

**WHISTLE WHILE YOU WORK: WHISTLE-BLOWER
PROTECTION UNDER DODD FRANK**

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I. INTRODUCTION

This note discusses whether informants, commonly referred to as whistle-blowers, are required to report wrongdoing to the United States Securities and Exchange Commission (“SEC”) in order to receive protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act’s anti-retaliation provisions. There is no clear decision from U.S. courts as to the correct interpretation of this issue, with district courts coming down on both sides.¹ The Eighth and Second Circuits have also recently declined to review cases involving the issue,² leaving the Fifth Circuit as the only appellate court to have decided the issue when it

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1. Yin Wilczek, *Eighth Circuit Declines to Hear Case On Dodd-Frank Definition of ‘Whistle-Blower’*, SECURITIES LAW DAILY (BNA) (Sept. 8, 2014), <https://www.bloomberglaw.com/search/results/ae3c53d95db8a46f6a6701e3db483d8d/document/XOU78QC000000?search32=C9P6UQR5E9FN6PBI9HMGNRKCLP6QFAPD5N20LR9DHHNKPBB7CTMSRQVD5MN0NRGD1P62SRSECUJ2> (stating that “[t]he question of whether informants are entitled to protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act only if they approached the SEC has divided several federal district courts.”).

2. *Id.*; Rob Tricchinelli, *2nd Cir. Punts on Internal Reporting Issue, Holds No Protection for Int’l Whistle-Blowers*, SECURITIES LAW DAILY (BNA) (Aug. 15, 2014), <https://www.bloomberglaw.com/search/results/ae3c53d95db8a46f6a6701e3db483d8d/document/X1EHRAG4000000?jcsearch=dk:bna%20a0f4q4m3w9#jcite>.

concluded that Dodd-Frank's whistle-blower protections are only available to those who initially reported to the SEC.³

This Note takes the position that whistle-blowers do not have to inform the SEC first in order to be classified as a whistle-blower and receive protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act's anti-retaliation provisions.

II. BACKGROUND

The Dodd-Frank Wall Street Reform and Consumer Protection Act was passed by U.S. Congress in July of 2010.⁴ The Dodd-Frank Act "established a new comprehensive whistle-blower program for the United States Securities and Exchange Commission (SEC)."⁵ The new whistle-blower program mandates that the SEC must pay monetary rewards to individuals who voluntarily provide information which leads to the SEC bringing and succeeding in actions resulting in \$1 million or more in sanctions.⁶ The whistle-blower's reward required by Dodd-Frank under such circumstances is at minimum 10% and up to 30% of the amount collected due to the whistle-blower's original information.⁷

The Dodd-Frank Act gives specific definitional language to determine who qualifies as a whistle-blower. Under Dodd-Frank, "the term 'whistleblower' means 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."⁸ The Dodd-Frank Act also gives specific language to protect whistle-blowers against retaliation from employers.⁹ This language states specifically that, "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

3. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013); Wilczek, *supra* note 1 (stating that "[w]ith the Eighth Circuit refusing to take up COR Clearing's appeal, the Fifth Circuit remains the only appellate court to have tackled the issue.").

4. MARVIN G. PICKHOLZ, PETER J. HENNING, & JASON R. PICKHOLZ, *SECURITIES CRIMES 2D*, 3-3 (Thomson Reuters 2014).

5. *Id.*

6. *Id.* (stating that the SEC must "provide monetary rewards to individuals who voluntarily provide original information to the SEC that result[s] in successful covered actions in which the SEC collects in excess of \$1 million in monetary sanctions").

7. *Id.*

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a)(6), 124 Stat. 1376 (2010).

9. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(h)(1)(A), 124 Stat. 1376 (2010).

whistleblower” with regard to providing the SEC with information.¹⁰ The exact language given by Dodd-Frank with regard to acts that cannot be retaliated against is listed below:

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.¹¹

The SEC goes on to say that an employer may not threaten an individual with a confidentiality agreement, or enforce a confidentiality agreement with the goal of impeding an individual from reporting possible violations to the SEC.¹² Along with this provision, the anti-retaliation protections afforded to whistle-blowers still apply even if the whistle-blower does not qualify for an award from the SEC.¹³ A whistle-blower who alleges retaliation under the above section may bring an action in an appropriate district court.¹⁴ Whistle-blowers who prevail in a lawsuit under the above section are entitled to relief that includes reinstatement to the same position and seniority status as before the discrimination, double the amount of back pay that would be owed, and

10. *Id.*

11. *Id.*

12. PICKHOLZ, HENNING, & PICKHOLZ, *supra* note 4, at 3–61 (“The SEC Rules add that an employer may not enforce or threaten to enforce a confidentiality agreement to impede an individual from communicating with the Commission directly about a possible securities law violation.”).

