Asadi*, 720 F.3d at 626.

used an example to show that a whistleblower who reported a securities violation to his superior and also to the SEC, without the superior knowing, and was promptly fired, was the class of whistleblower protected under § 78u–6(h)(1)(A)(iii).[114] The example illustrated that under the plain language of the provision, the third category of activity protected individuals who report in a manner, such as that covered by SOX, and therefore it was not rendered superfluous.[115] Moreover, it was Asadi's construction of that provision that rendered the text unnecessary.[116] His construction violated the surplusage canon,[117] which required each word be given due weight, because it reads the word "to the Commission" out of the definition of whistleblower.[118] Therefore, the court asserted Asadi's construction was not proper because it treated "to the Commission" as surplusage.[119]

Furthermore, the court argued that the SOX anti-retaliation provision would be rendered moot if courts were to extend Dodd-Frank's definition of a whistleblower.[120] This would likely occur because individuals would be more likely to bring a claim under Dodd-Frank rather than SOX, as Dodd-Frank provides for greater monetary damages, a longer statute of limitations, and the ability to bring a claim directly to federal court.[121] Accordingly, if courts accepted Asadi's construction then the use of the SOX anti-retaliation provision and its administrative scheme would be moot. [122]

The Fifth Circuit also addressed Asadi's contention that it should defer to the SEC's new regulation that expanded the DFWP's definition of whistleblower beyond the statutory definition.[123] The SEC's regulation expanded the definition of whistleblower to include individuals who did not report information to the SEC.[124] However, the court declared that Congress defined the term whistleblower unambiguously, and the provision clearly expressed Congress' intent to

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[114] *Id.* at 627-28.
[115] *Id.* at 628.
[116] *Id.*
[117] *See supra* text accompanying notes 71-73.
[118] *Asadi*, 720 F.3d at 628.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 628-29.
[122] *Asadi*, 720 F.3d at 629.
[123] *Id.*; *see* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b)(i).
[124] *Asadi*, 720 F.3d at 629.

require whistleblowers to report information to the SEC to qualify under Dodd-Frank.[125]

Lastly, the court pointed out that the SEC's Dodd-Frank regulations were inconsistent.[126] The regulation seemed to broaden the scope of who qualified as a whistleblower, yet, it explicitly required individuals to submit their securities law violation information to the SEC.[127] The provision that discusses submission of violations is 17 C.F.R. § 240.21F–9 and it provides: "[t]o be considered a whistleblower under Section 21F of the Exchange Act, you must submit your information about a possible securities law violation by either of these methods: (1) Online, through the Commission's Web site; or (2) By mailing or faxing a Form TCR . . . to the SEC Office of the Whistleblower."[128] Consequently, it was clear that the SEC's regulation concerning Dodd-Frank's whistleblower-protection provision was inconsistent.[129] Although it may have expanded the definition of a "whistleblower," it still required that person to submit the securities law violation information to the SEC.[130] The SEC's interpretation of who qualified as a whistleblower did not "reasonably effectuate[s] Congress's intent," and thus it did not strengthen Asadi's claim.[131] Therefore, the court held that the plain language of Dodd-Frank's whistleblower-protection provision, § 78u–6, was clear and unambiguous.[132] It limited protection to individuals who reported securities violations to the SEC, and thus, because Asadi did not report the alleged violation to the SEC, he did not qualify as a whistleblower.[133]

B. *Berman v. Neo@Ogilvy*

Conversely, in *Berman v. Neo@Ogilvy* the Second Circuit held that employees, who report securities violations internally, or to authorities other than the SEC, were entitled to protection under the

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[125] *Id.* at 630 ("Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision."); *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

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

[127] *Id.*

[128] *Id.*; *see* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F–9.

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

[130] *Id.*

[131] *Id.* (quoting Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007)).

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

[133] *Id.*

DFWP.[134] Berman, a financial director for Neo@Ogilvy ("Neo") from 2010 to 2013, managed the agency's financial reporting, compliance, and internal accounting.[135] Berman alleged that the company engaged in accounting fraud that violated SOX and Dodd-Frank.[136] He reported the violations to a senior officer at Neo, who subsequently terminated him in the spring of 2013.[137] Berman did not report the alleged violations to the SEC while employed at Neo.[138] However, in the fall of 2013, about six months after his termination and after the SOX limitation period ran out, Berman reported the information to the SEC.[139] The District Court, dismissed Berman's Dodd-Frank claim because he was terminated months before he reported the supposed securities violations to the SEC, and therefore, found he did not qualify as a whistleblower.[140] But, the Second Circuit reversed the District Court's ruling, holding that Berman was entitled to protection under Dodd-Frank § 78u–6(h)(1)(A)(iii) because the subsection extended protection to those employees who reported internally, rather than to the SEC.[141]

The Second Circuit, similar to the Fifth Circuit, began and ended its analysis with the statutory language of the DFWP and found that it was ambiguous because one provision of the statute was in tension with another provision of the statute.[142] The alleged ambiguity the court focused on was between the definition of whistleblower defined in § 78u–6(a) and the protection provision in § 78u–6(h)(iii) which detailed

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[134]Berman v. Neo@Ogilvy, 801 F.3d 145, 155 (2d Cir. 2015).

