

III. “Whistleblower” Redefined: Implications of the Recent Interpretative Split on the Dodd-Frank Whistleblower Anti-Retaliation Provision

A. Introduction

In the wake of the financial crisis, the Dodd-Frank Act¹ (“Dodd-Frank” or “Act”) provided new protections² for employees who report alleged violations of securities laws to the Securities and Exchange Commission (“SEC”).³ The “whistleblower provision,” as it is commonly termed, offers financial incentives for employees who report alleged securities violations and grants protections from retaliation for reporting these violations.⁴ But as the SEC’s implementation of the whistleblower provision gained momentum, federal courts split when interpreting the definition of “whistleblower.”⁵ The issue facing the courts is whether employees who report violations to an entity other than the SEC are eligible for Dodd-Frank’s anti-retaliation protection.⁶

This article will discuss the recent case law and explore the implications for employers and employees. Part B offers background on the Dodd-Frank whistleblower provision. Part C reviews the interpretive split among federal courts over the definition of “whistleblower.” Part D examines the implications of the different interpretations for employers and employees, and Part E concludes that legal uncertainty is likely to persist in the near future.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act) (codified at scattered sections in Titles 7, 12, 15, 18, 22, 31, and 42 of the United States Code).

² See Deborah A. DeMott, *The Crucial But (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 72 (2013) (explaining that Dodd-Frank “amended earlier federal securities law to add protections for ‘whistleblowers’”).

³ 15 U.S.C. § 78u-6 (2012).

⁴ See generally SEC, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2013) [hereinafter SEC WHISTLEBLOWER REPORT 2013], available at <http://sec.gov/about/offices/owb/annual-report-2013.pdf> (providing an overview of the Dodd-Frank whistleblower program).

⁵ See discussion *infra* Part C.3.

⁶ See discussion *infra* Part C.3.

B. Statutory Text

The Dodd-Frank whistleblower provision created incentives for whistleblowers to report securities violations and granted whistleblowers protection from retaliation for doing so.⁷ As an incentive, a whistleblower may receive a monetary award for providing information to the SEC that results in an enforcement action yielding at least \$1 million.⁸ This award may be between 10% and 30% of the amount recovered in the SEC's enforcement action.⁹ To date, the SEC has made six awards to whistleblowers, the largest of which was more than \$14 million.¹⁰

In addition, the anti-retaliation provision makes it illegal to discharge or discriminate against an employee who provides information to the SEC and supplies a private right of action in federal district court for employees who are demoted or fired as a result of whistleblowing.¹¹ This provision permits recovery of double back pay, plus interest, attorneys' fees, and costs.¹²

To administer the whistleblower program, Dodd-Frank directed the SEC to "establish a separate office within the Commission."¹³ The Act also empowered the SEC to issue regulations implementing the whistleblower program.¹⁴ The SEC subsequently established the Office of the Whistleblower ("OWB") to administer the whistleblower program.¹⁵ Dodd-Frank also created an Investor Protection Fund from which the SEC may pay awards to whistleblowers.¹⁶ The Investor Protection Fund contained nearly \$440 million at the end of fiscal year 2013.¹⁷

⁷ 15 U.S.C. § 78u-6.

⁸ 15 U.S.C. § 78u-6(b)(1).

⁹ *Id.*

¹⁰ SEC WHISTLEBLOWER REPORT 2013, *supra* note 4, at 14–15. For a description of the real estate fraud enforcement action leading to the \$14 million award, see Jean Eaglesham, *In an SEC Case, Tale of the Tip-Off*, WALL ST. J., Feb. 27, 2014, at C1.

¹¹ 15 U.S.C. § 78u-6(h)(1) (2012).

¹² 15 U.S.C. § 78u-6(h)(1)(C).

¹³ Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 1376, 1850 (2010) (codified at 15 U.S.C. § 78u-7(d) (2012)).

¹⁴ 15 U.S.C. § 78u-7(a).

¹⁵ SEC WHISTLEBLOWER REPORT 2013, *supra* note 4, at 3.

¹⁶ 15 U.S.C. § 78u-6(g).

¹⁷ SEC WHISTLEBLOWER REPORT 2013, *supra* note 4, at 16.