13. *Id.* (“The anti-retaliation protections apply even if the whistleblower does not satisfy the requirements, procedures, and conditions to qualify for an SEC whistle-blower award.”).

14. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(h)(1)(B)(i), 124 Stat. 1376 (2010) states: “Cause of action.— An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).”

compensation for litigation costs, including expert witness fees and reasonable attorneys' fees.¹⁵

Dodd-Frank whistle-blower protection is so contentious because of the vast amount of money at stake for corporations and for the SEC. With double back pay for whistle-blowers and SEC sanctions reaching into the millions of dollars,¹⁶ corporations have a great deal of interest in limiting their liability when it comes to whistle-blowers. In 2014, a single SEC award to a whistle-blower who provided information that led to a successful enforcement action totaled over \$30 million,¹⁷ and nine of the fourteen approved whistle-blower awards given since 2011 also came in the 2014 fiscal year.¹⁸ These actions show that the SEC is taking whistle-blowers and their protection seriously. With this potential liability corporations are going to need to control liability and information as tightly as possible, and that can only happen by trying to control whistle-blowers' remedies and keeping them in house.

As can be seen above, the Dodd-Frank Act provides extremely detailed language pertaining to whistle-blowers. The Act identifies whistle-blowers through an explicit definition of the term, and provides for whistle-blower rewards and protections, as well as remedies if the protections are violated. Despite the fastidious drafting of the Dodd-Frank Act, there is still a question as to whom the anti-retaliation protections apply.

The first issue litigated in the courts under the Dodd-Frank Act's whistle-blower provisions was whether an individual, who reports securities law violations internally, without reporting said violations to the Securities and Exchange Commission, has a cause of action against his or her employer based on the Dodd-Frank Act's anti-retaliation provisions.¹⁹ This issue has quickly risen to prominence as there have

15. *Id.* at (C) states:

Relief.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

- (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;
- (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and
- (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

16. U.S. Securities and Exchange Commission, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program 10 (2014), available at <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>.

17. *Id.*

18. *Id.*

19. PICKHOLZ, HENNING, & PICKHOLZ, *supra* note 4, at 3–64 states:

been multiple courts coming down on both sides of the issue since 2012. As the issue currently stands, the Eighth Circuit recently declined to review a case (*Bussing v. COR Sec. Holdings Inc.*) involving the matter,²⁰ leaving the Fifth Circuit as the only appellate court to have dealt with the issue.²¹

A. Cases Requiring Reporting to the SEC

The Fifth Circuit case in question, *Asadi v. G.E. Energy (USA), L.L.C.*, was decided in 2013.²² Plaintiff, Khaled Asadi, brought suit alleging that Defendant G.E. Energy (USA) L.L.C. violated the whistleblower protection provision of the Dodd-Frank Act by terminating him after he made a report of a possible securities law violation.²³ G.E. Energy moved to dismiss for failure to state a claim, which was granted by the district court.²⁴ The Fifth Circuit affirmed this decision, because the court said that Asadi did not qualify as a whistle-blower under the Dodd-Frank Act.²⁵ The court based this decision on the plain language of the Dodd-Frank Act, saying that the whistle-blower protection created by Dodd-Frank is only available to individuals who report violations of the securities laws to the Securities and Exchange Commission.²⁶ Because Asadi reported the possible securities violation internally and not to the

One of the first issues, if not the first issue, to be litigated in the courts under the Dodd-Frank Act's whistle-blower provisions was whether an individual who reports alleged securities law violations internally to his or her employer, but does not report those alleged violations to the SEC, can bring a cause of action against his or her employer under the Dodd-Frank Act's anti-retaliation provisions.

Id.