[135]*Id.* at 148-49.

[136]*Id.* at 149.

[137]*Id.*

[138]*Berman*, 801 F.3d at 149.

[139]*Id.*

[140]*Id.* Other district courts, and the Fifth Circuit, have taken the same approach as the district court in Berman's case and found that employees, who do not report to the SEC, do not qualify as whistleblowers. *See* Verfuerth v. Orion Energy Systems, Inc., 65 F.Supp.3d 640, 643-46 (E.D. Wis. 2014); Banko v. Apple Inc., 20 F.Supp.3d 749, 756-57 (N.D. Cal. 2013); Wagner v. Bank of America Corp., No. 12–cv–00381–RBJ, 2013 WL 3786643, at *4-*6 (D.Colo. July 19, 2013).

[141]*Berman*, 801 F.3d at 155; *see generally* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F–2 (expanding the scope of who can qualify as a whistleblower).

[142]*Berman*, 801 F.3d at 146, 155 (Throughout the Second Circuit's analysis, it relied on the reasoning set forth in *Burwell v. King*, 135 S. Ct. 2480, 2488-89, 2490-92 (2015), in which the Supreme Court was faced with a statutory ambiguity. The Court did not rely on an agency's interpretation because no agency had been appointed to enforce the statue. Therefore, the Supreme Court had the task of interpreting the statute itself which lead them to interpret and apply a narrow subsection in a broad manner. The Second Circuit used the reasoning in *Burwell* to bolster its argument that the DFWP should have a broad scope.).

the type of reporting that was protected under the DFWP.[143] The court conceded that there was no absolute conflict between the provisions, but it argued that the Fifth Circuit's reading of subdivision (iii) would leave it with an extremely limited scope.[144] First, it argued that some whistleblowers would report internally to their employer and to the SEC, however, it would be a rare occurrence.[145] Second, the court asserted that there were categories of whistleblowers that must report first to their employer, and only after they have reported internally, can they report to the SEC.[146] Attorneys and auditors make up that group, and thus, the court argued, they were afforded little protection from retaliation, because any retaliation would likely have preceded any reporting to the SEC.[147] In the case that the rare situation arose where a whistleblower reports to the SEC and an employer simultaneously, subdivision (iii) had a sharply limiting effect.[148]

Furthermore, the court, skeptical that Congress envisioned this sharply limited result, asked what Congress intended by adding subsection (iii).[149] Normally, it would look to the legislative history of an act; however, there was nothing indicative in the history to suggest what Congress intended.[150] Subsection (iii) was not in the original version of Dodd-Frank passed by the House and Senate.[151] Rather it

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[143] *Berman*, 801 F.3d at 146-47; *see supra* text accompanying notes 50-53 (citing to the DFWP definitional provision at § 78u–6(a) and the prohibition against whistleblowers provision at § 78u–6(h)(iii)).

[144] *Berman*, 801 F.3d at 150-51. *But see* Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 626-28 (5th Cir. 2013) (explaining that § 78u–6(h)(iii) clearly defines that one must report securities violations to the SEC to be afforded protection as a whistleblower under DFWP).

[145] *Berman*, 801 F.3d at 151 (stating that some employees feel that only reporting to their employer gives them an opportunity to end the wrongdoing immediately, whereas reporting to the Commission creates a greater risk of retaliation).

[146] *Id.*; *see* 15 U.S.C. § 78j–1(b)(1)(B) (requiring auditors to first report to the appropriate internal employer authorities); Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.1-7 (requiring an attorney to report any securities violations to their chief legal counsel).

[147] *Berman*, 801 F.3d at 151-52 (asserting that 15 U.S.C. § 78j–1(b)(2) "requires an auditor to report to the board of directors if the company does not take reasonable remedial action after the auditor's report to management . . . [and] subsection 78j–1(b)(3)(B) permits an auditor to report illegal acts to the Commission only if the board or management fails to take appropriate remedial action." Additionally, "Attorney Standards contemplates an attorney reporting to the Commission only after internal reporting . . . explicitly recognizing that by reporting internally first an attorney 'does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of the issuer'").

[148] *Berman*, 801 F.3d at 150-52.

[149] *Id.* at 146, 152-53.

