GOLD STAR FOR INTERNAL COMPLIANCE: WHY A BROADER PROTECTION OF DODD-FRANK WHISTLEBLOWERS IS BENEFICIAL

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INTRODUCTION

Paul Somers worked as the Vice President of Portfolio Management for a real estate investment trust company.[1] Somers noticed that his Senior Vice President committed various "acts of serious misconduct . . . including hiding seven million dollars in cost overruns on a development in Hong Kong."[2] Aware that the securities fraud posed serious violations of the Sarbanes-Oxley Act (SOX), Somers reported these violations to senior executives within the company, but not to the U.S. Securities and Exchange Commission (SEC).[3] Subsequently, the company wrongfully terminated Somers.[4] Due to a dispute in statutory interpretation of the definition of "whistleblower" under DFA, a circuit split emerged.[5] In light of this, the Supreme Court decided to put an end the controversy when it granted *certiorari* to hear the case.[6]

The Dodd-Frank Act (DFA) provides the SEC with means to provide eligible whistleblowers a monetary reward in exchange for original information that leads to an enforcement against a violation of the federal securities laws.[7] The DFA also "prohibits retaliation by employers against whistleblowers and provides them with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act."[8] Under the DFA, "'whistleblower' means any individual or group of 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."[9] The DFA further provides that no employer may retaliate over employment against a lawful whistleblower who provides information to the SEC in accordance with the section, or in making protected disclosures under SOX.[10] In a similar vein, SOX protects whistleblowers who disclose possible securities violations internally to supervisors.[11]

Litigation over the whistleblower protections of the DFA pitted the Second and Ninth Circuits against the Fifth Circuit concerning whether an employee who reports potential securities violations internally but not to the SEC is protected as a whistleblower for a subsequent wrongful termination.[12] The Fifth Circuit in *Asadi*

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[1] Somers v. Digital Realty Tr., Inc., 119 F. Supp. 3d 1088, 1091 (N.D. Cal. 2015), *aff'd*, 850 F.3d 1045 (9th Cir.), *reverse and remanded*, 583 U.S. ___, 138 S.Ct. 767 (2018).
[2] *Id.* at 1091.
[3] *Id.*
[4] *Id.*
[5] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013); *see also* Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2nd Cir. 2015).
[6] *Somers*, 138 S.Ct. 767; *see also* John K. Mickles, *If There's Something Strange in Your Workplace, Who Ya Gonna Call? The Second Circuit Expands Whistleblower Protection in Berman v. Neo@ogilvy LLC*, 62 VILL. L. REV. 357 (2017) (similar introduction and background structure).
[7] *See* 17 C.F.R. §§ 240.21F-4, 240.21F-8, § 240.21F-9 (2017).
[8] *See* 15 U.S.C. § 78u-6 (h)(A)–(B) (2016).
[9] *Id.* § 78u-6(a)(6).
[10] *Id.* § 78u-6(h)(1)(A)–(B).
[11] *See* 18 U.S.C. § 1514A(a)(1)(C) (2012).
[12] *See Asadi*, 720 F.3d 620; *Somers*, 119 F. Supp. 3d. 1088 (9th Cir. 2017); *Berman*, 801 F.3d 145.

v. G.E. Energy held that wrongfully terminated employees are not protected whistleblowers within the meaning of the DFA's anti-retaliation provision if said employees report fraud to management, but not to the SEC.[13] Conversely, the Second and Ninth Circuits in *Berman v. NEO@OGILVY* and *Somers v. Digital Realty Trust* held that the term "whistleblower" was sufficiently ambiguous to defer to the SEC's broad interpretation of the term, and therefore, employees who report securities violations to management but not the SEC are protected under the DFA.[14] The Supreme Court recently decided the controversy, ruling against a broader definition, and therefore a protection, of whistleblowers under the DFA.[15]

This article examines the split between the Circuits, the Supreme Court's decision in *Somers*, and the benefits of extending the DFA's whistleblower protection to employees who report potential securities violations internally without reporting to the SEC. Part I provides a brief legislative history of SOX and the DFA, explains their whistleblower-protection and anti-retaliation provisions, and describes the SEC's attempt to clarify these provisions. Part II introduces competing interpretations between reviewing courts and how *Chevron* provides guidance. Part III explains the judicial split created by the competing positions of the Fifth, Second, and Ninth Circuits in the context of the DFA's whistleblower protection provisions, and the recent Supreme Court decision regarding the same. Part IV analyses why a broader definition protects whistleblower's remedial benefits of wrongful termination, and argues that public policy is better served by protecting whistleblowers who do not report to the SEC.