20. *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014); Wilczek, *supra* note 1 ("The U.S. Court of Appeals for the Eighth Circuit has declined to review a case involving whether would-be whistle-blowers must report perceived wrongdoing to the Securities and Exchange Commission to be protected under Dodd-Frank's anti-retaliation provisions.").

21. Wilczek, *supra* note 1 ("With the Eighth Circuit refusing to take up COR Clearing's appeal, the Fifth Circuit remains the only appellate court to have tackled the issue.").

22. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

23. *Id.* at 621.

24. *Id.* ("The district court granted GE Energy's motion to dismiss for failure to state a claim.").

25. *Id.* at 623.

26. *Id.* ("The Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC.").

SEC, the court decided that he did not qualify as a whistle-blower, and therefore his whistle-blower protection claim failed under Dodd-Frank.²⁷

A case in the Court of Appeals of New York was decided under similar circumstances, and in a similar fashion to *Asadi*. In *Sullivan v. Harnisch*, Plaintiff Joseph Sullivan was fired after bringing a complaint of alleged misconduct to the CEO and President of the company, Defendant William Harnisch.²⁸ Like in *Asadi*, the court in this case decided that the Dodd-Frank Act did not apply to Sullivan's complaint because he did not in fact "blow the whistle", but instead only reported internally.²⁹ The court went on to reason that nothing in federal law has created a remedy for someone who reports potential misconduct internally, and therefore the court refused to create a remedy where Congress failed to do so.³⁰

B. Cases that Do Not Require Reporting to the SEC

Contrary to the opinions above, multiple courts have decided that reporting directly to the SEC is not required to receive whistle-blower protection. Many of these courts have focused on the inclusion of a reference to 18 U.S.C. § 1513(e) in the anti-retaliation provisions of Dodd-Frank.³¹ This section states that whoever knowingly retaliates against an individual for reporting wrongdoing or commission of a Federal offense to a law enforcement officer will be fined, imprisoned for not more than 10 years, or both.³² Due to the fact that the above section does not require reporting to the SEC, if the definition of whistle-

27. *Id.* at 630 states:

We conclude that the plain language of § 78u-6 limits protection under the Dodd-Frank whistleblower-protection provision to those individuals who provide "information relating to a violation of the securities laws" to the SEC. *Asadi* did not provide any information to the SEC; therefore, he does not qualify as a "whistleblower."

Id.

28. *Sullivan v. Harnisch*, 19 N.Y.3d 259 (2012).

29. *Id.* at 265 ("Sullivan does not claim to have blown a whistle—i.e., to have told the SEC or anyone else outside Peconic about Harnisch's alleged misconduct—but only to have confronted Harnisch himself.").

30. *Id.* ("Nothing in federal law persuades us that we should change our own law to create a remedy where Congress did not.").

31. PICKHOLZ, HENNING, & PICKHOLZ, *supra* note 4, at 3–65.

32. 18 U.S.C. § 1513(e) states:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

blower required reporting to the SEC under Dodd-Frank it would create an ambiguity or conflict between the anti-retaliation section of the Act and the Act itself.³³ Because the courts in question were not willing to read this ambiguity into Dodd-Frank, they ruled that anti-retaliation protection is available to whistle-blowers who do not report to the SEC.³⁴

In deciding that a whistle-blower was protected under Dodd-Frank despite not reporting to the SEC, the district court in *Bussing v. COR Clearing, LLC* used the above analysis.³⁵ The court said that despite the definitional language of whistle-blower including the requirement to report to the SEC, subsection (iii) of the anti-retaliation provision of Dodd-Frank “applies to disclosures that are completely unrelated to any tip to the SEC.”³⁶ The court went on to say that subsection (iii) “contains a catch-all provision which protects any disclosures required or protected by any law, rule or regulation subject to the jurisdiction of the SEC.”³⁷ Because the court found that reporting to the SEC is not required to receive whistle-blower anti-retaliation protection, Plaintiff Bussing subsequently qualified as a whistle-blower, and was deemed to have made protected disclosures.³⁸