[150] *Id.* at 152-53; *see also* Scalia, *supra* note 83, at 515 (stating that "the 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences").

[151] *Berman*, 801 F.3d at 152-53.

came about in a "conference based text" that was formulated to help resolve issues that may arise by the Conference Committee.[152] However, the court argued that there did not appear to be any explanation as to the intended purpose of subsection (iii) in any legislative materials.[153] Because there was no clear explanation for the addition of subsection (iii) or its meaning, the court determined that the issue warranted *Chevron* deference as to the SEC's Exchange Act Rule 21F-2.[154] The SEC enacted § 240.21F-2 in an attempt to harmonize the inconsistencies in the DFWP.[155] Section 240.21F-2 provided:

> (a) Definition of a whistleblower.
> (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F–9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.
> (2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F–4, 240.21F–8, and 240.21F–9 of this chapter.
> (b) Prohibition against retaliation.
> (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u–6(h)(1)), you are a whistleblower if:
> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

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[152] *Id.* at 152.

[153] *Id.* at 153 (stating that there is no mention of the meaning or purpose for adding subdivision (iii), but it appears that it came out of no-where).

[154] *Id.* at 155; *see supra* Part III.A (describing *Chevron* deference).

[155] *Berman*, 801 F.3d at 146; *see generally* Lloyd B. Chinn & Noa M. Baddish, *Will SEC's Broad Definition of 'Whistleblower' Prevail?*, LAW360 (Sept. 4, 2015, 10:18 AM), http://tinyurl.com/m85zsug (stating that the "SEC's interpretation 'best comports with [the Commissions] overall goals in implementing the whistleblower program'").

> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u–6(h)(1)(A)).
> (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.[156]

The court argued that § 21F-2(b)(ii) of the Act provided protection to an employee who reported internally without reporting to the Commission because of the cross-reference to SOX in subdivision (iii) of the DFWP, which allowed for internal reporting.[157] Therefore, because *Chevron* allowed for deference to an agency's interpretation of a congressional regulation where there are statutory ambiguities,[158] the court reasoned that it must give deference to the SEC's expanded interpretation of a whistleblower in § 21F-2(b)(ii).[159]

The Second Circuit reasoned that although definitional provisions generally were to be taken literally, it was not always warranted.[160] The court believed that the definition of whistleblower was not meant to apply to subsection (iii) of the DFWP, due to its late addition.[161] The conference committee hastily added subdivision (iii) in an attempt to reconcile the House and Senate bills, and unsurprisingly, no one noticed the new subdivision did not align neatly with the definition of whistleblower.[162] Subdivisions (i) and (ii) fit together with the definition, as they were in the original Senate version; however, the court argued, when conferees added subdivision (iii) at the last minute they created an unintended ambiguity.[163] Ultimately, the Second Circuit did not believe that Congress "would have expected [or intended

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[156]Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2 (2011) (referring to Dodd-Frank Wall Street Reform and Consumer Protection Act 15 U.S.C. § 78u-6(h)(1) (2010)).

[157]*Berman*, 801 F.3d at 147-48; Securities Whistleblower Incentives and Protections, Release No. 34–64545, File No. S7-33-10, at *17 (Aug. 12, 2011) (SEC explained in its release accompanying the Exchange Rule 21F–2 that "the statutory anti-retaliation protections [of Dodd–Frank] apply to three different categories of whistleblowers, and the third category [described in subdivision (iii) of subsection 21F(h)(1) (A)] includes individuals who report to persons or governmental authorities *other than the Commission*").

[158]Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

[159]*Berman*, 801 F.3d at 153, 155. Similarly, numerous district courts have deemed the DFWP ambiguous and have given deference to the SEC interpretation. *See also* Ahmad v. Morgan Stanley & Co., 2 F. Supp. 3d 491, 497-99 (S.D.N.Y 2014); Rosenblum v. Thomson Reuters (Mkts.) L.L.C., 984 F. Supp. 2d 141, 146–49 (S.D.N.Y. 2013).

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

[161]*Id.* at 154-55.

[162]*Id.* at 154.

