
Business Law—Second Circuit Extends the Dodd-Frank Act’s Anti-Retaliation Protection to Internal Whistleblowers—*Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

The Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (Dodd-Frank Act) reformed federal financial regulation in response to the Great Recession.² The Dodd-Frank Act includes incentives and protections for whistleblowers who report violations of federal securities laws.³ In *Berman v. Neo@Ogilvy LLC*,⁴ the Court of Appeals for the Second Circuit considered whether the anti-retaliation provisions of the Dodd-Frank Act protect a whistleblower who does not report violations to the Securities and Exchange Commission (SEC).⁵ The court held that the statute is sufficiently ambiguous so as to warrant deference under *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*⁶ to SEC regulations, which extend protection to internal whistleblowers who merely report violations within their organization.⁷ The court’s decision split from the Fifth Circuit—the only other circuit court of appeals that has addressed this issue and deemed that the statute unambiguously required whistleblowers to report to the SEC.⁸

In April 2013, Neo@Ogilvy LLC (Neo), a media services company, fired Daniel Berman, who had served as Neo’s finance director since October 2010.⁹ Berman alleged that during his employment at Neo, he discovered accounting fraud, violations of Generally Accepted Accounting Principles (GAAP), and

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

2. See Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 446 (2012) (explaining Congress enacted Dodd-Frank Act following 2008 financial crisis to create more successful corporate governance).

3. See 2015 SEC ANN. REP. TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 4 (describing Dodd-Frank Act’s whistleblower monetary incentives and retaliation protections); see also 15 U.S.C. § 78u-6 (2012) (codifying whistleblower protections of Dodd-Frank Act).

4. 801 F.3d 145 (2d Cir. 2015).

5. See *id.* at 147 (questioning whether internal whistleblowers can obtain retaliation remedies under Dodd-Frank Act).

6. 467 U.S. 837 (1984).

7. See 801 F.3d at 155 (deferring to SEC Rule 21F-2(b)(1) under *Chevron*); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (establishing framework for deferring statutory interpretation to administering agency); see also 17 C.F.R. § 240.21F-2(b)(1) (2016) (defining whistleblower according to SEC’s interpretation of Dodd-Frank Act’s whistleblower provisions).

8. 801 F.3d at 153 (referring to circuit split court’s decision created); see also *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (deeming statute unambiguously expressing Congress’s intent to report to the SEC for whistleblower qualification).

9. 801 F.3d at 148-49 (describing Berman’s position and duration of employment at media agency, Neo). Berman was responsible for the financial reporting, compliance, and accounting procedures of both Neo and its parent company, WPP Group USA, Inc. (WPP). *Id.*

various financial and securities regulations violations.¹⁰ Berman further alleged that he was fired after he reported these violations internally to Neo, which angered a senior officer.¹¹ Berman, however, did not report the alleged violations to the SEC until about six months after he was fired.¹²

Berman sued Neo and WPP on January 28, 2014, alleging, *inter alia*, that he was fired in retaliation for his whistleblower activities, and in violation of the anti-retaliation provisions of the Dodd-Frank Act.¹³ The defendants filed a motion to dismiss, arguing that Berman was not a whistleblower as defined by the Dodd-Frank Act at the time of retaliation because he had not reported the violations to the SEC.¹⁴ The magistrate judge, however, issued a report that qualified Berman as a whistleblower.¹⁵ Upon defendants' objection, the district court declined to adopt the whistleblower aspect of the magistrate judge's report; the district court granted the motion to dismiss because it held that Berman was not a whistleblower.¹⁶ The United States Court of Appeals for the Second Circuit reversed, deferring to the SEC's broader definition of whistleblower, which encompasses internal whistleblowers.¹⁷

Prior to Congress's enactment of the Dodd-Frank Act, the Sarbanes-Oxley Act of 2002¹⁸ (SOX) provided anti-retaliation protection to employees of publicly traded companies.¹⁹ The SOX protection encompasses internal

10. *See id.* at 149 (describing Berman's allegations regarding discovery of practices at Neo amounting to violations and fraud). In the United States, GAAP refers to common principles and practices that provide a standard for reporting the financial status of businesses. *See* Stuart H. Deming, *International Financial Reporting Standards: Their Importance to U.S. Business and Legal Practice*, 84 MICH. B.J. 14, 14 (2005). The Financial Accounting Standards Board (FASB), the SEC, and the American Institute of Certified Public Accountants provide the primary GAPP authority in the United States. *See id.*

11. *See* 801 F.3d at 149 (describing termination following internal reporting of violations).