In *Meng-Lin Liu v. Siemens A.G.*, the Court did not address whether Dodd-Frank’s anti-retaliation protections apply to whistle-blowers who only report internally, and dismissed the retaliation claim on extraterritoriality grounds.³⁹ The SEC, however, through an amicus brief in *Liu*, clarified its position that whistle-blowers are entitled to anti-retaliation protection, whether they report the violation to their employers or to the Commission.⁴⁰ The brief also explained that anti-retaliation protections extend to employees of public companies who

33. PICKHOLZ, HENNING, & PICKHOLZ, *supra* note 4, at 3–65.

34. *Id.*

35. *Bussing v. COR Clearing*, 20 F. Supp. 3d 719, 728 (D. Neb. 2014) (“The third category does not require that the whistleblower have interacted directly with the SEC—only that the disclosure, to whomever made, was ‘required or protected’ by certain laws within the SEC’s jurisdiction.”). The third category in question is the section of the anti-retaliation provision which references 18 U.S.C. § 1513(e)).

36. *Id.* at 8.

37. *Id.*

38. *Id.* at 5.

39. *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 332 (S.D.N.Y. 2013) (stating that, “given the other deficiencies in Liu’s complaint there is no need for this court to wade into this debate.”).

40. Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Appellant at 30, *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325 (S.D.N.Y. 2013) (No. 13-4385) (“According to the Commission, ‘individuals are entitled to employment anti-retaliation protection if they make any of the disclosures identified in Section 21F(h)(1)(A)(iii) of the Exchange Act, irrespective of whether they separately report the information to the Commission.’”).

make disclosures to their supervisor, or to anyone working for the employer who has the power to investigate or terminate misconduct, as well as to a category of whistle-blowers that includes individuals who report to “persons or governmental authorities *other than the Commission*.”⁴¹ The Amicus Curiae Brief also commented on the fact that Congress ambiguously limited the anti-retaliation provisions to only individuals who report information relating to securities law violations to the Commission itself.⁴² The above statements, made in the Amicus Brief in *Liu*, make it very clear that the position of the Securities and Exchange Commission is that whistle-blowers are entitled to anti-retaliation protection whether they make disclosures internally, or to the Commission.⁴³

In *Rosenblum v. Thomson Reuters (Markets) LLC*, Mark Rosenblum was terminated by Thomson Reuters after reporting a potential securities law violation both internally and to the FBI.⁴⁴ The court denied Thomson Reuters’ motion to dismiss for failure to state a claim, concluding that disclosure to the SEC is not required in order to qualify for Dodd-Frank whistle-blower protection.⁴⁵ The court came to this decision by considering the Dodd-Frank Act as a whole, which when narrowly construed requires a report to the SEC, compared to the anti-retaliation provision, which does not require a report to the SEC.⁴⁶ Because of this ambiguity in the Dodd-Frank Act, the court decided it was appropriate to

41. *Id.* at 28:

The Commission explained that, accordingly, the anti-retaliation protections will extend to, among others, employees of public companies who make certain disclosures internally 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.” . . . The Commission [also] concluded “that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category [*i.e.*, clause (iii)] includes individuals who report to persons or governmental authorities *other than the Commission*.”

Id.

42. *Id.* at 18 (stating that “Congress did not unambiguously limit the employment anti-retaliation protections in Section 21F(h)(1) to only those individuals who provide the Commission with information relating to a securities law violation.”).

43. *Id.* at 30.

44. *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 144 (S.D.N.Y. 2013) (“On August 3, 2012, weeks after Rosenblum complained to his superiors and alerted the FBI, he was terminated from his position with no severance pay and without compensation for his accrued vacation days.”).

45. *Id.* at 148.

46. *Id.* at 147 (“When considering the DFA as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement.”).

consider the SEC view on the anti-retaliation provision.⁴⁷ The SEC viewpoint, which was expounded in the Amicus Brief in *Liu*,⁴⁸ is that the anti-retaliation provision applies to three different categories of whistle-blowers, one of which includes persons who report to individuals or government authorities outside of the SEC.⁴⁹

As shown above, there are two main schools of thought as it relates to the availability of anti-retaliation provisions for whistle-blowers under the Dodd-Frank Act. The first school of thought, as shown in both the *Asadi* and *Sullivan* cases, is that Dodd-Frank anti-retaliation protection is not afforded to individuals who do not report potential violations of securities laws to the SEC, and instead only report internally, or to another governmental agency.⁵⁰ The second school of thought is one of leniency, affording anti-retaliation protection under Dodd-Frank to all whistle-blowers who report potential securities violations either internally, to the SEC, or to other government agencies. This school is demonstrated by the *Bussing* and *Rosenblum* cases, along with the SEC's Amicus Curiae Brief in support of the Appellant in the *Liu* case.⁵¹ The pressing question, as is shown by the differing viewpoints of the courts above (along with the SEC itself), is, as the issue comes into prominence in the courts, which viewpoint will become the majority? Potentially more important, which viewpoint is the "correct" one?