[163]*Id.* at 154-55.

subdivision (iii)] to have [such an] extremely limited scope."[164] It favored a broad reading of the provision because it fit better with the apparent purpose of the statute.[165] However, the court found the statute was "sufficiently ambiguous," and thus allowed it to give *Chevron* deference to the SEC's rule.[166] The SEC has the responsibility of enforcing the statute and thus they have the power to resolve the apparent ambiguity.[167] By doing so, the Second Circuit chose to defer to the "reasonable interpretive rule adopted by the [SEC]."[168] The court concluded by finding "Berman [was] entitled to pursue Dodd-Frank remedies for [Neo's] alleged retaliation" after his internal report of securities violations to his supervisor, "despite not having reported to the [SEC] before his termination."[169]

C. *The Berman Dissent*

Judge Dennis Jacobs dissented in an opinion, finding that if statutory language was plain and unambiguous the court must enforce the statute accordingly.[170] Because the DFWP was clear, it deserved a straightforward reading.[171] Judge Jacobs began his dissent by stating that the SEC, along with the majority, altered the DFWP by reading the words, "to the Commission," out of the provision's definition of whistleblower.[172] He argued that rewording or re-forming any number of statutes would render them more easily understood and interpreted.[173] However, he found it was not the court's duty to improve a statute, rather the court's "obligation [was] to apply congressional statutes as written."[174]

Moreover, Judge Jacobs stated that the DFWP had more perks than SOX, but because Berman failed to report to the SEC, his only avenue for protection was under SOX.[175] He argued, however, that the

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[164] *Berman*, 801 F.3d at 155.

[165] *Id.*

[166] *Id.* at 155; *see supra* Part III.A (discussing *Chevron* deference and when a court should allow *Chevron* deference to an agencies interpretation).

[167] *Berman*, 801 F.3d at 155.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 160.

[171] *Berman*, 801 F.3d at 160.

[172] *Id.* at 155.

[173] *Id.*

[174] *Id.* at 155.

[175] *Berman*, 801 F.3d at 156; *see supra* text accompanying notes 40-47 (comparing the DFWP with SOX).

majority and the SEC attempted to patch a perceived hole in the DFWP coverage by expanding the definition of a whistleblower to include individuals who reported internally, but not to the SEC.[176] Next, Judge Jacobs addressed the definitional section of the DFWP,[177] and asserted that the definition of whistleblower was preceded by the statement "[i]n this section the following definitions shall apply."[178] He agreed with the Fifth Circuit's ruling, that the definition alone expressly and unambiguously required an individual to report securities violations to the SEC to qualify as a whistleblower.[179] Judge Jacobs asserted that Berman's reading, and the majority's, was not the natural reading of the DFWP.[180] Also, he stressed that the majority did not challenge his reading; rather, they afforded *Chevron* deference to the SEC's regulation, which altered an unambiguous definition.[181] The majority misread the provision and inserted the term "employee" into the statute, reading whistleblower right out, and thus broadened the scope of the DFWP.[182] Congress not only chose to use the term whistleblower, not employee, in the DFWP, but it went further and defined the term whistleblower, and thus Berman had no claim because he did not qualify as a whistleblower.[183]

Furthermore, the majority created an "arguable tension" because they found the text to have an "extremely limited scope," as it would be highly unlikely that anyone would report simultaneously, or nearly simultaneously to their employer and the SEC.[184] Because the aforementioned reporting would be so rare, Congress could not have intended that result.[185] The dissent suggested that there is no support for the majority's proposition.[186] In fact, there are a plethora of Congressional regulations with a very narrow scope, and yet no statutory

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[176] *Berman*, 801 F.3d at 156; Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-2(b) (2014) (expanding the definition of whistleblower to include those individuals who report internally).

[177] Dodd-Frank Wall Street Reform and Consumer Protection Act 15 U.S.C. § 78u-6(a) (2010).

[178] *Berman*, 801 F.3d at 156.

[179] *Id.* at 157.

[180] *Id.*

[181] *Id.*

[182] *Berman*, 801 F.3d at 157-58.

[183] *Id.* at 157-58 (Judge Jacobs further stated, that the generic term, employee, was used in SOX, not the DFWP, but the majority applied the term universally, ignoring the distinction Congress' intended to draw between the two statutes).

[184] *Id.* at 158 (stating "the majority looks here, there and everywhere-except to the statutory text" to interpret the meaning of the DFWP provision).

[185] *Id.*

[186] *Berman*, 801 F.3d at 158.

canon had been created to support the majority's interpretation.[187] The Supreme Court's jurisprudence, for years, "consistently [applied a] plain text [reading] over opportunistic influences about legislative history and purpose."[188]

Judge Jacobs concluded by reasoning that "the sole consequence of applying the [DFWP] as written [was] that those who report only to their employer" would be afforded protection by SOX not the DFWP.[189] No major crisis would occur; rather, it just placed the burden on individuals to decide how they wish to report in light of the remedies available.[190] Conversely, the real danger that arose was that judges and bureaucrats would take it upon themselves to restructure statutes to give them a reach that was more acceptable.[191] Judge Jacobs finished by finding that "[i]f the statutory language [was] plain, [the court] must enforce it according to its terms."[192]

V. EVALUATION: ADOPTING THE FIFTH CIRCUIT'S APPROACH TO THE DODD-FRANK WHISTLEBLOWER PROVISION

Dodd-Frank was enacted during a time of financial and economic turmoil, with the aim of improving accountability and transparency in the U.S. financial system.[193] The objective of the whistleblower provision was to encourage the reporting of securities law violations, and provide protection to those individuals who report.[194] Overall, Dodd-Frank has been very successful since its implementation.[195] In 2011, the SEC received just 334 whistleblower reports,[196] but by 2014 the SEC saw a

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[187] *Id.*

[188] *Id.* at 159; *see also* Baker Botts LLP v. ASARCO L.L.C., 135 S. Ct. 2158, 2169 (2015) (stating that the judiciary's "job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'"); Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

[189] *Berman*, 801 F.3d at 159.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 160.

