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Asadi: Renegade or Precursor of Who Is a Whistleblower Under the Dodd-Frank Act?

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I. Introduction

Whistleblowers have a long and honorable history. From Ralph Nader blowing the whistle on the hazards of GM's Corvair in *Unsafe at Any Speed*¹ in the 1960's to Jeffrey Wigand in 1996 exposing the duplicity of the tobacco industry,² whistleblowers have put conscience ahead of career and personal success to expose corporate fraud and wrongdoing. Not surprisingly, they have had to endure ridicule and ostracism as well as financial hardship. Legislation has sought to protect them from retribution,³ often with mixed success.⁴ The most recent legislative effort is the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) that allows whistleblowers to collect a bounty for the whistleblowing⁵ and also protects the whistleblower from retaliatory acts by his or

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1. See RALPH NADER, *UNSAFE AT ANY SPEED* (1965).

2. See *Jeffrey Wigand on 60 Minutes*, February 4, 1996, JEFFREYWIGAND.COM, <http://www.jeffreywigand.com/60minutes.php> (last visited Mar. 18, 2015). Wigand's whistle blowing was the subject of the film *The Insider* (1999).

3. See Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010).

4. See Leonard M. Baynes, *Just Pucker and Blow: An Analysis of Corporate Whistleblowers*, 76 ST. JOHN'S L. REV. 875, 891 (2002) (reporting that about 25-33% of whistleblower retaliation suits are successful). See also Anne Kates Smith, *The Elusive Rewards and High Costs of Being a Whistleblower*, KIPPLINGER, <http://www.kiplinger.com/article/business/T012-C000-S002-high-costs-of-being-a-whistleblower.html> (last visited Mar. 30, 2015).

5. 15 U.S.C. § 78u-6(a)(6) (2012).

her employer.⁶ One of the challenges currently dividing the courts is determining who should come within the protection of the legislation. The Fifth Circuit Court of Appeals, in *Asadi v. GE Energy*,⁷ interpreted the definition of “whistleblower” quite narrowly to encompass only those individuals who make information available directly to the Securities and Exchange Commission (SEC). This interpretation by the Fifth Circuit not only rejects the broader interpretation of SEC regulations, but is also inconsistent with the decisions of various district courts that have considered this question. Part I opens with a discussion of the requirements of “whistleblower” status under both the statutory language of Dodd-Frank and the accompanying SEC regulations. Part II reviews the *Asadi* decision and calls into question the soundness of the court’s decision to disregard SEC regulations. Part III explores the circumstances in which administrative regulations are entitled to deference and those situations in which they may be disregarded as an overreach of power. Part IV surveys several district court decisions that have interpreted the term “whistleblower” under Dodd-Frank. Part V argues that even public policy dictates that the courts should adopt a broad interpretation of “whistleblower” so as to provide maximum safeguards against fraud and abuse. The paper concludes that the Fifth Circuit in *Asadi* reached an incorrect result, and, therefore, that this renegade decision which advocates a narrow scope of whistleblower protection should be rejected in future judicial interpretations of who is a whistleblower.

II. Understanding the Protections of Dodd-Frank

Dodd-Frank was enacted at a time of public disenchantment with American business due to illegal corporate activities and a lack of transparency. The legislation established a whistleblower protection program, the origins of which can be traced back to financial regulatory reform proposed in 2009.⁸

6. *Id.* § 78u-6(h)(1)(A).

7. *See Asadi v. G. E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

8. *See* Press Release, U.S. Dep’t of the Treasury, Fact Sheet: Administration’s Regulatory Reform Agenda Moves Forward; Legislation Strengthening Investor Protection Delivered to Capitol Hill (July 10, 2009),

The goal of enhancing protection for whistleblowers was found to be significant to ushering in an era of financial reform. According to a Treasury Department press release, at the initial proposal for financial reform that ultimately led to Dodd-Frank, expanding SEC authority to incentivize whistleblowers was considered key as “[t]his authority will encourage insiders and others with strong evidence of securities law violations to bring that evidence to the SEC and improve its ability to enforce the securities laws.”⁹

A. *The Statutory Definition of Whistleblower Is Contradictory*

Section 922 of Dodd-Frank amended the Securities and Exchange Act of 1934 by adding a new Section 21F entitled, “Securities Whistleblower Incentives and Protection.” This new legislation at subsection 6(a)(6) defines the term whistleblower as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission (SEC), in a manner established, by rule or regulation, by the Commission.”¹⁰ This statutory language indicates that to be considered a whistleblower under Dodd-Frank one must actually report information to the SEC.

Another provision of Section 21F intended to strengthen protection for whistleblowers is the anti-retaliation provision of subsection 6(h)(1)(A) which provides that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in other 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;

available at <http://www.treasury.gov/press-center/press-releases/Pages/tg205.aspx>.

9. *Id.*

10. 15 U.S.C. § 78u-6(a)(6) (emphasis added).

- (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, [the Securities Exchange Act of 1934] . . . or any other law, rule, or regulation subject to the jurisdiction of the Commission.¹¹

While the definition found in subsection 6(a)(6) clearly requires reporting to the SEC as a prerequisite of whistleblower status, item (iii) of subsection 6(h)(1)(A) seemingly opens the possibility of other methods of reporting.

By their own terms the first two anti-retaliation categories protect whistleblowers who report potentially illegal activity to the SEC or who work with the SEC directly, concerning potential securities violations. By contrast, the third category does not require the whistleblower to 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.¹²

To reconcile these seemingly contradictory definitions we first look to administrative regulations.

B. *Administrative Regulations Broaden the Whistleblower Definition*

Section 924 of Dodd-Frank directed the SEC enact

11. *Id.* § 78u-6(h)(1)(A).