I. LEGISLATIVE HISTORY AND SUMMARY OF WHISTLEBLOWER PROTECTION

A. SOX

Following the collapse of Enron, Congress enacted SOX in 2002 to increase SEC oversight of corporate accountability and prevent the downfall of corporations through fraud.[16] Congress stated that SOX's purpose was to protect investors by "improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws."[17] SOX aimed to achieve its goals through increased supervision of public audit accountants, establishing independent audit committees, and increased transparency of corporate financial statements.[18] Upon the enactment of SOX, President Bush stated: "No more easy money for corporate criminals" and declared the legislation "the most-far reaching reform of American business practices since the time of Franklin Delano Roosevelt."[19]

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[13] *Asadi*, 720 F.3d at 623.
[14] *Berman*, 801 F.3d at 145; *Somers*, 119 F. Supp. 3d at 1105.
[15] *Somers*, 138 S.Ct. 767.
[16] H.R. REP. NO. 107-610 (2002), *as reprinted in* 2002 U.S.C.C.A.N. 542. (Conf. Rep.), at 1 (2002).
[17] *Id.*
[18] *Id.*
[19] Elisabeth Bumiller, *CORPORATE CONDUCT: THE PRESIDENT; Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, (Jul. 31, 2002), http://www.nytimes.com/2002/07/31/business/corporate-

Section 806 of SOX creates a private cause of action for employees who raise complaints of possible securities fraud and face retaliation from their employer.[20] This section prohibits employer retaliation against an employee "in the terms and conditions of employment because of any lawful act done by the employee."[21] This protection applies broadly to any employee who "provides information, causes information to be provided, or otherwise assists in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of the SEC's regulations or defrauds shareholders.[22]

SOX establishes its own methods of enforcement action and list of procedures for a whistleblower seeking protection.[23] Similar to the DFA, SOX's whistleblower protection provision states that no company or its affiliates or subsidiaries with a class of securities registered under the SEA, or "any officer, employee contractor, subcontractor, or agent" of such company may "discharge, demote, suspend, threaten, harass, or in any other way discriminate against an employee in the terms and conditions of employment" because of an employee's lawful disclosure of information reasonably believed to be a violation of securities law.[24] For refuge under SOX, a whistleblower alleging discrimination by an employer must either file a complaint with the Secretary of Labor or file a complaint in the appropriate district court if the Secretary does not reach a final decision within 180 days of the filing.[25] Additionally, SOX sets a right to a jury trial for any party or employer named in the complaint.[26]

B. DFA

In 2008, the United States entered its largest financial crisis since the Great Depression, known as the Great Recession.[27] During the Great Recession, calls grew louder for increased corporate accountability and additional consumer protections aimed to curb Wall Street's practices that led to the Recession; so Congress enacted the DFA.[28] Like SOX, the DFA aimed to provide comprehensive financial regulatory reform.[29] The DFA's broad goal was to "protect consumers and investors, to enhance Federal understanding of insurance issues, to regulate the

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conduct-the-president-bush-signs-bill-aimed-at-fraud-in-corporations.html (last visited Jun. 15, 2018).

[20] Bradford K. Newman & Shannon S. Sevey, *Protections for Whistleblowers Under Sarbanes-Oxley*, PRAC. LAW. 39, 40 (2005).

[21] 18 U.S.C. § 1514A(a) (2012).

[22] *Id.* § 1514A(a)(1).

[23] *Id.* § 1514A(b)(1)(A–B).

[24] *Id.*

[25] *Id.* § 1514A(b)(1)(A–B).

[26] *Id.* § 1514A (b)(2)(A–E).

[27] Robert Rich, *The Great Recession*, FEDERAL RESERVE HISTORY, (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_of_200709 (last visited Jun. 16, 2018).

[28] *See, e.g.*, 156 Cong. Rec. E1383–01 (daily ed. July 20, 2010) (statement of Rep. McCollum); 156 Cong. Rec. E1347–01 (daily ed. July 15, 2010) (statement of Rep. Conyers).