[193] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, at 1, 111th Cong. (2d Sess. 2010).

[194] Nicole H. Sprinzen, *Asadi v. GE Energy (USA) L.L.C.: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 152, 162 (2014).

[195] *Id.* at 166.

[196] OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM'N., 2012 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, at 4 (2012).

dramatic increase in reporting, with over 3,500 recorded reports.[197] Consequently, it has become increasingly important to recognize and understand the implications of the Second and Fifth Circuit's decisions, as this circuit split has set the stage for a potential Supreme Court review of the DFWP.[198]

A. *Assessing the Criticism's and Implications of the Circuit Split*

The split between the Federal Circuit Courts over whether an individual who reports internally and not to the SEC should qualify as a whistleblower has several implications. First, it is argued that the Fifth Circuit's narrow interpretation will encourage employees with securities violations information to forgo reporting internally to company management, and instead race to the SEC to submit their information.[199] These critics argue that the bounty provision of the DFWP will encourage employees to seek the large payouts for reporting to the SEC, rather than provide the company with an opportunity to investigate and potentially remedy the problem internally.[200] This author concedes that the potential monetary benefits may influence some employees to bypass internal reporting and go straight to the SEC. However, the SEC has several rules in place to encourage internal reporting.[201] First, a whistleblower can receive credit for reporting violations internally, but only if the internal report generates useful information that is then passed to the SEC.[202] Second, a whistleblower "is permitted 120 days from the time of first reporting internally to report directly to the SEC and still be treated as if he or she had reported to the SEC on the earlier date."[203] Lastly, a whistleblower can potentially receive a larger award if they "voluntary[ily] participat[e] in a company's internal compliance

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[197] 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 5, at 1.

[198] Joseph C. Toris, Richard J. Cino, & David R. Jimenez, *Split Appeals Court Decision May Set Stage for Supreme Court Review of Dodd-Frank Whistleblower Provision*, JacksonLewis.com (Sept. 16, 2015), http://tinyurl.com/ltv37aq.

[199] *See* Sprinzen, *supra* note 194, at 166; *see also* Joseph De Simone & Marcia E. Goodman, *SEC's Final Rules on Whistleblower Bounty Program May Impact Corporate Compliance Programs*, MAYER BROWN LEGAL UPDATE (June 20, 2011), http://tinyurl.com/mxl6hwt (stating that "corporate compliance directors have good reason to worry that these new rules do not do enough to incentivize whistleblowers to report information internally").

[200] *See* Sprinzen, *supra* note 194, at 166; Keen, *supra* note 6, at 233-34.

[201] *See* Simone & Goodman, *supra* note 199.

[202] *Id.* (stating that an employee can also receive "'potentially a greater award'—for any additional information generated by the company in [the SEC's] investigation").

[203] *Id.*

procedure."[204] Consequently, these rules help to discourage the much-feared "rush to the SEC" by providing incentives to whistleblowers to report perceived violation's internally, before reporting it to the SEC.[205] It is important to note that statistics have shown that a majority of whistleblower's first attempt to report internally to their employer before reaching out to the SEC or other channels.[206] Subsequently, it seems evident that the DFWP encourages, rather then discourages, corporate compliance and internal reporting.[207]

Next, critics argue that the Fifth Circuit's narrow reading of the DFWP will lead the SEC to be inundated with reports, many of which are low quality, effectively detracting from their ability to address and pursue high quality tips.[208] However, in 2011, the Chairman of the SEC stated that whistleblower tips generated from the Dodd-Frank program "have saved the SEC weeks of investigation time."[209] It is obvious that the implementation of a program like Dodd-Frank would lead to an increase in tips provided to the SEC, but that is exactly what the agency was tasked with addressing.[210] Frankly, the whole point of implementing Dodd-Frank was to encourage and increase the volume and quality of whistleblower tips, and the act is having that exact effect.[211] Therefore, a narrow reading of the DFWP, to only allow reporting to the SEC, may

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[204] *Id.* ("Conversely, interference with internal compliance procedures may decrease the award.").

[205] *See generally* Sprinzen, *supra* note 194, at 165; Simone & Goodman, *supra* note 199.