12. Mark J. Oberti, *Practical Applications in Employment Law: A New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 91-92 (2012).

regulations to implement the statute's mandates.¹³

The SEC regulation implementing the anti-retaliation provision of the statute provides:

(1) For purposes of the anti-retaliation protections afforded by . . . 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 . . . that has occurred, is ongoing, or is about to occur, and;
- (ii) You provide information in a manner described in Section 21F(h)(1)(A) . . .¹⁴

Provision (ii) incorporates the anti-retaliation provisions of Section 806 of the Sarbanes-Oxley Act that provides protections for employees of *public* companies when the employees report information to (1) a federal regulatory or law enforcement agency, (ii) any member of Congress or a committee of Congress, or (iii) a person with supervisory authority over the employee or any other person working for the employer who has authority to investigate, discover, or terminate misconduct. These reporting options apply to public companies and so offer no relief to employees of private companies.¹⁵

This regulatory language allowing reporting to the employer's internal reporting system rather than directly to the SEC seems at odds with the statutory language of Dodd-Frank's whistleblower definition which includes only those reporting directly to the SEC. In its explanation of the SEC's seeming expansion of the "whistleblower" definition to encompass those who do not report directly to the SEC, the SEC acknowledged that "[a] significant issue discussed in the Proposing Release [of the regulations] was the impact of the whistleblower program on companies' internal compliance processes."¹⁶ The regulations

13. 15 U.S.C. § 78u-7.

14. 17 C.F.R. § 240.21F-2(b)(1) (2015).

15. See Chelsea Hunt Overhuls, *Unfinished Business: Dodd-Frank's Whistleblower Anti-Retaliation Protections Fall Short For Private Companies and Their Employers*, 6 J. BUS. ENTREPRENEURSHIP & L. 1 (2012).

16. Implementation of the Whistleblower Provisions of Section 21F of the

included proposals to encourage potential whistleblowers to utilize internal compliance.¹⁷

According to the SEC's Office of the Whistleblower, "The whistleblower program was designed to complement, rather than replace, existing corporate compliance programs. While it provides incentives for insiders and others with information about unlawful conduct to come forward, it also encourages them to work within their company's own compliance structure."¹⁸ In the 2013 *Asadi* case, the Fifth Circuit rejected the SEC's broad interpretation of the statute, considering the SEC's regulations at odds with congressional intent. Let us now turn to a discussion of that case.

III. *Asadi* Rejects the SEC Statutory Interpretation

Khaled Asadi, a dual United States and Iraqi citizen, was employed by G.E. Energy in 2006 as the company's Iraq County Executive, a job which required him to relocate to Jordan. In 2010, G.E. was negotiating a joint venture agreement with the Iraq Minister of Electricity. It was brought to Asadi's attention by someone in the Iraqi government that G.E. might have hired a woman close to the Senior Deputy Minister of Electricity "in order to curry favor with the Minister while negotiating a lucrative Joint Venture Agreement."¹⁹ According to Asadi, the Deputy Minister specifically requested that she be hired.

Asadi, concerned that this action would be a violation of the Foreign Corrupt Practices Act (FCPA),²⁰ reported this to his supervisor and also to the G.E. Energy ombudsperson for that

Securities Exchange Act of 1934, SEC Release No. 34-64545, 17 C.F.R. Parts 240 & 249 (2011), *available at* <http://www.sec.gov/rules/final/2011/34-64545.pdf>.

17. For example, the regulations provide that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of any bounty award.

18. SEC OFFICE OF THE WHISTLEBLOWER, ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2013), *available at* <https://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

19. *See* Am. Compl., *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) (No. 12-20522).

20. The FCPA generally forbids individuals or companies from endeavoring to influence foreign officials by offering, promising, or giving them anything of value. 15 U.S.C. § 78dd-1 (2012).

region. Shortly after Asadi expressed his concerns about these activities, he received a negative performance review and was pressured by his employer to step down from his position and accept a role in the company with minimal responsibility. When he did not do so, the following year he was fired.

Asadi brought a claim against his employer alleging, in part, that his termination following his reporting of a possible FCPA violation was impermissible under the Dodd-Frank whistleblower protection provision. At issue in the case was whether Asadi was within the protection of that statute.

Conceding that he did not come within the literal definition of a whistleblower since he did not provide information to the SEC, Asadi asserted that he was still within the scope of Dodd-Frank based on that law's description of protection for whistleblowers. Asadi asked the court to read the provisions of 78u-6(h)(1)(A) as creating additional avenues of whistleblower protection, specifically that since subparagraph (iii) does not require disclosures be made to the SEC it provides protection even for those individuals who do not fall within the literal definition of a whistleblower.

In considering Asadi's claim, the Fifth Circuit analyzed the interplay between subsections (6)(a) and (6)(h) as illustrated in Part I. Subsection (a) contains definitions for terms used throughout the statute. "That definition [of whistleblower] standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of §78u-6."²¹ Considering the interpretation of legal texts, the court relied on the following, "When a . . . definitional section says a word 'means' something, the clear import is that this is its only meaning."²²

Ultimately, the Appeals Court disagreed with Asadi, rejecting the notion that subparagraph (iii) defines who can qualify as a whistleblower, and instead relied on the plain language of the statute that there is only one category of whistleblower – the one who provides information to the SEC. The court interpreted subsection (iii) rather narrowly as simply

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

22. *Id.* (citing ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 226 (1st ed. 2012)).

defining categories of protected activities in which a whistleblower may engage. As a result, the court concluded there was no conflict between the definition of whistleblower and the third category of protected activity. Relying on *Chevron*,²³ the court rejected the SEC's expansive interpretation of the term whistleblower, stating, "[i]f the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress."²⁴ As will be explained in Part IV, the *Asadi* court was incorrect in its refusal to recognize the SEC regulations.

IV. The Authority of an Administrative Agency to Broaden a Statutory Mandate Should be Upheld

An administrative agency is free to interpret the construction of a statute created by Congress which was meant to guide an agency in implementing Congress's will in any given area of law. The U.S. Constitution's Article I, §1 states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."²⁵ The text is specific in that *all legislative powers* are vested in Congress and the Supreme Court has ruled that, "This text permits no delegation of those powers".²⁶

A. Powers of Administrative Agencies

Black's Law Dictionary defines legislative power as,

The power to make laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws. Under federal law, this power is vested in Congress, consisting of the House of Representatives and the Senate. A legislative body may delegate a portion of its

23. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

24. *Id.* at 842-44.