III. ANALYSIS

Due to the fact that there are numerous cases supporting both sides of the issue at hand regarding Dodd-Frank anti-retaliation protection, it is necessary to compare and contrast the rationales of the two viewpoints. With the arguments for and against each viewpoint on the table, it will be much easier to glean valuable insight into the appropriate and correct position for the majority to take.

47. *Id.* at 147–48.

48. Brief for the Securities and Exchange Commission, *supra* note 40 at 30.

49. *Rosenblum*, 984 F. Supp. 2d at 148 *quoting* Securities Whistleblowers Incentives and Protections, 76 Fed. Reg. 34300 (2011) ("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.").

50. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013); *Sullivan v. Harnisch*, 19 N.Y.3d 259 (2012).

51. *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); Brief for the Securities and Exchange Commission, *supra* note 40.

A. Whistle-blower Reporting to the SEC Required for Anti-Retaliation Protection

The first argument for requiring whistle-blower reporting to the SEC comes from the *Asadi* case.⁵² The court in *Asadi* considered the topic of who gets whistle-blower protection to be straightforward under a plain language and structural analysis of Dodd-Frank.⁵³ The court reasoned that the definition of the term “whistle-blower” is given in the relevant statute, and plainly states that a whistle-blower must report a violation of securities laws “to the Commission.”⁵⁴ Based on this definition, the court provides that, “[t]his definition, standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a ‘whistleblower’ for purposes of § 78u-6.”⁵⁵ Despite the claim that an ambiguity exists between the definition of “whistle-blower” and the terms of the anti-retaliation provision, the court in *Asadi* held no ambiguity or conflict exists, and that to be a whistle-blower and therefore receive protection, an individual must report to the SEC.⁵⁶ An argument along a similar vein as the *Asadi* argument comes from the *Sullivan* case.⁵⁷ The argument is that there is “[n]othing in federal law that persuades us that we should change our own law to create a remedy where Congress did not.”⁵⁸ Both of these arguments center around the fact that Congress has not included anything in the Dodd-Frank Act, including the anti-retaliation provisions, which explicitly say that a whistle-blower can receive protection for reporting to a person or institution other than the SEC.

Another argument for the requirement of SEC reporting is to reduce the confusion that currently plagues the anti-retaliation provisions of the Dodd-Frank Act. If it were set in stone that to receive protection a whistle-blower must report to the SEC, the whistle-blower would have to do just that to receive said protection. The requirement would help

52. *Asadi*, 720 F.3d 620.

53. *Id.* at 623 (“We hold that the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC.”).

54. *Id.* (“Specifically, the term ‘whistleblower’ means 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.”).

55. *Id.* at 626.

56. *Id.* at 627 (stating that “the text of § 78u-6 clearly and unambiguously provides a single definition of ‘whistleblower.’ Therefore, the whistleblower-protection provision does not contain conflicting definitions of ‘whistleblower.’”).

57. *Sullivan v. Harnisch*, 19 N.Y.3d 259 (2012).

58. *Id.* at 265.

potential whistle-blowers weigh their options clearly before making a decision, and it would help the SEC and the courts in determining who receives protection.

An argument that has the potential to appeal to both sides of the spectrum would be the potential for an increase in reporting to the SEC if the strict reporting standard was put into place. This would give the SEC more control over investigations that may not have previously come to light and therefore greater chance to impact industry. This argument has a notable flipside, however, as internal reporting would be greatly reduced, along with a potential reduction in reporting as a whole.