[206] Sprinzen, *supra* note 194, at 166, 191 ("The response that they received from their employers, who ignored, rebuffed, or retaliated against them, led them to make external reports.").

[207] *Id.* at 192 ("Where employees feel that their reports will be well-received by their employer and they have confidence that their employment will not be jeopardized by making such reports, they are more likely to voice concerns about potential legal violations internally to their employer. Of course, this is the route that corporate employers prefer."); *see generally* Jyotin Hamid, Mary Beth Hogan, Jonathan R. Tuttle, Ada Fernandez Johnson, & Ryan M. Kusmin, *Client Update: Second Circuit Creates Circuit Split on the Question of Whether Internal Reporting Triggers Whistleblower Anti-Retaliation Protection Under Dodd-Frank*, at 4, DEBEVOISE.COM (Sept. 11, 2015), http://tinyurl.com/lmp76rj ("Companies should take care to monitor and test the effectiveness of their policies and procedures around internal reporting of alleged misconduct.").

[208] Simone & Goodman, *supra* note 199; *See* Foscaldi, *supra* note 38, at 493; Keen, *supra* note 6, at 234.

[209] Jordan Eth, Randall Fons, & Justin Hoogs, *Client Update: A Divided SEC Issues Final Dodd-Frank Whistleblower Program Rules*, at 3, MORRISON FOERSTER (May 25, 2011), http://tinyurl.com/mqloz6a.

[210] *See id.*

[211] *See, e.g.*, Gay Parks Rainville & Jay A. Dubow, *SEC Adopts Final Dodd-Frank Whistleblower Rules That Allow Employee-Whistleblowers to Circumvent Companies' Internal Compliance Programs*, PEPPER HAMILTON (May 27, 2011), http://tinyurl.com/kjbqtwm.

cause an uptick in reported tips.[212] However, it is likely that Congress anticipated an uptick in reporting when they enacted Dodd-Frank, which is why they established the SEC Office of the Whistleblower, to administer the DFWP.[213] Moreover, critics argue that the SEC will receive more low quality tips over high quality tips, subsequently interfering the with SEC's ability to pursue the high quality tips.[214] But, from a glance at the annual statistics, the SEC is having no problem pursing and successfully charging violators.[215]

Finally, the Fifth Circuit argued that if they were to adopt the broad reading of the DFWP that *Asadi* suggested, it would render SOX moot, which is a valid point.[216] The court reasoned that if a whistleblower were allowed to bring a SOX claim under the DFWP, according to Asadi's reading of § 78u–6(h)(1)(A)(iii), then it would be unlikely anyone would make a disclosure under SOX.[217] Whistleblowers would choose to disclose under Dodd-Frank because they would receive greater monetary benefits, a longer statute of limitations, and the ability to bring their claim directly to federal court first.[218] Thus, if the court accepted Asadi's construction then "the SOX anti-retaliation provision, and most importantly, its administrative scheme, for practical purposes, would be rendered moot."[219] Conversely, in *Somers v. Digital Realty Trust, Inc.*, the court argued that the Fifth Circuit overlooked two reasons why an individual may choose to report under SOX and not Dodd-Frank.[220] First, the court reasoned that an individual might prefer SOX's administrative forum, under which OSHA has responsibility for investigating.[221] However, this is a weak argument because under the DFWP, an individual is not tasked with the sole responsibility of investigating and bringing their claim to court; in fact, the contrary

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[212] *See generally* Simone & Goodman, *supra* note 199; Foscaldi, *supra* note 38, at 492.

[213] OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM'N., *Welcome to the Office of the Whistleblower*, SEC.GOV, https://www.sec.gov/whistleblower.

[214] *See, e.g.*, Simone & Goodman, *supra* note 199; *See* Foscaldi, *supra* note 38, at 492.

[215] *See generally supra* text accompanying notes 3-5 (discussing the Office of the Whistleblowers annual findings that an increase in tips has lead to more successful claims and whistleblower payouts).

[216] Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 628-29 (5th Cir. 2013).

[217] *Id.* at 628-29; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2010).

[218] *Asadi*, 720 F.3d at 629; *see supra* text accompany notes 43-47 (giving a more detailed look at the benefits of bringing a Dodd-Frank claim).

[219] *Asadi*, 720 F.3d at 628-29.

[220] Somers v. Digital Realty Trust, Inc., 119 F.Supp.3d 1088, 1104 (N.D. Cal. 2015).