25. U.S. CONST. art. I, § 1.

26. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)).

lawmaking authority to agencies within the executive branch for purposes of rule making and regulation. But a legislative body may not delegate its authority to the judicial branch, and the judicial branch may not encroach on legislative duties.²⁷

One should note that in that definition, a distinction is made between the law and a rule. A rule is defined as, “an established and authoritative standard or principle[.]”²⁸ So, if in fact Congress is the only one who may make laws, why is it then that an allowance is made for the creation of rules by means of a delegation to agencies of a rule-making function? According to the Supreme Court, “This Court [U.S. Supreme Court] established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.”²⁹

The fundamental precept of the delegation doctrine fits well within the Framers’ design of a workable National Government, in that though the U.S. Constitution grants Congress the power to make laws, it does not prohibit a transfer of some of that authority to another branch, thus freeing Congress to address itself to more pressing legislative concerns.³⁰

Therefore the delegation of rulemaking authority from Congress to agencies is seen as a beneficial necessity for the creation of a workable national government. There has also been a realization that certain issues may pose a complexity which Congress may be ill-suited to handle in the specific.³¹

The reach of the Federal Government’s enumerated powers is broader still because the

27. BLACK’S LAW DICTIONARY 919 (8th ed. 2004).

28. *Id.* at 1357.

29. *Loving*, 517 U.S. at 758 (1996) (citing *Wayman v. Southard*, 6 L. Ed. 253 (1825)).

30. *Id.* at 771.

31. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) (recognizing “the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly”).

Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³²

So given that a delegation of some of Congress’s authority is allowed, if not required, we next address the question of what is the appropriate percentage, scope and/or degree of that delegation? This question was not lost on one of our founding fathers, Thomas Jefferson, who said “Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution.”³³ And it is to those details of execution that we now turn our attention.

The Supreme Court has repeatedly allowed a conferring of decision-making authority upon agencies,³⁴ Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”³⁵ The purpose thereby is to provide a guide for the agencies’ exercise of authority.³⁶ The Court has also recognized the expertise of administrative agencies. The U.S. Supreme Court in *City of Milwaukee v. Illinois*, in discussing the Federal Water Pollution Control Act Amendments of 1972, said that the Act was being “supervised by an expert administrative agency,”³⁷ thus confirming the EPA’s position as both an expert and as a

32. Nat’l Fed’n of Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

33. 5 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 319 (Paul L. Ford ed., 1904) (letter to E. Carrington, (Aug. 4, 1787)).

34. *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 457 (2001).

35. *Id.* at 472 (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

36. *Whitman*, 531 U.S. at 463 (citing *Am. Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

37. *Milwaukee v. Illinois*, 451 U.S. 304, 305 (1981).

supervisor.

Administrative agencies were created to be specialists in given areas of the law, taking on the role of a supervisor, who presumably, is guided by a set of instructions which Congress would promulgate. There is an inherent problem in this dynamic, in that the agency is being guided by someone, who is not an expert in the field to be regulated. How can Congress appropriately set the boundaries for the agency to operate within, when they lack the technical knowledge of understanding the scope of the problem to be dealt with? Many times the extent of the problem, its subtleties, or its facets are not even known until extensive factual material is analyzed and evaluated by the agency experts. How can Congress set limits on the agency action when Congress at the time of their promulgation of an enabling statute does not understand the exacting particulars of what is to be done?

The answer lies in the fact that the courts have taken the position that it shall be sufficient for the purposes for delegation of authority that Congress sets out the legislative policy for the agency to follow, while leaving the details of specific implementation to the agency. It also appears that the degree of freedom delegated to the agency is for Congress to decide. The Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”³⁸ Therefore, it appears that the amount of freedom, or lack thereof, granted to the agency, will be determined by Congress’ judgment and “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”³⁹

Yet how should we discern the scope of Congressional intent in that delegation of authority? Should we look to words alone? Should we look to the overall tenor of the statute and its gleaned general intent or should we look only to what Congress specifically said? The answer has been fairly consistent for the last 100 years, beginning with Justice Holmes understanding that, “[w]e do not inquire what the legislature meant; we ask

38. *Mistretta v. United States*, 488 U.S. 361, 416 (1989).

39. *Whitman*, 531 U.S. at 475 (citing *Loving v. United States*, 517 U.S. 748, 748 (1996)).

only what the statute means.”⁴⁰

In 1984, the Supreme Court in the landmark decision of *Chevron USA v. Natural Resources Defense Council, Inc.*, outlined in a fairly concise fashion what the court will be looking for when it is reviewing agency action and/or interpretation pursuant to that agency’s enabling statute.

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if 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.⁴¹

Therefore based on *Chevron*, the freedom of agency action and interpretation is based on the clarity of the intent of Congress, as demonstrated in the language of the statute. “If the intent of Congress is clear . . . the agency must give effect to that unambiguous language.”⁴² That does raise the question of whether the language chosen is “clear.” Is it possible for a word which is chosen by Congress to be both singular in its denotative definition as well as chosen for its connotative definition? The Supreme Court has made clear that, when context permits, the

40. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

41. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

42. *Id.*

agency is allowed to use its expertise in deciding the extent of a definition.⁴³

When the words chosen have definitions which lead to a general interpretation the agency is allowed to interject its expertise. But when the word chosen is one where there is little doubt as to its meaning and extent, the agency's actions are limited. "[I]t is for agencies, not courts, to fill statutory gaps. The fact that a statute is unambiguous means that there is no gap for the agency to fill and thus no room for agency discretion."⁴⁴

B. *The Scope of Agency Freedom*

If the Congressional intent is silent or ambiguous what may the agency do? Again *Chevron* and its subsequent interpretations give us the answer. In 2005 the Supreme Court in *Brand X* stated thusly: "If statute is ambiguous, and implementing agency's construction is reasonable, *Chevron* requires federal courts to accept agency's construction of statute, even if agency's reading differs from what court believes is best statutory interpretation."⁴⁵

Lest we forget, the court does want to make it clear that, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."⁴⁶

43. In *Whitman*, the Court held that while Congress did not have to provide direction to the EPA concerning how it defined "country elevators" that were to be exempt from new stationary-source regulations governing grain elevators, it did have to furnish substantial guidance on setting air standards that affected the entire national economy. *Whitman*, 531 U.S. at 475. Similarly, the Court ruled that a congressional statute was not required to "decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or ... how 'hazardous' was too hazardous" (citing *Touby v. United States*, 500 U.S. 160, 165-67 (1991), nor must a statute authorizing agencies to recoup "excess profits" paid under wartime Government contracts define how much profit was too much (citing *Lichter v. United States*, 334 U.S. 742, 783-86 (1948). *Id.* at 475.

44. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) (internal quotations marks and citation omitted).

45. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005).

46. *Chevron*, 467 U.S. at 837 n.9.