[29] *See, e.g.*, H.R. CONF. REP. 111-517 (2010), *as reprinted* in 2010 U.S.C.C.A.N. 722.

over-the-counter derivatives market, and for other purposes."[30] More specifically, the Senate congressional record of the bill recognized that the DFA would create a new regulatory council to watch for economic red flags, provide for a wide variety of additional consumer protections, extend financial institution oversight, and "give the SEC and CFTC new authorities and resources to protect investors."[31]

When Senate Judiciary Committee Chairman Patrick Leahy presented the bill to President Obama at the Senate proceedings, Chairman Leahy stated his satisfaction that his authored whistleblower protection provisions would ensure that "law enforcement and Federal agencies have the necessary tools to investigate and prosecute financial crimes and to protect whistleblowers who help uncover these crimes."[32] Chairman Leahy emphasized transparency as key to Wall Street reform and stressed that "open information helps investors make sound decisions."[33]

Section 21F of the DFA empowers whistleblowers to sue over an employer's retaliation and encourages whistleblowers to come forward with information that leads to successful administrative action against securities laws violators.[34] Specifically, Section 21F(a)(6) defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established by rule or regulation, by the Commission."[35] Section 21F(h)(1)(A), the "whistleblower protection provision," states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower:
>
> (i) in providing information *to the Commission* in accordance with this section;
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> (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
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> (iii) in making disclosures that are required or protected under [SOX]. . .and any other law, rule, ore regulation subject to the jurisdiction of the Commission.[36]

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[30] *Id.*
[31] 156 CONG. REC. S5902-01 (statement of Sen. Leahy).
[32] *Id.*
[33] *Id.*
[34] *See, e.g.*, 15 U.S.C. § 78u–6 (2012).
[35] 15 U.S.C. § 78u-6(a)(6) (emphasis added).
[36] *Id.* § 78u-6(h)(1)(A) (emphasis added).

The whistleblower protection provision enables the SEC to pay whistleblowers monetary awards from the SEC Investor Protection Fund. It also gives the SEC discretion to take into account: the significance of the information provided, the degree of cooperation that the whistleblower provides, the SEC's interest in deterring the specific securities law violations at hand, and any factors that the SEC considers relevant by rule or regulation.[37] Additionally, the DFA lays out the deposits and credits of the SEC Investor Protection Fund and establishes that if the amounts credited into the fund are insufficient to cover a whistleblower award, then the SEC shall deposit the unsatisfied portion from any monetary sanction that the SEC collects.[38] Lastly, Section 21F(j) gives the SEC authority to issue rules and regulations as necessary to implement provisions of the whistleblower program consistent with the section's purposes.[39]

C. The SEC

The DFA's whistleblower protection provision has been litigated in an increasing number of cases since the DFA's inception.[40] District courts found ambiguity in the DFA's definition of whistleblower and struggled to determine whether a wrongfully terminated employee fell within the DFA's protections if the employee did not report possible securities fraud directly to the SEC.[41] In an attempt to clear the ambiguity, the SEC enacted Rule 21F-2 to the SEA on August 12, 2011, titled "Securities Whistleblower Incentives and Protection."[42] Rule 21F-2(b) defined who is a protected whistleblower and states that "the anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award" with the SEC.[43] Further, Rule 21F distinguished internal whistleblower protection from the reporting method directly to the SEC described in Section 21F(h)(1)(A), but reiterated that both are protected under the DFA.[44] In promulgating Rule 21F, the SEC stressed the importance of internal compliance processes to corporations and drafted the Rule to motivate whistleblowers to utilize their internal compliance and reporting systems.[45]

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[37] 15 U.S.C. § 78u-6(c)(1)(B) (2012).
[38] *Id.* § 78u-6(3)(A–B).
[39] *Id.* § 78u-6(j).
[40] *Asadi*, 720 F.3d, at 624 (*citing* Kramer v. Trans-Lux Corp., No. 3:11CV1424 (SR), 2012 WL 4444820, at 4; Nollner v. S. Baptist Convention, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at 4–5)). *See also* Connolly v. Remkes, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at 6 (N.D. Cal. 2014).
[41] *Id.*
[42] Whistleblower Status and Retaliation Protection, 17 C.F.R. § 240.21 F-2 (2017).
[43] *Id.* § 240.21 F-2(b)(1)(iii).
[44] *Id.* § 240.21 F-2(b)(1–3).
[45] *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300-01 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249) (". . . we have made additional changes to the rules to further incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate.")