The reduction of internal reporting runs contrary to the objectives set forth by the SEC when it created rules to implement whistle-blower provisions.⁵⁹ The goal of the Commission was to support internal reporting and compliance through incentives,⁶⁰ incentives that are nullified if a whistle-blower only becomes a whistle-blower within the meaning of the statute, upon reporting to the SEC. According to the SEC there is an appropriate circumstance for internally reporting first, and “by ensuring that individuals who report internally first will not be potentially disadvantaged by losing employment anti-retaliation protection . . . better supports a core overall objective of the whistleblower rulemaking—avoiding disincentivizing individuals from reporting internally first in appropriate circumstances.”⁶¹

Requiring reporting to the SEC for protection not only leads to the reduction of internal reporting, but also leads to a drastic reduction in the number of parties that the SEC can protect.⁶² The fact that the SEC can and will bring enforcement actions against employers who terminate or harm their employees for internal reporting is an important deterrent for corporate wrongdoing.⁶³ With this deterrent removed by the strict reporting standard, companies will feel free to terminate any employee they feel is causing too much trouble. This drastically shifts the balance of power to the entities that already have a majority of the control, and

59. Brief for the Securities and Exchange Commission, *supra* note 40 at 3 (“An ‘objective’ of the rulemaking was ‘to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials *first* while still preserving their rights under the Commission’s whistleblower program.”) (*quoting* Securities Whistleblowers Incentives and Protections, 76 Fed. Reg. 34300 (2011)).

60. *Id.*

61. *Id.* at 28.

62. *Id.* at 29 (“The Commission’s interpretation was reasonable because it enhances the Commission’s ability to bring enforcement actions when employers take adverse employment actions against employees for reporting securities law violations internally.”).

63. *Id.*

reduces the ability of the SEC to regulate fair trade and proper business practices.

B. Anti-Retaliation Protection for Whistle-blowers Regardless of Reporting Avenue

Along with arguments for a strict anti-retaliation protection policy, there are arguments that specifically oppose anti-retaliation protection for whistle-blowers, regardless of reporting avenue. The main argument, apart from the lack of explicit statutory support shown above, is that there is a considerable detriment to companies because they are powerless against SEC whistle-blower protection, no matter the circumstance. A lenient protection policy would be detrimental to companies because even if the report does not meet the SEC requirements for an award,⁶⁴ anti-retaliation provisions⁶⁵ could still apply. The detriment created here is that employees will feel more free to report, which at the least damaging end of the spectrum could lead to a “boy who cried wolf” scenario, and at the most damaging end of the spectrum, will lead to potentially meritless yet costly internal investigations, or potentially even more damaging, SEC investigations. The fact that companies will not be able to discipline employees, even for meritless claims could open the door to individuals with unsavory intentions profiting off of potentially helpless corporations.

The arguments for Dodd-Frank anti-retaliation protection regardless of reporting avenue start with the statutory interpretation of the inclusion of 18 U.S.C. § 1513(e) in the anti-retaliation provisions of Dodd-Frank. This reference to this provision allows the anti-retaliation provisions to be interpreted as not requiring reporting to the SEC, as can be seen in the Pickholtz book, as well as in the *Bussing* case analysis.⁶⁶ Another positive for leniency in whistle-blower protection is greater ease and safety in reporting. With greater ease and safety in reporting comes more reporting in general, which is important for regulation of industry. Also, this increase in reporting will lead to a greater transparency in the

64. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(b)-(c), 124 Stat. 1376 (2010).

65. *Id.* at § 922(h).

66. PICKHOLTZ, HENNING, & PICKHOLTZ, *supra* note 4, at 3-65; *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014) (“The third category does not require that the whistleblower have interacted directly with the SEC—only that the disclosure, to whomever made, was ‘required or protected’ by certain laws within the SEC’s jurisdiction.”). The third category in question is the section of the anti-retaliation provision which references 18 U.S.C. § 1513(e)).

market, which is also important for regulation and economic development.

The most important argument for Dodd-Frank anti-retaliation protection may also be the most basic. The SEC stated in its Amicus Brief in *Liu* that Dodd-Frank anti-retaliation provisions apply to individuals who report to sources other than the SEC itself.⁶⁷ The Amicus Brief stated that the goal of the whistle-blower program rulemaking, to maintain incentives for individuals to report internally, is complimented by lenient reporting protection.⁶⁸ The fact that the SEC supports protection for all whistle-blowers makes a decision on the appropriate viewpoint seem relatively simple.