In 2001 in *United States v. Mead Corp.*, the court found that if agency power was not delegated then it was for the court to decide the statutory interpretation.⁴⁷ “When an agency exercises delegated lawmaking power, the court must accept the agency’s reasonable interpretation of the statute. When an agency is not exercising delegated lawmaking power, the court interprets the statute giving appropriate deference, under the circumstances, to the agency’s interpretation, but deciding for itself the meaning of the statute.”⁴⁸

Therefore, agency freedom is a direct consequence of the specificity of the statutory language. The more generalized the language, the more the courts are willing to allow the agency freedom in the use of its expertise. The more restrictive the language, the less the courts are willing to allow forays into uncharted waters. Less clear is the outcome when the general tenor of a statute is pointing in a general direction. Will the court allow the agency to move into that area?

Turning our attention back to the proper interpretation of a “whistleblower” under Dodd-Frank, the question remains how to properly interpret the interplay between subsections (a) and (h). The ambiguity created when these two subsections are viewed together opens the door to the administrative interpretation which should have been respected by the Fifth Circuit. In an *Amicus Curiae* brief filed on February 20, 2014 in support of Liu Meng-Lin, the appellant in a Second Circuit case, the SEC states, “The examination of the relevant statutory language demonstrates, at a minimum, considerable tension and inconsistency within the text, thus revealing that Congress did not unambiguously express an intent to limit the employment anti-retaliation protections under Section 21F(h)(1) only to those individuals who report securities law violations to the Commission.”⁴⁹

47. Michael P. Healy, *Reconciling Chevron, Mead and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 21 (2011) (citing *United States v. Mead Corp.*, 533 U.S. 218, 238 (2001)).

48. *Id.*

49. Brief of the SEC, *Amicus Curiae* in Support of the Appellant, Meng-Lin v. Siemens, A.G., No. 13 Civ. 317, 2013 WL 5692504, at *1 (S.D.N.Y. Oct. 21, 2013) (No. 13-4385). For additional discussion of this brief, see Mystica M. Alexander, *Defining the Whistleblower Under Dodd Frank: Who Decides?* 5

As will be illustrated in Part V, various district courts that have commented on the difficult task of reconciling these two apparently inconsistent positions have also overwhelmingly agreed the provisions taken together are either “conflicting” or “ambiguous,” and, therefore, should be applied with the broad interpretation provided in the SEC regulations.

V. District Court Interpretations of Whistleblower Protection

Various district courts have been asked to interpret the whistleblowing and reporting requirements of Dodd-Frank. The *Asadi* court, while recognizing that several district courts have ruled in favor of an expansive interpretation of the term whistleblower, opted not to follow that line of reasoning. The two opinions of *Egan v. TradingScreen, Inc.* involved a financial software business that provided software to conduct trades on the Internet.⁵⁰ *Nollner v. Southern Baptist Convention, Inc.*,⁵¹ concerned allegations of bribery under the Foreign Corrupt Practices Act.⁵² Lastly, *Kramer v. Trans-Lux Corp.*⁵³ dealt with alleged violations of the defendant company’s pension plan.⁵⁴ Although each of the cases dealt with distinct fact patterns and differing outcomes for the whistleblowers, one common thread between them (and several other district court decisions considering similar issues)⁵⁵ is the acknowledgement that to

CAL. L. REV. CIRCUIT 278 (2014). In its August 2014 resolution of this case, the Second Circuit failed to address this issue and decided the case on other grounds.

50. *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 103416, at *1 (S.D.N.Y. Sept. 12, 2011); *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *1 (S.D.N.Y. May 4, 2011).

51. *See Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

52. *Id.* at 990. *See also* 15 U.S.C. § 78dd-1 (2012).

53. *See Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939, at *1 (D. Conn. Sept. 25, 2012).

54. *Id.* at *1.

55. Other district courts in agreement with the SEC’s expansive interpretation include: *Connolly v. Remkes*, No. 5:14-cv-03144, 2014 U.S. Dist. LEXIS 153439 (N.D. Cal. Oct. 28, 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp 3d 519 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 U.S. Dist. LEXIS 31142 (D.N.J. Mar. 11, 2014), *aff’d on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Genberg v. Porter*, 935 F. Supp. 2d 1094

come within the whistleblower protection of Dodd-Frank an individual need not report directly to the SEC, but rather, in certain circumstances, indirect reporting, such as through company internal reporting is sufficient. We will review each of these cases in turn. We will then turn our attention to two post-*Asadi* district court cases. In *Englehart v. Career Education Corporation*,⁵⁶ the U.S. District Court for the Middle District of Florida followed the decision of the *Asadi* court. Less than two weeks after the *Englehart* decision, the U.S. District Court for the District of Nebraska in *Bussing v. COR Clearing LLC*⁵⁷ rejected the reasoning of the Fifth Circuit.

A. Egan v. TradingScreen, Inc.

TradingScreen is a financial software business that provides hedge funds, asset managers, private bankers, and high net-worth individuals with software that helps them conduct trades on the Internet. Defendant, TradingScreen Brokerage Services, LLC ("TSBS"), is a broker-dealer affiliated with TradingScreen, Inc. and Philippe Buhannic is Chief Executive Officer of both TradingScreen, Inc. and TSBS.⁵⁸

Patrick Egan, the plaintiff, began working for TradingScreen in 2003. In early 2009, he learned Buhannic, the CEO of Defendant, was diverting TradingScreen's corporate assets to another company that he solely owned, SpreadZero, which offered products and services similar to those of TradingScreen. In particular, Egan alleged that Buhannic was using TradingScreen employees to do unpaid work for SpreadZero, cannibalizing TradingScreen's customer lists, and invoicing SpreadZero at below-market rates for various services. By late 2009, Plaintiff concluded that Buhannic's behavior was costing TradingScreen hundreds of thousands of dollars and

(D. Colo. 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42 (D. Mass. 2013); *Rosenblum v. Thomson Reuters (Mkts.), LLC*, 984 F. Supp. 2d 141 (S.D.N.Y. 2013); *Murray v. UBS Secs., LLC*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945, at *1 (S.D.N.Y. May 21, 2013).