12. *Id.* (referring to time frame of Berman's reporting to SEC).

13. *See* Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 406 (S.D.N.Y. 2014) (outlining Berman's claims), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015).

14. *See* Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 406 (S.D.N.Y. 2014) (presenting defendants' arguments, contending Berman lacked reasonable belief actions violated securities laws), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015). The defendants moved to dismiss all of Berman's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6); Berman v. Neo@Ogilvy LLC, No. 14-CV-00523, 2014 WL 6865718, at *1 (S.D.N.Y. August 15, 2014) (granting defendants' motion to dismiss and granting Berman permission to amend retaliation claim), *report and recommendation adopted in part and rejected in part*, 72 F. Supp. 3d 404 (S.D.N.Y. 2014).

15. Berman v. Neo@Ogilvy LLC, No. 14-CV-00523, 2014 WL 6865718, at *5-8 (S.D.N.Y. August 15, 2014) (offering analysis and concluding Berman meets whistleblower qualification meriting protection), *report and recommendation adopted in part and rejected in part*, 72 F. Supp. 3d 404 (S.D.N.Y. 2014).

16. *See* Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 410-11 (S.D.N.Y. 2014) (rejecting magistrate judge's conclusion Berman meets whistleblower qualification and dismissing anti-retaliation claims), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015). The district court found that Berman was not a whistleblower because he did not report to the SEC. *See id.* at 405.

17. *See* 801 F.3d at 155 (deferring to SEC's whistleblower definition, entitling Berman to Dodd-Frank Act protection).

18. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of U.S. Code).

19. *See* 18 U.S.C. § 1514A(a) (2012) (codifying SOX provisions). Berman could not substantiate his

whistleblowers and does not require these whistleblowers to report violations to the SEC.²⁰ The Dodd-Frank Act added a section titled “Securities Whistleblower Incentives and Protection” (section 21F) to the Securities Exchange Act of 1934.²¹ In contrast to the SOX’s anti-retaliation provisions, the Dodd-Frank Act provides whistleblowers alleging discrimination with more monetary damages, allows them to file claims in district court without first filing with a federal agency, and provides them with a substantially longer statute of limitations.²² Courts, however, are divided as to whether internal whistleblowers are protected under the Dodd-Frank Act.²³

The courts are split regarding protection of internal whistleblowers because of a perceived inconsistency between two provisions of the Dodd-Frank Act.²⁴

claim based on a SOX violation, which explicitly protects internal whistleblowers, because the SOX statute of limitations had expired. *See* 801 F.3d at 149.

20. *See* § 1514A(a)(1)(C) (providing protection for employees who report internally).

21. *See* Dodd-Frank Act § 922(a), 124 Stat. at 1841 (amending Securities Exchange Act of 1934); *see also* 15 U.S.C. §§ 78u-6(b), (h) (2012) (codifying whistleblower award incentives for successful SEC enforcement actions and whistleblower protection by prohibiting retaliation).

22. *See* *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013) (comparing SOX and Dodd-Frank Act’s whistleblower provisions). *Compare* 15 U.S.C. § 78u-6(h)(1)(C) (providing relief under Dodd-Frank Act), *with* 18 U.S.C. § 1514A(c)(2) (codifying damages under SOX); *compare* 15 U.S.C. § 78u-6(h)(1)(B)(i) (allowing action in district court under Dodd-Frank Act), *with* 18 U.S.C. § 1514A(b)(1) (noting whistleblower initially files complaint with Secretary of Labor); *compare* 15 U.S.C. § 78u-6(h)(1)(B)(iii) (codifying statute of limitations under Dodd-Frank Act), *with* 18 U.S.C. § 1514A(b)(2)(D) (codifying shorter statute of limitations under SOX than under Dodd-Frank Act).