Since the inception of the whistleblower program, the number of informational tips that the SEC receives has increased each year.¹⁸ In fiscal year 2013, the SEC received 3238 tips.¹⁹ As tips and retaliation claims continue to increase in number, federal courts have split on how to interpret the term “whistleblower” in the anti-retaliation provision.²⁰ Although Dodd-Frank defines “whistleblower” as a person who reports to the SEC, the anti-retaliation provision, which uses the term “whistleblower,” purports to include claims by employees who report securities violations internally, rather than to the SEC.²¹ Given the growth in informational tips²² and the nearly \$440 million in the SEC’s Investor Protection Fund,²³ the interpretation of the whistleblower provision carries high stakes for corporations and their employees.²⁴

C. Whistleblower Provision Creates Interpretative Split Among Federal Courts

Dodd-Frank organized the whistleblower provision into ten sections. Litigation surrounding the whistleblower provision focuses on the tension between the definition of “whistleblower” in the “Definitions” section²⁵ and the use of the term “whistleblower” in the “Protection of whistleblowers” section.²⁶

1. Statutory Text

Dodd-Frank defines a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”²⁷ But the section titled “Protection of whistleblowers” (the “anti-retaliation provision”) states that “[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a

¹⁸ *Id.* at 8.

¹⁹ *Id.*

²⁰ See discussion *infra* Part C.3.

²¹ See discussion *infra* Part C.1.

²² SEC WHISTLEBLOWER REPORT 2013, *supra* note 4, at 8.

²³ *Id.* at 16.

²⁴ See discussion *infra* Part D.

²⁵ 15 U.S.C. § 78u-6(a) (2012).

²⁶ 15 U.S.C. § 78u-6(h).

²⁷ 15 U.S.C. § 78u-6(a)(6) (emphasis added).

whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower” and provides three categories of “lawful act[s].”²⁸ An employer may not retaliate when the whistleblower (1) “provid[es] information to the Commission in accordance with this section;” (2) “initiat[es], testify[es] in, or assist[s] in any investigation or judicial or administrative action of the Commission based upon or related to such information;” or (3) “mak[es] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.”²⁹

The interpretative question is whether employees who make internal disclosures required by the Sarbanes-Oxley Act³⁰ or other securities laws, but do not report to the SEC, are eligible for the anti-retaliation provision’s protection. The cases commonly involve employees who allege retaliation for reporting supposed securities violations to their supervisors (the employees, “internal reporters”).³¹ This category of whistleblowers is described in subpart (3) above.³²

2. SEC’s Interpretation

Exercising its rulemaking authority,³³ the SEC issued a final rule interpreting the term “whistleblower” in the anti-retaliation provision.³⁴ The SEC rule states that “[f]or purposes of the anti-retaliation protections . . . you are a whistleblower if: (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . and; (ii) you provide that information in a manner described in [the anti-retaliation provision].”³⁵ The third “manner” that the anti-retaliation provision describes, which is disjunctive from the preceding subsections, does

²⁸ 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

²⁹ *Id.* (emphasis added).

³⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at scattered sections in Titles 15 and 18 of the United States Code).

³¹ See discussion *infra* part C.3.

³² See 15 U.S.C. § 78u-6(h)(1)(A).

³³ 15 U.S.C. § 78u-6(j) (“The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.”).

³⁴ 17 C.F.R. § 240.21F-2 (2013).

³⁵ *Id.*

not independently require reporting to the SEC.³⁶ Thus, the SEC's interpretation does not apply the definition of "whistleblower" from the definition section to the anti-retaliation provision discussed in Part C.1.³⁷

As the SEC recognized in its comments on the final rule, "the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*."³⁸ The SEC noted that the internal reporter category of whistleblowers incorporates the Sarbanes-Oxley anti-retaliation provision, which protects employees of public companies from retaliation for reporting alleged securities violations to "a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct."³⁹ In other words, the SEC's interpretation extends Dodd-Frank's anti-retaliation protection to employees whom employers discriminate against for reporting securities violations within the company.⁴⁰

Although Sarbanes-Oxley also provides anti-retaliation protection for whistleblowers, the protection that Dodd-Frank provides is broader. For example, Dodd-Frank offers a longer statute of limitations and more generous awards.⁴¹ Thus, whistleblowers who report in compliance with Sarbanes-Oxley often seek the enhanced protections that Dodd-Frank offers.⁴²

³⁶ 15 U.S.C. § 78u-6(h)(1)(A).