56. See *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *1 (M.D. Fla. May 12, 2014).

57. See *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014).

58. *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 103416, at *3 (S.D.N.Y. Sept. 12, 2011).

posing a threat to the existence of TradingScreen's business.⁵⁹

In early 2010, Plaintiff reported Buhannic's behavior to the President of TradingScreen, Michael Chin, who passed the information to those members of TradingScreen's Board of Directors who were not controlled by Buhannic (the "Independent Directors"). The Independent Directors hired the law firm of Latham & Watkins LLP ("Latham") to conduct an internal investigation. Latham issued a report confirming Plaintiff's allegations. As a result, the Independent Directors informed Buhannic that he would have to resign, but he gained control of the Board and thereby prevented them from forcing his resignation. Buhannic then fired Chin and Plaintiff without informing the Board.⁶⁰

Egan claimed relief under the Securities Whistleblower Incentives and Protection provisions of Dodd-Frank, specifically the portion of the statute that allows a private cause of action for whistleblowers alleging retaliatory discharge or other discrimination.⁶¹ He argued that he could bring an action against Buhannic and TradingScreen under these anti-retaliation provisions.⁶² However, Defendants contended that these provisions did not cover Egan because he never personally contacted the SEC to report Buhannic's conduct.⁶³ The court found that Egan's claim raised three questions: (1) whether any disclosure to the SEC is required as a predicate to an action under the whistleblower anti-retaliation provisions of Dodd-Frank; (2) if such disclosure is required, whether the party invoking the Act must have personally and directly reported to the SEC; and (3) whether Egan had adequately alleged that the information he provided to attorneys retained by the Independent Directors was ultimately reported to the SEC.⁶⁴ Since he did not report information to the SEC, he attempted to show that his disclosures fell under the categories of disclosures

59. *Id.* at *4-5.

60. *Id.* at *5-6.

61. *Id.* (citing 15 U.S.C. § 78u-6(h)(1)(B)(i)). Relief includes reinstatement, double the back pay owed, costs and fees. *Id.* (citing 15 U.S.C. § 78u-6(h)(1)(C)).

62. *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *8-*9 (S.D.N.Y. May 4, 2011).

63. *Id.* at *9.

64. *Id.*

delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.⁶⁵ He could not come under the Sarbanes-Oxley Act because its whistleblower provisions apply only to publicly-traded companies and TradingScreen was a privately held company.⁶⁶ Egan also argued that he disclosed Buhannic's violations of rules promulgated by the Financial Industry Regulatory Authority ("FINRA"), and that these disclosures fell under Dodd-Frank's protection of disclosures "subject to the jurisdiction of the Commission."⁶⁷ The court rejected this argument because Dodd-Frank protects whistleblowers who fulfill an existing duty to disclose, but it does not protect those who report violations of SEC laws or regulations that do not impose such a duty. Furthermore, the FINRA rules Egan cited do not impose a duty to disclose.⁶⁸ Finally, he claimed that his disclosures were protected by section 78u-6(h)(1)(A)(iii)'s incorporation of 18 U.S.C. § 1513(e), which prohibits "interference with the lawful employment or livelihood of any person" who provides truthful information "to a law enforcement officer" relating to the commission of federal offenses.⁶⁹ But the court held that he did not allege that he or anyone acting jointly with him reported Buhannic's conduct to a law enforcement or government authority other than the SEC. Therefore, it concluded, a claim of whistleblowing under section 1513(e) still relied on the question of whether Egan or anyone acting jointly with him did in fact report to the SEC.⁷⁰ Nevertheless, because he raised factual allegations that supported his original pleading "on information and belief" that his information concerning Buhannic's conduct was reported to the SEC, the court granted him leave to amend his complaint.⁷¹ The court intended that his amended complaint would plead facts supporting his knowledge,

65. *Id.* at *14.

66. *Id.*

67. 15 U.S.C. § 78u-6(h)(1)(A)(iii).

68. *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *18 (S.D.N.Y. May 4, 2011).

69. *Id.* at *18-19.

70. *Id.* at *19.

71. *Id.* at *30.

heretofore on “information and belief,” that Buhannic’s conduct was reported to the SEC. It stated that such amendment would be effective only if it supported knowledge of actual transmission to the SEC.⁷² Nonetheless, the court found that his amended complaint failed to state a claim under Dodd-Frank’s whistleblower protection provisions because the law firm to whom Buhannic’s conduct was reported did not report his actions to the SEC.⁷³ Consequently the court dismissed his Dodd-Frank claim,⁷⁴ while acknowledging that “a literal reading of the definition of the term ‘whistleblower’ in 15 U.S.C. § 78u-6(a)(6), requiring reporting to the SEC, would effectively invalidate § 78u-6(h)(1)(A)(iii)’s protection of whistleblower disclosures that do not require reporting to the SEC.”⁷⁵

B. *Nollner v. Southern Baptist Convention, Inc.*

Ron Nollner and his wife Beverly were Tennessee residents. He had many years of experience in the construction industry and was a devoted member of the Southern Baptist community. Around April 2008, he responded to an International Mission Board of the Southern Baptist Convention, Inc. (IMB)⁷⁶ job posting to perform missionary-related work on the church’s behalf in New Delhi, India. The posting solicited candidates to manage construction of a new office building in New Delhi, including working with local companies, assisting in obtaining necessary permits, and ensuring that engineering standards were followed. It also indicated that the term of employment would be a minimum of 24 months and a maximum of 36 months. Furthermore, it included a “Spouse Assignment Description,” which stated that the candidate’s spouse would “be a vital part of the team,” reflecting an intent to hire both the

72. *Id.*

73. *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 103416, at *9 (S.D.N.Y. Sept. 12, 2011);

74. *Id.* at *14.

75. *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *14 (S.D.N.Y. May 4, 2011).

76. IMB is a wholly owned subsidiary of the Southern Baptist Convention. *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp. 2d 986, 989 (M.D. Tenn. 2012).

construction manager and his or her spouse.⁷⁷

IMB encouraged the Nollners to take the positions identified in the Job Vacancy Announcement. In October 2008, at IMB's urging, the Nollners accepted the positions, which they understood would last at least one 36-month term. In anticipation of moving to New Delhi for this extended period, the Nollners sold essentially all of their assets. Mr. Nollner gave up his active construction career and his wife quit her job.⁷⁸

When they arrived in New Delhi, the situation was not what had been promised. The planning and permitting phase of the project had already been completed and the defendants would not allow Mr. Nollner to meet with the architect or contractor for the job at issue until April 2009, well into the project. Over the next several months, Mr. Nollner also became aware of much disturbing information, including the contractor and architect paying bribes to local Indian officials with money IMB furnished as well as their attempting to bribe him.⁷⁹ He reported these practices and potential illegalities to his supervisors multiple times, but they ignored his entreaties.⁸⁰ When he reported his grave concerns about potential bribery to the defendants' employees, they "seemed unbothered, if not complicit."⁸¹ In October 2010, his superiors asked him to resign. After he refused, he was terminated, his superiors claiming his position was no longer necessary. When the Nollners returned to the U.S, they instituted suit in Tennessee state court, which defendants later removed to federal district court.⁸²

The court cited Dodd-Frank's definition of a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the

77. *Id.*

78. *Id.*

79. *Id.* at 990.