23. *See* *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (adopting SEC’s interpretation of internal whistleblower protection). Many other courts have extended protection to internal whistleblowers. *See, e.g.*, *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *6 (S.D.N.Y. May 21, 2013) (deferring to SEC’s rule which clarifies ambiguity in statute); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424(SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) (following SEC’s rule); *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp. 2d 986, 993-95 (M.D. Tenn. 2012) (referring to internal reporting); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *7 (S.D.N.Y. May 4, 2011) (acknowledging protection extends to multiple categories of disclosures, including internal disclosure). Other courts—including both district courts and the appellate court for the Fifth Circuit—have deemed the Dodd-Frank Act to unambiguously require reporting to the SEC. *See, e.g.*, *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (declaring statute unambiguous); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *8 (M.D. Fla. May 12, 2014) (citing *Asadi* reasoning in determining statute unambiguous); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013) (agreeing with *Asadi* decision); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013) (applying rules of statutory interpretation to declare statute unambiguous); *see also* Andrew Walker, Note, *Why Shouldn’t We Protect Internal Whistleblowers? Exploring Justifications for the Asadi Decision*, 90 N.Y.U. L. REV. 1761, 1774 (2015) (justifying *Asadi* interpretation).

24. *See supra* note 23 and accompanying text (exemplifying court decisions with opposite conclusions regarding internal whistleblower protection); *see also* 15 U.S.C. §§ 78u-6(a)(6), (h)(1)(A) (codifying definition of whistleblower and anti-retaliation provisions). The courts have split due to a supposed inconsistency between the whistleblower definition pursuant to § 78u-6(a)(6) and the anti-retaliation provisions pursuant to § 78u-6(h)(1)(A). *See* Walker, *supra* note 23, at 1768 (referring to apparent ambiguity between Dodd-Frank’s definitional section and third protected whistleblower category). The courts’ split over the issue of extending protection to internal whistleblowers has created differing incentives and consequences for whistleblowers. *See id.* at 1771. For example, critics have argued that denying protection to internal whistleblowers incentivizes external reporting to the SEC; on the other hand, it leaves internal whistleblowers “who are most vulnerable to

Specifically, section 21F(a)(6) defines the term “whistleblower” to require reporting information relating to violations of securities laws to the SEC.²⁵ Section 21F(h)(1)(A), however, provides anti-retaliation protection to “a whistleblower . . . because of any lawful act done by the whistleblower – (i) in providing information to the [SEC] . . . or (iii) in making disclosures that are required or protected under the [SOX]” (subsection (i) and subsection (iii), respectively).²⁶ Thus, because subsection (iii) references the SOX that provides protection for internal reporting within the organization, it apparently conflicts with the SEC reporting requirement outlined in the whistleblower definition contained in section 21F(a)(6).²⁷ Additionally, the SEC has established regulations implementing the Dodd-Frank Act, construing the whistleblower definition to include internal whistleblowers and extending anti-retaliation protection to them.²⁸ While many district courts have deferred to the

retaliation” unprotected, and minimizes opportunities to identify corporate violations internally. *See id.* at 1771-72. Arguably, it also leads to more costly external investigations. *See id.* at 1773.

25. *See* 15 U.S.C. § 78u-6(a)(6). Section 21F(a)(6) 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.” *Id.*

26. *See* 15 U.S.C. § 78u-6(h)(1)(A). Section 21F(h), the anti-retaliation provision pursuant to the Dodd-Frank Act, provides:

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 [SOX], the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id.

27. *See* 18 U.S.C. § 1514A(a)(1) (2012) (codifying SOX internal reporting provision). The SOX provision protects employees who report internally 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).” *Id.*; *see also* 15 U.S.C. § 78u-6(a)(6) (codifying Dodd-Frank Act’s definition of whistleblower).