³⁷ 17 C.F.R. § 240.21F-2.

³⁸ Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. § 240.21F-2).

³⁹ *Id.*

⁴⁰ See, e.g., *Rosenblum v. Thomson Reuters (Markets) LLC*, No. 13 Civ. 2219(SAS), 2013 WL 5780775, at *4-5 (S.D.N.Y. Oct. 25, 2013) (denying employer's motion to dismiss anti-retaliation suit where employee only reported internally).

⁴¹ See *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013) (explaining that Sarbanes-Oxley allows for back pay and requires reporting to the Secretary of Labor before filing suit in federal district court, whereas Dodd-Frank provides double back pay as a remedy and does not require reporting an anti-retaliation claim to a federal agency before filing suit).

⁴² See *Fifth Circuit's Recent Dodd-Frank Whistleblower Ruling May Benefit Employers*, SAUL EWING LLP (Aug. 2013), <http://saul.com/publications-alerts-1135.html> ("[M]any employees who fail to report to the Department

3. Federal Courts Split When Reviewing SEC's Interpretation

At least seven federal district courts have broadly interpreted Dodd-Frank's anti-retaliation provision to include internal reporters.⁴³ *Genberg v. Porter*,⁴⁴ which was decided after the SEC issued its final rule, offers one example. In *Genberg*, the district court held that applying the limited definition of "whistleblower" to internal reporters would render that category meaningless.⁴⁵ The district court characterized the internal reporter category as a "narrow exception" to Dodd-Frank's definition of whistleblower, which applies only to disclosures required by law within the SEC's jurisdiction.⁴⁶

Although the district court in *Genberg* reached the same result as the SEC, the court did not explicitly consider whether to

of Labor [as Sarbanes-Oxley requires] or who fail to meet [Sarbanes-Oxley's] strenuous 180-day statute of limitations have sought relief under Dodd-Frank.").

⁴³ *Rosenblum*, 2013 WL 5780775, at *4–5 (deferring to SEC's interpretation and denying employer's motion to dismiss); *Ellington v. Giacomakis*, No. 13-11791-RGS, 2013 WL 5631046, at *3 (D. Mass. Oct. 16, 2013) (same); *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *7 (S.D.N.Y. May 21, 2013) (same); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *4–5 (D. Conn. Sept. 25, 2012) (same); *cf. Azim v. Tortoise Capital Advisors, LLC*, No. 13-2267-KHV, 2014 WL 707235, at *3 (D. Kan. Feb. 24, 2014) (allowing plaintiff's motion to amend complaint to include anti-retaliation claim because "some authority" exists supporting plaintiff's position that internal reporters may receive anti-retaliation protection); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013) (reading the internal reporter category as a "narrow exception" to the definition of whistleblower); *Nollner v. S. Baptist Convention*, 852 F. Supp. 2d 986, 993–94, n.9 (M.D. Tenn. 2012) (same); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011) (same). *Contra Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4–5 (D. Colo. July 19, 2013) (rejecting the SEC's interpretation and praising the Fifth Circuit's *Asadi* decision).

⁴⁴ 935 F. Supp. 2d 1094 (D. Colo. 2013).

⁴⁵ *Id.* at 1106.

⁴⁶ *Id.*

defer to the SEC's interpretation.⁴⁷ Other district courts to consider the question have afforded *Chevron* deference to the SEC.⁴⁸ In *Rosenblum v. Thomson Reuters*,⁴⁹ for instance, the district court found the statute ambiguous and the SEC's interpretation reasonable.⁵⁰ Thus, the court deferred to the SEC's final rule.⁵¹

In contrast, the only federal circuit court to consider the question determined that the statute was not ambiguous and refused to defer to the SEC's interpretation.⁵² In *Asadi v. G.E. Energy (USA)*, the Fifth Circuit concluded from the text of the statute that the definition of "whistleblower" applied to internal reporters.⁵³ The Fifth Circuit argued that the definition section pertained to the *people* whom the statute protects, whereas the categories in Section 78u-6(h)(1)(A) represent the *activities* that the statute protects.⁵⁴ Reading the statute this way, according to the Fifth Circuit, would not render the anti-retaliation provision superfluous because the provision protects whistleblowers from retaliation when an employer takes action based on an internal report before learning that an employee simultaneously reported to the SEC.⁵⁵

⁴⁷ *Id.*; see Nollner, 852 F. Supp. 2d at 993 & n.8, 994 & n.9 (acknowledging SEC's interpretation and noting that it offers "guidance" but not applying the *Chevron* framework).