[221] *Id.*

occurs.[222] Under Dodd-Frank, the SEC's Office of the Whistleblower helps to investigate a claim and provides anonymity to the whistleblower.[223] So, while a whistleblower may choose to bring a SOX claim, there is still more incentive to bring a DFWP claim and the SEC conducts the investigation.[224] Second, the court in *Somers* argues that SOX provides other monetary incentives, such as recovery for emotional distress or reputational harm.[225] While this is true, the DFWP provides a chance at an even greater monetary gain, because if a whistleblower's tip leads to a successful enforcement, then the individual can receive between 10% and 30% of the sanction imposed by the SEC.[226] Consequently, the Fifth Circuit's argument is well grounded, because although there may be a few minor benefits to filing under SOX, an individual has significantly more benefits if they choose to file a claim under the DFWP.[227] Thus, many whistleblowers will likely choose to disclose under the DFWP.

Overall, the purpose of enacting the DFWP was to encourage the reporting of securities violations and to protect individuals who made those reports.[228] Honestly, whether a court follows a broad reading or a narrow reading of the DFWP, the intended purpose is still achieved. It ultimately comes down to deciding which court correctly interpreted the DFWP in applying the principles of statutory interpretation.

B. *The Best Approach*

Statutes should be "worded with sufficient definiteness so that laypeople, lawyers, and judges all understand" how to adhere to, and apply the statute in practice.[229] Presently, the DFWP has sufficiently defined the term whistleblower and clarified which types of actions, taken by a whistleblower, will afford them Dodd-Frank anti-retaliation

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[222] OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM'N., *What Happens to Tips*, SEC.GOV, http://tinyurl.com/sec-wb-413.

[223] *Id.*

[224] *See generally id.*

[225] *Somers*, 119 F.Supp.3d at 1104; *see* Sarbanes-Oxley Act of 2002 (SOX) § 806, 18 U.S.C. § 1514A(c)(2)(C).

[226] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(b)(1); *see supra* text accompanying notes 3-6 (discussing SEC awards of $14 and $30 million, respectively).

[227] *See generally* Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 628–29 (5th Cir. 2013); *supra* text accompanying notes 43-47 (giving a more detailed look at the benefits of bringing a Dodd-Frank claim).

[228] *See* Sprinzen, *supra* note 194, at 152, 162.

[229] *See* Michelle V. Barone, Note, *Honest Services Fraud: Construing the Contours of Section 1346 in the Corporate Realm*, 38 DEL. J. CORP. L. 571, 592 (2013).

protection.[230] This author recommends the adoption of the Fifth Circuit's approach.

First, when interpreting a statute, a court must determine if the language is clear and unambiguous.[231] The Supreme Court "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says."[232] The Fifth Circuit found that the DFWP clearly expressed Congress's desire requiring an individual to report directly to the SEC to qualify as a whistleblower.[233] When Congress enacted the DFWP, it created a definition section, § 78u-6(a)(6), where it unambiguously defined the term whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission [the "SEC"]."[234] This section is preceded by the statement "*[i]n this section the following definitions shall apply.*"[235] Consequently, it is clear that Congress intended the definition of whistleblower, one who reports "*to the Commission*," to apply throughout, including § 78u–6(h)(1)(A)(iii).[236]

Additionally, in the Second Circuit, "the majority seemingly found the Dodd-Frank Act's statutory language ambiguous not because certain words were susceptible to multiple definitions, but rather because it considered it unlikely that Congress would have wanted the anti-retaliation provision to have a 'limited effect.'"[237] Yet, as the dissent in *Berman* pointed out, there is no statutory construction or jurisprudence to support the majority's proposition.[238] "The U.S. Code is full of statutory provisions with 'extremely limited' effect; there is no canon that counsels reinforcement of any sub-sub-sub-section that lacks a paradigm shift."[239] The majority tried to infer what it believed Congress "actually" intended,

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[230] *See Asadi*, 720 F.3d at 625-27, 630.

[231] *Id.* at 622-23; *see supra* Part III (statutory construction).

[232] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

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

[234] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, 15 U.S.C. § 78u-6(a)(6) (2010).

[235] *Id.* at § 78u-6(a); *see* Berman v. Neo@Ogilvy, 801 F.3d 145, 158 (2d Cir. 2015).

[236] *See Asadi*, 720 F.3d at 623-24, 625; Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also* Dodd-Frank § 922, 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2010).

[237] Aaron M. Katz & Eva Ciko Carman, *Circuit Split on Dodd-Frank Act Whistleblower Provision*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Sept. 16, 2015), http://tinyurl.com/l6k2mf9.

[238] *Berman*, 801 F.3d at 158.