28. *See* 17 C.F.R. § 240.21F-2(b)(1)(ii) (2016) (extending SEC definition of whistleblower to internal whistleblowers). Specifically, the SEC regulations provide, in relevant part:

For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

- (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a) that has occurred, is ongoing, or is about to occur, and;
- (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

§ 240.21F-2(b)(1)(i)-(ii) (providing inferential link to protect employees reporting internally); *see also* Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934,

SEC's interpretation under *Chevron*, some courts have deemed the statute to be unambiguous, rejecting the SEC's interpretation and thereby excluding protection of internal whistleblowers.²⁹

In *Asadi v. G.E. Energy (USA), L.L.C.*,³⁰ the Court of Appeals for the Fifth Circuit held that the statutory definition of whistleblower in the Dodd-Frank Act unambiguously requires reporting to the SEC.³¹ The Fifth Circuit resolved any apparent conflict by distinguishing between who is protected based on the definition of "whistleblower," and which actions constitute protected activity pursuant to the anti-retaliation provision of section 21F(h)(1)(A).³² Moreover, the court rejected the argument that the whistleblower definition's requirement to report to the SEC renders subsection (iii) superfluous in view of subsection (i), which also requires reporting to the SEC.³³ For example, the court explained that subsection (iii) is the only provision that can protect an employee who reports a violation internally on the same day as reporting to the SEC when the employer, who is not yet aware of the SEC reporting, fires the employee.³⁴

In *Berman v. Neo@Ogilvy LLC*, the Court of Appeals for the Second Circuit found a sufficiently ambiguous tension between section 21F's whistleblower

SEC Release No. 34-75592, 2015 WL 4624264, at *2 (Aug. 7, 2015) (distinguishing whistleblower requirements for purposes of anti-retaliation protection versus awards); Securities Whistleblower Incentives and Protections, SEC Release No. 34-64545, 76 Fed. Reg. 34300-01, at *34304 (June 13, 2011) (explaining SEC's interpretation involves no requirement of reporting violations to SEC).

29. See *supra* note 23 and accompanying text (providing examples of court decisions reaching opposite conclusions regarding protection of internal whistleblowers). Many commentators have noted that leaving internal whistleblowers unprotected under the Dodd-Frank Act is contrary to its purpose and incentives. See, e.g., Mystica M. Alexander, *Defining the Whistleblower Under Dodd-Frank: Who Decides?*, 5 CAL. L. REV. CIR. 278, 284 (2014) (suggesting Fifth Circuit's interpretation in *Asadi* may discourage whistleblowers); Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 149 (2014) (advocating adoption of rule protecting internal whistleblowers to comport with purposes of Dodd-Frank Act); Thomas S. Markey, "Whistleblower" Redefined: Implications of the Recent Interpretative Split on the Dodd-Frank Whistleblower Anti-Retaliation Provision, 33 REV. BANKING & FIN. L. 441, 449 (2014) (noting Fifth Circuit's interpretation may discourage internal reporting). Different interpretations of the statute have also created a tension between the SEC and some courts. See Alexander, *supra*, at 278 (noting SEC and judiciary view issue differently). The SEC's position is that individuals need not report violations to the SEC to qualify as whistleblowers. See *id.* On the other hand, some courts, notably the Fifth Circuit, have ruled in favor of requiring whistleblowers to report to the SEC. See *id.* at 282-83.

30. 720 F.3d 620 (5th Cir. 2013).

31. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (concluding Dodd-Frank's whistleblower provisions unambiguously express Congress's intent for whistleblower reporting).

32. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013) (concluding section 21F(h)(1)(A) fails to capture "category of whistleblower" and only represents protected activity). The court deemed that subsections (i) through (iii) of the anti-retaliation provision of section 21F(h)(1)(A) constitute categories of protected activities, rather than additional categories of whistleblowers that the SEC construed, thereby avoiding conflict with the whistleblower definition. See *id.* at 626.

33. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 626-28 (5th Cir. 2013) (arguing statutory sections not superfluous based on language structure and statutory interplay).

34. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013) (providing example of employee whistleblower protection solely under subsection (iii)).

definition and subsection (iii) of the anti-retaliation provision of the Dodd-Frank Act, thereby warranting *Chevron* deference to the SEC's broad interpretation.³⁵ The court agreed with the Fifth Circuit that there is "no absolute conflict" within section 21F, citing the *Asadi* example of "simultaneous" reporting to both the employer and the SEC.³⁶ The court argued, however, that application of the narrow construction of the whistleblower definition to subsection (iii) would leave that provision with an "extremely limited scope."³⁷ Simultaneous reporting to the SEC and internally to an employer is rare; moreover, auditors and attorneys are required to report wrongdoing internally before reporting to the SEC.³⁸ Accordingly, the court reasoned that the rare and limited protection that subsection (iii) affords under the Fifth Circuit's interpretation casts doubt as to whether Congress intended it, thereby creating sufficient ambiguity.³⁹ Ultimately, the court noted that section 21F's ambiguity might be attributed to "realities of the legislative process."⁴⁰

Although the Second Circuit did not construe the definition of whistleblower, the court's approach of deferring to the SEC regulations effectively extended the Dodd-Frank Act's anti-retaliation protection to internal whistleblowers.⁴¹ In concluding that the statute is ambiguous, the court relied solely on the "extremely limited scope" of subsection (iii).⁴² As the dissenting opinion notes, however, there is an argument that the "extremely limited" effect by itself does not render the statute "impaired or ambiguous."⁴³

In addition to maintaining that subsection (iii) would be left with an

35. See *supra* note 17 and accompanying text (discussing deference to SEC).

36. See 801 F.3d at 150-51 (acknowledging "no absolute conflict" within whistleblower provisions of Dodd-Frank Act). The "simultaneous" reporting the court cited ensures that the SEC reporting requirement of the "whistleblower" definition is satisfied, along with the incorporation of SOX remedies for internal reporting in subsection (iii). See *id.*

37. See *id.* at 151. The court discussed multiple reasons for the limited scope. See *id.*

38. See *id.* at 151-52 (elaborating rationale for subsection (iii)'s "extremely limited scope"). For example, public company auditors must comply with the SOX provisions that require reporting illegal acts to management first, and subsequently to the SEC, only if management or the board of directors does not adopt reasonable remedies. See *id.* at 151. Similarly, attorneys at public companies must comply with the SOX provisions and the SEC's Standards of Professional Conduct. See *id.* at 151-52. Compliance entails reporting internally first, such as to the chief legal counsel or chief executive officer, to preserve client confidences. See *id.* at 152.

39. See *id.* at 152 (questioning Congress's intent by first considering legislative history). The court explained that subsection (iii)'s purpose cannot be ascertained from the legislative history because the history does not mention subsection (iii)'s addition. See *id.* at 152-53.

40. See 801 F.3d at 154. The court explained that the process of quickly reconciling lengthy House and Senate bills could result in overlooking mismatched provisions, especially when new provisions are subsequently added. See *id.*

41. See *id.* at 155 (explaining court "need not definitively construe statute" mainly due to blatant statutory tensions).

42. See *supra* notes 37-38 and accompanying text (addressing court's reasoning regarding narrow scope of subsection (iii)).