⁴⁸ *E.g.*, *Murray*, 2013 WL 2190084, at *4; see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

⁴⁹ No. 13 Civ. 2219 (SAS), 2013 WL 5780775 (S.D.N.Y. Oct. 25, 2013).

⁵⁰ *Id.* at *5.

⁵¹ *Id.*; see Brief for SEC as Amicus Curiae Supporting Appellant at 18 & 20 n.14, *Liu v. Siemens A.G.*, No. 13-4385 (2d Cir. Feb. 20, 2014), 2014 WL 663875, at *18 & 20 n.14 (urging that "Congress did not unambiguously limit the employment anti-retaliation protections . . . to only those individuals who provide the Commission with information" and noting that the congressional conference committee added the internal reporter category with no indication in the legislative history as to its meaning).

⁵² *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013); accord *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4-5 (D. Colo. July 19, 2013) (praising the *Asadi* decision).

⁵³ *Id.* at 623.

⁵⁴ *Id.* at 625 ("The three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.").

⁵⁵ *Id.* at 627.

These cases illustrate, in part, a conflict between two canons of statutory interpretation. On the one hand, the SEC's interpretation gives effect to the internal reporter category in the anti-retaliation provision.⁵⁶ On the other hand, the Fifth Circuit construed the term "whistleblower" to have consistent meaning throughout the statute.⁵⁷ Although most federal courts to address the issue have sided with the SEC,⁵⁸ the interpretative issue is far from settled.

D. Implications for Employers, Employees, and Potential Plaintiffs

Although early Dodd-Frank anti-retaliation claims often failed,⁵⁹ anti-retaliation suits have since gained momentum.⁶⁰ The interpretation of "whistleblower" carries practical effects for employers, employees, and potential whistleblower-plaintiffs.

⁵⁶ See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). *But see Corley v. United States*, 556 U.S. 303, 325 (2009) (Alito, J., dissenting) ("Like other canons, the antisuperfluosity canon is merely an interpretive aid, not an absolute rule.").

⁵⁷ *Asadi*, 720 F.3d at 626; see *Sullivan v. Stroop*, 496 U.S. 478, 489 (1990) ("[A] maxim of statutory construction [is] that identical words in two related statutes, or in different parts of the same statute, are intended to have the same meaning."). *But see* *District of Columbia v. Carter*, 409 U.S. 418, 421 (1973) ("[W]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law." (internal quotation marks omitted)).

⁵⁸ See cases cited *supra* note 43.

⁵⁹ See Barbara Hoey & Jeanne Barber, *Keeping Current: Two Federal Courts Issue Expansive Interpretations of the Dodd-Frank Act's Whistleblower Definition*, ABA BUSINESS LAW TODAY 2 (Oct. 2012), <http://americanbar.org/content/dam/aba/publications/blt/2012/10/keeping-current-two-courts-201210.authcheckdam.pdf>.

⁶⁰ *E.g.*, *Rosenblum v. Thomson Reuters (Markets) LLC*, No. 13 Civ. 2219 (SAS), 2013 WL 5780775, at *4-5 (S.D.N.Y. Oct. 25, 2013). For the elements commonly required to state an anti-retaliation claim, see *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1105 (D. Colo. 2013) (citing *Nollner v. S. Baptist Convention*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012)); see also cases cited *supra* note 43.