80. *Id.*

81. *Id.*

82. The original complaint asserted claims for breach of contract, promissory estoppel, and retaliatory discharge under Tennessee common law and the Tennessee Public Protection Act. When they added a claim under Dodd-Frank, the defendants removed the case to federal district court on the grounds that the court had original federal question jurisdiction over the Dodd-Frank claim and supplemental jurisdiction over the state law claims. *Id.* at 988.

securities laws to the Commission [i.e., the SEC], in a manner established, by rule or regulation, by the Commission.”⁸³ It reviewed the anti-retaliation provision of the Act most relevant to the Nollners, to wit:

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.⁸⁴

Addressing the scope of this provision, the court noted that its protections extend only to any “law, rule, or regulation *subject to the jurisdiction of the Commission*,” so that where an employee reports a violation of a federal law by the employer, Dodd-Frank only protects that employee against retaliation if the federal violation falls within the SEC’s jurisdiction.⁸⁵ Thus, the court stated, a plaintiff seeking relief under this provision must demonstrate that the disclosure at issue relates to a violation of federal securities laws, and that it is “required or protected” by laws, rules, or regulations within the SEC’s jurisdiction.⁸⁶ Consequently, an employee is not protected from retaliation if the disclosure at issue is not “required” or otherwise “protected” by a law, rule, or regulation within the SEC’s jurisdiction.⁸⁷ The Nollners argued that their employer violated the Foreign Corrupt Practices Act⁸⁸ by bribing foreign officials and it retaliated against them for reporting those violations internally.⁸⁹ The court noted that the FCPA provides both criminal and civil enforcement mechanisms, with the

83. *Id.* at 992-93 (citing 15 U.S.C. § 78u-6(a)(6)).

84. *Id.* at 993 (citing 15 U.S.C. § 78u-6(h)(1)(A)).

85. *Id.* at 994.

86. *Id.*

87. *Id.*

88. 15 U.S.C. §§ 78dd-1, *et seq.*

89. *Nollner v. S. Baptist Conventon, Inc.*, 852 F.Supp. 2d 986, 995-96 (M.D. Tenn. 2012).

Department of Justice (DOJ) solely responsible for all FCPA criminal enforcement and the SEC in charge of enforcement for FCPA violations by issuers.⁹⁰ Because the defendants were not “issuers” and had not committed any securities violations, the SEC had no jurisdiction over them, the court decided, and so it refused to interpret Dodd-Frank as extending its whistleblower protections to companies that otherwise have no relationship to the SEC and have not committed securities violations.⁹¹ As result, it dismissed the Nollners’ Dodd-Frank claim with prejudice.⁹² Although the Nollners did not qualify for whistleblower protection in the circumstances of this case, significant for our purposes is the court’s acknowledgement that *Egan* correctly determined that whistleblower protection could be extended more broadly to those who do not provide disclosures directly to the SEC but rather indirectly notify the SEC through initiating reporting through internal company reporting channels.

C. *Kramer v. Trans-Lux Corp.*

Richard Kramer began working for the Trans-Lux Corporation in 1981, and for the past eighteen years had served as its Vice President of Human Resources and Administration, responsible for managing its relationship with the Pension Benefits Guaranty Corporation’s (PBGC) oversight of the Trans-Lux ERISA governed pension plan, ensuring company compliance with all federal and state laws and regulations and serving as plan sponsor/administrator on all benefit plans as well as serving as fiduciary for its Defined Benefit and Defined Contributions plans. His supervisor was Angela Toppi, Trans-Lux’s Chief Financial Officer, and Jean Marc Allain, its Chief Executive Officer.⁹³

Kramer and Toppi both served as members of the company’s pension plan committee. Although the pension plan required the committee to have at least three members, since 2009 the

90. *Id.* at 996 (citing 15 U.S.C. § 78dd-2(d)).

91. *Id.* at 997.

92. *Id.* at 997-98.

93. *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424(SRU), 2012 WL 4444820, at *2 (D. Conn. Sept. 25, 2012).

committee had only two members. Kramer repeatedly advised Toppi that the committee needed at least one additional member, but she rejected his advice.⁹⁴

Not only did Toppi serve on the pension plan committee, but she also was the sole trustee of Trans-Lux's pension plan. Kramer believed that her position as a trustee created a conflict of interest, and reported his concerns to the company. Specifically, Kramer was concerned that Toppi had inside knowledge of Trans-Lux's financial situation, and continued to hold company bonds as a pension investment, even as they lost nearly all of their value. Again, his concerns were rejected.⁹⁵

In December 2008, March 2009, September 2010, and January 2011, Trans-Lux amended its pension plan. The plan required amendments to be made pursuant to the recommendation of a three-person committee, but the 2010 and 2011 amendments were instead made at the recommendation of a two-person committee. Toppi was also required to bring the 2009 amendments to the board of directors for approval. She failed to do so, and also neglected to file the 2009 amendments with the SEC.⁹⁶

In March 2011, Toppi ordered Kramer not to file a Form 10 with the PBGC. The form would have notified the PBGC that there had been a missed contribution, and would have subjected Trans-Lux to an immediate penalty.⁹⁷

Kramer continued to express his concerns to Toppi and Allain but again they were dismissed. In May 2011, he contacted Trans-Lux's board of directors' audit committee about his concerns. Shortly thereafter, he sent a letter to the SEC about Trans-Lux's failure to submit the 2009 amendment to the board of directors or the SEC.⁹⁸ In July 2011, Kramer was fired,⁹⁹ and subsequently brought suit under Dodd-Frank.¹⁰⁰

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424(SRU), 2012 WL 4444820, at *2 (D. Conn. Sept. 25, 2012).

100. *Id.* at *1. He also brought a claim under the Employment Retirement Income Security Act ("ERISA"). *Id.* at *3.