43. See 801 F.3d at 158 (Jacobs, J., dissenting). The dissent noted that the U.S. Code includes numerous provisions with extremely limited effect. See *id.*

extremely limited scope, the *Berman* court could have further argued that the Fifth Circuit's reasoning still leaves section 21F impaired or ambiguous.⁴⁴ Specifically, the Fifth Circuit's *Asadi* decision distinguishes between who is protected and the type of activity that is protected, answering the former with the whistleblower definition and the latter with the anti-retaliation provisions.⁴⁵ Yet, the *Asadi* court ignores the fact that the whistleblower definition itself refers to an activity—reporting to the SEC.⁴⁶ Thus, contrary to the Fifth Circuit's argument, the Second Circuit could have asserted that there is no clear separation between the type of protected activity and who is protected, as one is defined in terms of the other.⁴⁷ Therefore, application of the whistleblower definition to subsection (iii) introduces another type of ambiguity into the statute—one that involves the timing of multiple required reporting activities, both internally and to the SEC.⁴⁸

Under the Fifth Circuit's interpretation, whether one qualifies for protection as a whistleblower may effectively depend on the timing of when one reports to the SEC, even though the statute makes no explicit reference to timing.⁴⁹ The hypothetical example in *Asadi* involved reporting to both the Chief Executive Officer and the SEC on the day of discovering a violation.⁵⁰ Instead of reporting “simultaneously,” if employees report to the SEC after a few hours or even minutes after reporting internally, they may not be protected under subsection (iii) depending on how the statute is construed in terms of timing of reporting activities.⁵¹ For example, construing the statute to require reporting to the SEC before or “simultaneously” with internal reporting necessitates the construction of the undefined term “simultaneously,” and could result in the “whistleblower” not being protected—an unreasonable and congressionally unintended outcome.⁵² Thus, the Fifth Circuit's interpretation creates

44. See *id.* (criticizing majority opinion, considering its reasoning insufficient to render statute “impaired or ambiguous”); see also *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 626-30 (5th Cir. 2013) (explaining Fifth Circuit's reasoning).

45. See *supra* notes 32-34 and accompanying text (presenting distinction between protected individuals and activities).

46. See 15 U.S.C. § 78u-6(a)(6) (2012). The section 21F(a)(6) whistleblower definition that the Dodd-Frank Act introduced recites the activity of “provid[ing], information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” *Id.*

47. See *supra* notes 32-34 and accompanying text (presenting Fifth Circuit *Asadi* argument).

48. See 15 U.S.C. § 78u-6(a)(6), (h)(1)(A) (describing SEC reporting activity and reciting disclosure under SOX encompassing internal reporting); see also *supra* note 27 and accompanying text (reciting SOX provision protecting internal whistleblowers).

49. See 15 U.S.C. § 78u-6(a)(6) (excluding any reference to timing of reporting to SEC); *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 626-30 (5th Cir. 2013) (elaborating Fifth Circuit's interpretation of Dodd-Frank whistleblower provisions).

50. See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013) (describing example to demonstrate subsection (iii)'s nonsuperfluous nature).

51. See 801 F.3d at 150-51 (introducing “simultaneous” reporting requirement to protect employees who report to both employer and SEC).

52. See 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012) (reciting anti-retaliation provision). Subsection (iii)

uncertainty as to when reporting to the SEC must occur in relation to internal reporting, thereby importing an ambiguous timing requirement into the statute.⁵³ By contrast, the SEC's construction of the statute does not result in this timing ambiguity because it does not require reporting to the SEC.⁵⁴

The Second Circuit's decision in *Berman* renders the Dodd-Frank Act's anti-retaliation protection applicable to internal whistleblowers, thereby diverging from the Fifth Circuit's *Asadi* decision. The court's reasoning in support of its conclusion may be expanded by showing that the Fifth Circuit's interpretation introduces timing ambiguity into the statute. This circuit split makes the issue of statutory construction of the Dodd-Frank Act's whistleblower protection provisions a good candidate for Supreme Court review.

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provides, in relevant part, that no employer may retaliate against "a whistleblower . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the [SOX]." *Id.* The phrase "act done by the whistleblower" may be construed as requiring a whistleblower to report to the SEC prior to or "simultaneously" with performing the act. *See* 801 F.3d at 150-51 (providing example of simultaneous reporting).

53. *See* 801 F.3d at 150-51 (suggesting statute requires simultaneity).

54. *See* 17 C.F.R. 240.21F-2(b)(1)(ii) (2016) (extending SEC's whistleblower definition to internal whistleblowers).