The SEC's view may encourage employees to report possible securities violations internally because they will have the protection of the anti-retaliation provision.⁶¹ Further, employers may have an incentive to investigate and correct violations because their failure to do so could result in the employee reporting to the SEC.⁶² Additionally, because internal reporters will have Dodd-Frank's protection from retaliation, employers may face an increase in anti-retaliation lawsuits.⁶³

In contrast, the Fifth Circuit's interpretation may discourage employees from reporting internally because employees could only gain anti-retaliation protection if they subsequently report to the SEC.⁶⁴ If this interpretation incentivizes reporting to the SEC,

⁶¹ Brief for SEC as Amicus Curiae Supporting Appellant, *supra* note 51, at 16. *Contra* DeMott, *supra* note 2, at 73 (explaining that Dodd-Frank's whistleblower award provision may "undermine" internal reporting); *cf.* E-mail from Jeanne Barber, Associate, Littler Mendelson P.C., to author (Mar. 1, 2014, 11:18 AM EST) (on file with author) (observing that the SEC's interpretation encourages employees to internally report ambiguous or "frivolous" claims as a defensive mechanism or for the purpose of a big payday).

⁶² See Hoey & Barber, *supra* note 59 ("[I]t is more important than ever for employers to be diligent in monitoring how they handle employee complaints, and in making sure that there are always legitimate reasons for the discipline of any employee, and especially anyone who has 'blown the whistle.'"); Rich Steeves, *Whistling Down the Wind: The Pitfalls and Possibilities of the Dodd-Frank Whistleblowing Program*, INSIDE COUNSEL (Jan. 27, 2014), <http://insidecounsel.com/2014/01/27/whistling-down-the-wind-the-pitfalls-and-possibili> ("Due to the considerable risk of prosecution, sanctions and damage to reputation associated with whistleblowers who report to the SEC, businesses would certainly prefer if matters are handled in house.").

⁶³ See Hoey & Barber, *supra* note 59 (observing that cases in which courts uphold the SEC's interpretation "could well result in a steep increase in Dodd-Frank retaliation lawsuits," in part because the broader definition "offer[s] even greater incentive for employees and plaintiffs' attorneys to pursue such claims").

⁶⁴ See William McLucas, Laura Wertheimer & Arian June, *Don't Tread on Whistleblowers: Mitigating and Managing Retaliation Risks*, 46 SEC. REG. & L. REP. (BNA) 77, at *10-11 (Jan. 13, 2014) [hereinafter *Don't Tread on Whistleblowers*] (proclaiming that the Fifth Circuit's interpretation may encourage whistleblowers to "bypass internal reporting channels to ensure that they are protected against retaliatory conduct" and recommending strategies to "mitigate the reputational risks to the organization in the event retaliation claims are filed"); E-mail from Jeanne Barber to author, *supra*

employers may confront an increase in enforcement actions and the ensuing financial and reputational consequences.⁶⁵ On the other hand, employers may also receive better information from the outset about alleged securities violations.⁶⁶ Additionally, the SEC may have an easier time prosecuting violations with more inside information at its disposal.⁶⁷ However, loyal employees who fear retribution may remain silent rather than report to the SEC.⁶⁸ Instilling a corporate

note 61 (“Requiring employees to report to the SEC makes them better articulate their claims, which in turn helps create a bubble of protection around them. Employers who are made aware of SEC reports are more likely to be on guard for retaliation.”); E-mail from David J. Marshall, Partner, Katz, Marshall & Banks LLP, to author (Mar. 6, 2014, 12:38 PM EST) (on file with author) (arguing that the Fifth Circuit’s interpretation will “frustrate” the SEC’s “careful and laborious efforts” to promote compliance with securities laws without undermining companies’ internal reporting structures).

⁶⁵ See *Don’t Tread on Whistleblowers*, *supra* note 64, at *11 (predicting that “an increased understanding by employees (and their counsel) of the statutory protections . . . against retaliation will likely contribute to a surge of retaliation claims that may be tougher and more expensive to defend and may yield unforeseen collateral consequences”); SAUL EWING, *supra* note 42 (reporting that employers expect the Fifth Circuit’s approach to “stem the tide of frivolous anti-retaliation suits”).

⁶⁶ See E-mail from Jeanne Barber to author, *supra* note 61 (reporting to the SEC “formalizes the process,” puts employers “on guard for potential retaliation,” and requires whistleblowers to “better articulate their claims”).

⁶⁷ See Caroline Binham, *Home Office Looks at ‘Bounty’ Plan for Corporate Whistleblowers*, FIN. TIMES, Oct. 1, 2013, at 1 (“White-collar crimes are notoriously difficult to detect and prove beyond reasonable doubt, so having an ‘insider’ come forward with hard evidence can aid the prosecution considerably.”); SAUL EWING, *supra* note 42 (hypothesizing that the Fifth Circuit’s holding, by encouraging reporting to the SEC, “will serve the SEC’s goal of ferreting out fraud and corruption”).