The court first wrestled with the definition of “whistleblower” under Dodd-Frank and the anti-retaliation sections, holding that it is broader with respect to the anti-retaliation section than it is for the rest of the Act.¹⁰¹ It next reviewed the SEC’s rule that states for the purposes of the 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)).¹⁰²

The court next rejected Trans-Lux’s argument that Kramer was not engaging in protected activity when he sent a letter to the SEC, because he did not do so in a manner established by the SEC, holding that Section 78u-6(a)(6)’s requirement that the information at hand have been provided “in a manner established, by rule or regulation, to the Commission” does not apply to section 78u-6(h)(1)(A). Instead, the court reasoned, someone must only allege that they possessed a “reasonable belief that the information” provided “relates to a possible securities law violation,” and that the information was provided in a manner described in section 78u-6(h)(1)(A).¹⁰³ The court found that Kramer’s disclosures were related to violations of the securities laws and that disclosures protected under Sarbanes-Oxley’s whistleblower provision are also protected under Dodd-Frank’s whistleblower provision. Sarbanes-Oxley protects persons who disclose information they reasonably believe

101. *Id.* at *11 (citing *Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp. 2d 986, 989 (M.D.T.N. 2012); *Egan v. TradingScreen Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *1 (S.D.N.Y. May 4, 2011)).

102. *See Kramer*, 2012 WL 4444820, at *4 (citing 17 C.F.R. § 240.21F-2(b)(1) (2015)).

103. *Id.* at *5 (citing 17 C.F.R. § 240.21F-2(b)).

constitutes a violation of SEC rules or regulations, when the information is provided to, among others, “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).”¹⁰⁴ Kramer alleged that Allain had supervisory authority over him, and that the Trans-Lux audit committee may have had the authority to investigate, discover, or terminate misconduct. The court found that Kramer’s emails and letter where he raised his concerns demonstrated that he may have reasonably believed Trans-Lux to be committing violations of SEC rules or regulations.¹⁰⁵ Therefore, the court ruled that he alleged sufficient facts to support a Dodd-Frank whistleblower claim based on his internal and external communications, and consequently denied Trans-Lux’s motion to dismiss his Dodd-Frank claim.¹⁰⁶

D. Englehart v. Career Education Corporation

Diana Englehart was employed as the Director of Career Services at the Sanford Brown Institute, one of over ninety schools run by her employer, Career Education Corporation (“CEC”). As part of her responsibilities, Ms. Englehart was responsible for preparing budgets and financial forecasts which would then be made available to both shareholders and the public.¹⁰⁷ When Ms. Englehart noticed what she considered “material misrepresentations” in the budgets and forecasts that had been prepared by the Institute she relayed her concerns to the Vice President of Operations at the Institute in November, 2010.¹⁰⁸ Englehart believed that the misrepresentations, which overstated both placement and enrollment numbers, were a violation of the Securities and Exchange Act of 1934.¹⁰⁹ Shortly after expressing her objections, Englehart was placed on paid leave. While on leave, she was fired. Englehart alleged this

104. *Id.* at *17 (citing 18 U.S.C. § 1514A(a)(1)(C)).

105. *Id.* at *17-18.

106. *Id.* at *18-19.

107. *See* Englehart v. Career Educ. Corp., No. 8:14-CV-444-T-33EAJ, 2014 WL 2619501, at *1 (M.D. Fla. May 12, 2014).

108. *Id.* at *2-*3.

109. *Id.* at *3.

firing was done in retaliation for her objections to the proposed figures for the budget and forecast and sought to come within the protections of the Dodd-Frank Whistleblower Program.¹¹⁰

In response, CEC maintained that Englehart failed to state a claim on which relief could be granted. CEC's objection was based on the fact that Englehart did not provide any information to the SEC and, therefore, could not come within the statutory definition of a whistleblower found at 15 U.S.C. § 78u-6.¹¹¹ The district court found in favor of CEC, finding that, "allowing individuals who do not satisfy the Dodd-Frank Reform Act definition of "whistleblower" to bring a claim under 15 U.S.C. § 78u-6(h) would contradict the section's title - 'Protection of Whistleblowers'."¹¹² The court refused to second guess what it considered to be the unambiguous statutory language of Dodd-Frank.¹¹³

E. Bussing v. COR Clearing, LLC

On May 21, 2014, less than two weeks after the decision in Englehart, the U.S. District Court for the District of Nebraska rejected the holding in *Asadi* and granted the plaintiff, Julie Bussing, relief under the Dodd-Frank Whistleblower Protection Program and allowed her claim to continue.¹¹⁴ Bussing is a CPA who holds various Financial Industry Regulatory Authority (FINRA) licenses.¹¹⁵ Bussing worked as an independent contractor for COR Securities Holding, Inc. (COR) assisting with due diligence for the company's acquisition of Legent Clearing, LLC, a company which had previously been investigated for FINRA violations.¹¹⁶ To help address Legent's prior regulatory violations, Bussing developed a "Change of Control Plan" which was to be implemented following COR's acquisition in 2012.¹¹⁷

110. *Id.* at *7.

111. *Id.* at *8.

112. *Id.* at *22.

113. *Id.* at *23.

114. *See Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014).

115. *Id.* at 723.

116. *Id.*

117. *Id.*

COR offered Bussing the position of Executive Vice President of Legent, which she accepted only after she was assured the Change of Control Plan would be implemented.¹¹⁸

On January 1, 2012 Bussing began to work for Legent. Although Christopher Frankel was CEO of Legent, Bussing was orally assured that she would report directly to Steven Sugarman, CEO of COR, and COR's Board of Directors. In April 2012, FINRA began proceedings against Legent for various violations of financial rules and as part of those proceedings made requests for certain documents. While she was preparing a response to FINRA's requests, Bussing discovered additional violations and potential violations of securities regulations and FINRA rules.¹¹⁹ Although Sugarman and the COR directors initially approved of Bussing's investigation and recommendations, very soon after Bussing began implementing auditing measures to assess potential violations, directors from both COR and Legent expressed dissatisfaction with her efforts.¹²⁰ On April 29, 2012, Bussing submitted a report to COR and Legent with descriptions of violations of the Bank Secrecy Act and anti-money laundering rules and explanation of Legent's inadequate internal record keeping.¹²¹ Bussing was asked to cease responding to FINRA's requests. She refused to do so. On May 4, 2012, Bussing was told she needed a vacation and was put on paid leave, and, soon after, on approximately May 20, 2012, her employment was terminated.¹²²

Bussing brought twelve claims against COR and Legent, among them a claim alleging retaliation in violation of the whistleblower protection provision of Dodd-Frank.¹²³ In response, COR filed a motion to dismiss. The dispute on this issue centers, in part, on whether Bussing qualifies as a whistleblower despite the fact that she did not make any disclosures to the SEC. Departing from the Fifth Circuit's holding in *Asadi*, the district court ruled that the term "whistleblower" should be given its ordinary meaning for the

118. *Id.*

119. *Id.*

120. *Id.* at 724.