[239] *Id.*

because it considered it highly unlikely that Congress could have meant for the statute to have a narrow application.[240] They assumed that the term whistleblower, although clearly defined in § 78u–6(a),[241] could not *only* require an individual to report to the SEC.[242] However, "[w]hen . . . a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning."[243] If a statute is plainly stated and the intent of Congress is clear, "nothing is left for interpretation."[244] The law emanating from the statute is binding upon the courts and the public.[245] "To allow a court . . . to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch . . . and practically invest it with the lawmaking power." But a court's duty is not to make law; rather it is tasked with interpreting and applying the law.[246] Therefore, "[t]he remedy for a harsh law is not in interpretation but in amendment or repeal."[247]

Furthermore, the Second Circuit argued that since § 78u–6(h)(1)(A)(iii) was a last minute addition, then Congress could not have meant for it to apply with the other provisions of the statute.[248] Whether a provision is added early or late, it should have no effect on the reading of the statute in plain meaning.[249] Since the plain statutory language was unambiguous, then it must be applied as written.[250] As the Supreme Court has stated, if Congress directly addresses "the precise question at issue . . . there is no room for the agency to impose it's own answer to the question."[251] In any event, it is not the court's duty to alter, amend, or pass statutory legislation that they feel could be improved; it is Congress'

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[240] *See id.* at 155.

[241] Dodd-Frank § 922, 15 U.S.C. § 78u-6(a) (2010).

[242] *See Berman*, 801 F.3d at 154-55.

[243] Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 623 (5th Cir. 2013) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts 226* (1st ed. 2012).

[244] *See* Singer & Singer, *supra* note 71.

[245] *Id.*

[246] *The Judicial Branch*, https://www.whitehouse.gov/1600/judicial-branch (May 15, 2016).

[247] *See* Singer & Singer, *supra* note 71.

[248] Berman v. Neo@Ogilvy, 801 F.3d 145, 155 (2d Cir. 2015).

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

[250] *Id.*

[251] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

responsibility.[252] If a statute is not addressing the issue or achieving the goal it was enacted to accomplish, then Congress can amend the act, but the judiciary cannot. If courts get sucked into restructuring or re-construing statutes to achieve a result that helps people they believe are doing the right thing, then the courts will constantly be whipsawed by aiding people or entities they feel deserve it, which is not the court's job. The majority in *Berman* continually referenced *King v. Burwell*, but the dissent made the influential argument that "the Court did not mean in *King v. Burwell* to revisit the era when judges could cast aside plain statutory text just because they harbor 'doubts about what was going on in the heads of individual 'conferees' during the legislative process.'"[253] Therefore, it is clear that "the statutory scheme is coherent and consistent" with what congress intended, and thus no deference should be given to the SEC's interpretation; instead the statute must be read and enforced as written.[254]

Finally, when applying the canons of statutory construction to the Dodd-Frank Whistleblower Provision, it is obvious that the statute is clear and unambiguous, and thus must be applied as written.[255] The "plain meaning" canon supports the finding that Congress defined the term whistleblower and intended for it to apply throughout the statute.[256] "The statute . . . clearly expresses Congress' intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank."[257] Additionally, the Second Circuit's argument that Congress did not intend every whistleblower to only report "to the Commission" is refuted by the application of the surplusage canon.[258] Each word must be given effect, "no clause, sentence, or word [should be rendered] superfluous, void, or insignificant."[259] This principle strongly suggests adherence to the Fifth Circuit's finding, because application of the Second Circuit's ruling would render "to the Commission" insignificant.[260] Subsequently, this author argues that when adhering to rules of statutory construction and viewing the Supreme Court's jurisprudence, the Fifth Circuit correctly ruled that the DFWP was clear and unambiguous and must be applied as written.

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[252] *See* Berman v. Neo@Ogilvy, 801 F.3d 145, 155 (2d Cir. 2015).

[253] *Id.* at 160.

[254] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

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

[256] *See supra* Part III; *Asadi*, 720 F.3d at 628–30.

[257] *Id.*

[258] *See* Berman v. Neo@Ogilvy, 801 F.3d 145, 155 (2d Cir. 2015).

[259] Market Co. v. Hoffman, 101 U.S. 112, 115 (1879).

[260] *See generally* Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 628 (5th Cir. 2013).

Therefore, this rule would only qualify those individuals who report to the SEC as whistleblowers.

VI. CONCLUSION

The DFWP was enacted to encourage reporting of securities violations and ensure protection for the whistleblowers that report those violations. It is clear this program has been successful with the number of whistleblower tips increasing each year, and awards reaching record amounts. Still, there is some uncertainty about the application of the DFWP, which has led to a split among the circuits. The solution proposed in this Note supports adherence to the Fifth Circuit's approach by reading the DFWP as written, because it is clear and unambiguous, and by extending protection only to those individuals who report directly to the SEC, consequently qualifying them as a whistleblower. This solution adheres to the principles of statutory construction and achieves the goal of increasing reporting of securities violations, while protecting whistleblowers, which is what Congress intended.

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