⁶⁸ See Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace*, 35 VAND. J. TRANSNAT’L L. 457, 462 (2002) (positing that employees will blow the whistle “if adequately protected from retaliation”); Dina Medland, *Whistleblowing Almost Killed Me*, FIN. TIMES, June 6, 2013, at 1 (observing that whistleblowers are often “ignored, demeaned, dismissed, publicly rubbished and treated like outcasts”); Eaglesham, *supra* note 10 (“‘We’re confident there will be more frequent and numerous payouts as the program continues to gain momentum,’ said SEC enforcement chief Andrew Ceresney in a statement.”). *But see* E-mail from Jeanne Barber to author, *supra* note 61 (advocating the view that *Asadi* will not deter

culture of trust may help employers encourage internal reporting, even under the Fifth Circuit's narrower interpretation of "whistleblower."⁶⁹

E. Conclusion

Pursuing actions based on whistleblower tips is an enforcement priority for the SEC.⁷⁰ With news of the record-breaking \$14 million whistleblower award in 2013 and nearly \$440 million in the Investor Protection Fund, the stakes are high for employers and employees.⁷¹ The recent split among federal courts on the question of whether the Dodd-Frank Act's anti-retaliation provision applies to internal reporting⁷² has created uncertainty for employees and employers.⁷³ As district and circuit courts grapple

whistleblowers with "meritorious claims" and will only deter whistleblowers with "frivolous claims").

⁶⁹ See Dworkin, *supra* note 68, at 485 ("Organizations that foster internal reporting and open discussion are likely to find that external reporting will be virtually nonexistent."); Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 16 (2007) (contending that "[w]histleblowers suffer heavy psychological and professional costs for their disclosures," including "decreased physical and emotional health" and "continuing social marginalization by co-workers"); Steeves, *supra* note 62 (contending that "culture and morale are clearly a factor" and suggesting that external reporting is more likely "in cases where employees do not trust leadership").

⁷⁰ See Michael D. Trager, *Implications of Recent Developments in SEC Enforcement*, HARV. L. SCH. FORUM ON CORPORATE GOVERNANCE AND FIN. REGULATION (Oct. 26, 2013, 9:02 AM), <https://blogs.law.harvard.edu/corpgov/2013/10/26/implications-of-recent-developments-in-sec-enforcement>; *The SEC Speaks: Enforcement Panel Discusses 2013 Priorities and Past Successes*, MORGAN, LEWIS & BOCKIUS LLP 2 (Feb. 27, 2013) http://morganlewis.com/pubs/Securities_LF_SECSpeaks2013_27feb13.pdf.

⁷¹ See SEC WHISTLEBLOWER REPORT 2013, *supra* note 4, at 1, 16.

⁷² See discussion *supra* Part C.3 ("At least seven federal district courts have interpreted Dodd-Frank's anti-retaliation provision broadly, so as to include internal reporters.").

⁷³ See discussion *supra* Part D ("The interpretation of 'whistleblower' carries practical effects for employers, employees, and potential whistleblower-plaintiffs.").

with the definition of “whistleblower” in the Dodd-Frank Act, the status of internal reporters under the Act remains unclear.⁷⁴

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⁷⁴ See *Don't Tread on Whistleblowers*, *supra* note 64, at *10 (“At this juncture, the legal landscape on this issue is unsettled. . . . It remains to be seen how this statutory interpretation question will be resolved.”); SAUL EWING, *supra* note 42 (acknowledging the potential for a split in the federal appeals courts in the wake of *Asadi*); *cf.* E-mail from Jeanne Barber to author, *supra* note 61 (remarking that appeals from the district court cases may create a circuit split with *Asadi*, increasing the likelihood of Supreme Court review); E-mail from David J. Marshall to author, *supra* note 64 (predicting that internal reporters will ultimately receive anti-retaliation protection under Dodd-Frank, either by virtue of a Supreme Court decision or further Congressional action). The parties in *Asadi* did not petition for Supreme Court review.

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