121. *Id.*

122. *Id.* at 725.

123. *Id.* at 726.

purposes of the retaliation section of the Act. The court stated,

When it is apparent that Congress intended a word to be given its ordinary meaning, notwithstanding the presence of a statutory definition to the contrary, and when applying the definition to provision at issue would defeat that provision's purpose, the Court will not mechanically read the statutory definition into that provision.¹²⁴

The court found it illogical that Congress intended to discourage internal reporting since internal reporting is often a more efficient way of dealing with potential violations in the workplace.¹²⁵ The court, therefore, found that Bussing could pursue her claim.¹²⁶

VI. Public Policy Requires an Expansive Interpretation of Whistleblower

Prudent public policy that protects the public interest requires an expansive interpretation of whistleblower protection. SEC regulations that offer a broad interpretation of who may qualify as a whistleblower support one of the primary goals of financial reform, that of enhancing the ability of the SEC to enforce the securities laws. As such, contrary to the conclusion of the Fifth Circuit in *Asadi*, the SEC regulations should be adopted and respected by the judiciary.

Limiting protection from retaliation only to those individuals who report potential securities law violations directly to the SEC will undermine internal compliance programs. Internal compliance programs have been put in place as a means of reducing fraudulent and illegal activity. "The Federal Sentencing Guidelines, the Department of Justice's Principles of Federal Prosecution of Business Organizations, and the SEC's Seaboard Report, have long placed a premium on

124. *Id.* at 729.

125. *Id.* at 733.

126. *Id.* at 734-35.

effective corporate compliance programs. Complaint procedures have always been an integral part of any such program.”¹²⁷ By incentivizing only direct reporting to the SEC, the *Asadi* court is supporting “a ‘race’ to the doorstep of the SEC”¹²⁸ by the whistleblower. Such a dynamic encourages reporting to the SEC before giving the company an opportunity to address and correct issues of concern.¹²⁹

Recognizing the need to ensure that the external reporting requirement does not undermine internal compliance the SEC, final SEC rules have made clear that (1) participating in a company’s internal reporting process could increase the amount of any bounty payment¹³⁰ and (2) an internal report by a whistleblower that leads to a report by the company is considered a report to the SEC by the whistleblower as long as the information is provided to the SEC within 120 days of the internal reporting.¹³¹ “The final rules drafted by the SEC represent well-crafted regulations that strike a balance between internal and external reporting.”¹³²

“A perennial justification and a perennial objective of financial regulatory reform is the restoration of investor trust and confidence.”¹³³ Enhancing the ability of the SEC to enforce securities laws will help boost public confidence in corporate America. Furthermore, an expansive interpretation of who is a whistleblower will further Congress’ intent in passing Dodd-Frank. When the Act was passed, Sen. Christopher J. Dodd (D-Conn.), who shepherded the bill through the Senate, said the

127. Allan Dinkoff, *Corporate Compliance Programs After Dodd-Frank* (2011), available at http://www.weil.com/files/upload/corporate_compliance_post_dodd-frank_aelc_oct.11.pdf.

128. Justin Blount & Spencer Markel, *The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act’s Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1039 (2012).

129. *Id.*

130. 17 C.F.R. § 240.21F-6(a)(4) (2015).

131. *Id.* § 240.21F-4(c)(3).

132. Blount & Markel, *supra* note 128, at 1057. See also Geoffrey Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73 (2012).

133. Ronald J. Colombo, *Trust, Financial Services Regulation, and the Dodd-Frank Act*, 30 BANKING & FIN. SERVICES POL’Y REP. 8, 8 (2011).

legislation would help restore Americans' confidence in the financial system.¹³⁴ At the time of its passage in July 2010, he was quoted as saying, "More than anything else, my goal was, from the very beginning, to create a structure and architecture reflective of the 21st century in which we live, but also one that would rebuild that trust and confidence."¹³⁵

Lastly, financial scandals invariably impact stock prices.¹³⁶ What really is at stake here involves the very foundation of the capitalist system and its inherent premise that investors are to be rewarded or penalized for taking financial risks in what is assumed to be a level playing field. Bitter experience has shown that the system cannot be left to its own devices but needs the firm hand of regulatory oversight if it is to succeed in its mission of attracting investment for entrepreneurial ventures. Therefore, any regulatory reading of a statute that serves to firm up or bolster stock prices ought to be encouraged and promoted. A liberal interpretation of who is a whistleblower is such reading.

For these reasons, it is imperative that the law provides incentives and broad protections for those individuals who risk their career and reputation by coming forward to expose corporate wrongdoing and chicanery.

VII. Conclusion

A review of the whistleblower protections of Dodd-Frank, accompanying SEC regulations, and district court decisions of both interpretations, makes clear that the ambiguity of the statute should be resolved under the broad interpretation of the SEC regulations. Viewing the definition of whistleblower narrowly and in isolation, as was done in *Asadi*, creates the illusion of clarity. Under Section 21F subsection 6(a), a whistleblower is one who reports a violation of the securities exchange laws to the SEC. But a statute should not be read in

134. Brady Dennis, *Congress Passes Financial Reform Bill*, WASH. POST, July 16, 2010, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071500464_pf.html.

135. *Id.*

136. Lynn A. Stout, *The Investor Confidence Game*, 68 BROOK. L. REV. 407, 408 (2002).

the absence of its other provisions. The anti-retaliation subsection 6(h)(1)(A)(iii) describes other times when a whistleblower is to be protected, one of which being when a whistleblower makes disclosures to other parties, such as the disclosures required under the Sarbanes-Oxley Act. This lack of a consistent reporting requirement calls into question Congress's intended definition of whistleblower. This failure of clarity creates the ambiguity. The Supreme Court has said repeatedly that if the statute is ambiguous, it is for the agency to resolve this ambiguity in furtherance of the policy set forth in the statute. Consequently, the courts should reject the conclusion of the Fifth Circuit in *Asadi* and instead defer to the SEC's regulations. This approach best supports the comprehensive reform goals of Dodd-Frank and its public policy mission to protect whistleblowers.