C. Suggestion and Possible Issues with Suggested Outcome

As seen above, the goal of whistle-blowing and reporting in the eyes of the SEC matches up with its lenient viewpoint with regards to whistle-blowers protection, that anti-retaliation protection should be extended to all individuals who report possible securities laws violations.⁶⁹ Because this is the case, it may seem that the issue can now be handled with ease by the SEC. There is, however, an issue that needs to be dealt with if this viewpoint of whistle-blower protection is adopted. The issue is, what other entities besides the SEC can a whistle-blower report to and still receive Dodd-Frank protections? Can a whistle-blower receive protection only if they report to their employer? Or should they be allowed to report to governing bodies of their industry, law enforcement officers, and other government agencies outside of the SEC while still receiving Dodd-Frank protection?

The most appropriate fix for this problem is a simple one, allow whistle-blowers Dodd-Frank protection no matter who the individuals

67. Brief for the Securities and Exchange Commission, *supra* note 40, at 16:

By clarifying that the prohibition on employment retaliation extends to individuals who report internally in instances such as these (irrespective of whether they have reported to the Commission), Rule 21F-2(b)(1) complements the overall goal of the whistleblower program rulemaking to maintain incentives for individuals to first report internally in appropriate circumstances.

Id.; Yin Wilczek, *SEC Stance on Dodd-Frank Protection For Whistle-Blowers Gains Favor With Courts*, CORPORATE LAW & ACCOUNTABILITY REPORT (BNA) (June 6, 2014), <https://www.bloomberglaw.com/document/XFFA4HKS000000?jcsearch=dk:bn%20a0f1c1y8m5#jcite> (“Federal district courts are agreeing with the Securities and Exchange Commission that would-be whistle-blowers need not first approach the agency to be protected under Dodd-Frank’s anti-retaliation provisions.”).

68. Brief for the Securities and Exchange Commission, *supra* note 40, at 16.

69. *Id.* at 16; Wilczek, *supra* note 67.

choose to report to (within reason of course), such as reporting internally, reporting to a law enforcement or government agency, or to an industry specific regulatory body. When individuals are allowed to report to a wide variety of entities it goes a long way to solving potential ease of reporting problems that would arise if reporting was only allowed at the SEC level. If an individual has reporting options at levels ranging from their own employers up to the SEC they will be able to choose where they feel the most comfortable reporting, while still receiving Dodd-Frank protections. Making reporting easier for potential whistle-blowers, as well as safer by allowing for Dodd-Frank protection at all levels, leads to greater transparency, and, in turn, strengthened industry.

IV. CONCLUSION

The best way to deal with the issue of Dodd-Frank anti-retaliation provisions is to afford protection to all whistle-blowers that report potential securities violations, regardless of whether they report directly to the Securities and Exchange Commission, internally, or to another government agency. This is due to the fact that, as mentioned above, affording protection to all whistle-blowers regardless of whom they choose to report to allows for easier and safer reporting for potential whistle-blowers. As it becomes easier and safer for whistle-blowers to blow the whistle on corporations, the more likely they are to come forward, which leads to greater transparency in industry. Greater transparency in industry is crucial in many cases because it allows for more effective, and if necessary, stronger regulation in industries where continuous violations of securities laws arise. This conclusion is bolstered by the actions of both the SEC and many federal courts. The SEC clarified its stance on the protection of whistle-blowers, explaining that potential whistle-blowers do not need to report to the SEC first to receive Dodd-Frank protections.⁷⁰ Along with the SEC clarification, “more and more federal district courts” are adopting the SEC viewpoint mentioned above.⁷¹ Now that the SEC has clarified its stance, the obvious conclusion is that courts in the future will determine that the Fifth Circuit was incorrect in its determination that, to be protected as a whistle-blower under the Dodd-Frank anti-retaliation provisions, one must report to the SEC.⁷²

70. Wilczek, *supra* note 67.

71. *Id.*

72. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013) (stating that, “[u]nder Dodd-Frank’s plain language and structure, there is only one category of

whistleblowers: individuals who provide information relating to a securities law violation to the SEC.”).