In a further attempt to clarify the whistleblower protection provision of the DFA, the SEC issued an interpretive rule on August 7, 2015.[46] The SEC explicitly stated that "an individual may qualify as a whistleblower for purposes of Section 21F's employment retaliation protections, irrespective of whether he or she has adhered to the reporting procedures specified in Rule 21F-9(a)."[47] The SEC explained that Section 21F is ambiguous on the scope of employment retaliation protections, and that Section 21F-2 promulgated two separate definitions of whistleblower.[48] The SEC clarified that the definition of whistleblower in Rule 21F-2(b)(1), unlike the definition in Rule 21F-2(a) that applies to award and confidentiality provisions, does not require reporting to the SEC to receive protection from employer retaliation.[49] Additionally, Rule 21F plainly states that the employment retaliation protections apply whether or not an individual satisfies the requirements, procedures, and conditions to qualify for an award.[50] Lastly, the SEC concluded that its interpretation "best comports with the SEC's goals in implementing the whistleblower program" by encouraging individuals to report misconduct internally in appropriate circumstances and reduces the risk of jeopardizing investor-protection and law-enforcement benefits.[51]

II. AMBIGUITY CALLS FOR *CHEVRON* ANALYSIS

Many courts have tackled the question whether the DFA protects internal whistleblowers who do not report to the SEC, and two competing schools of thought have emerged.[52] The majority have deemed the DFA's whistleblower-protection provision as ambiguous and deferred to the SEC's Rule under the *Chevron* doctrine.[53] However, a minority of courts found that Rule 21F(a)(6) and Section 21F(h)(1)(A)(iii) of the DFA conflict, and that the term 'whistleblower' is unambiguous; and therefore, a whistleblower must report to the SEC in order to receive protection under the DFA.[54]

When reviewing a statute that an agency administers, a court must begin a *Chevron* two-step analysis.[55] First, the court must determine whether Congress has spoken directly on the precise question at issue.[56] If Congress intent is clear, the inquiry ends there.[57] If not, the court must determine whether the agency's "answer is based on a permissible construction of the statute."[58] If so, the "court may not

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[46] *Interpretation of the SEC's Whistleblower Rules Under Section 21f of the Securities Exchange Act of 1934*, Release No. 34-75592 (August 7, 2015) (to be codified at 17 C.F.R. pt. 241), at 1.
[47] *Interpretation of the SEC's Whistleblower Rules*, *supra* note 46.
[48] *Id.* at 2.
[49] *Id.*
[50] *Id.* at 3.
[51] *Id.*
[52] *Berman*, 801 F.3d at 153.
[53] *Id.*
[54] *Id. See generally Asadi*, 720 F.3d 620.
[55] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 84 (1984).
[56] *Chevron*, 467 U.S. at 84.
[57] *Id.*
[58] *Id.*

substitute its own construction of the statutory provision" but must defer to the agency's interpretation.[59]

A narrow reading of the term 'whistleblower' that requires an attorney or auditor to report to the SEC before disclosing the fraud internally creates a conflict between securities laws because it would either require specific categories of whistleblowers to breach SEC rules and other securities laws or be denied DFA protection.[60] *Berman* noted that there are categories of whistleblowers, such as attorneys and auditors, who cannot report potential fraud to the SEC until after they have reported the wrongdoing to their employer under the SEA, other provisions of SOX, and SEC-implemented Attorney Standards.[61] Subsection § 78j-1 of the SEA requires an auditor to report to the board of directors if the company officers do not take reasonable remedial action, and permits an auditor to report "illegal acts to the [SEC] only if the board or management fails to take appropriate remedial action."[62] If subdivision (iii) requires reporting to the SEC, then its reference to SOX anti-retaliation provisions would not protect an auditor under the DFA because the auditor must wait for the company's response to internal reporting before reporting to the SEC, and the employer would almost always retaliate before the auditor could report to the SEC.[63]

The phrase "to the Commission," with a literal and narrow interpretation to require reporting to the SEC for DFA protection, also renders subsections (i) and (ii) of the DFA superfluous.[64] Admittedly, the broad definition which does not require reporting to the SEC effectively reads the phrase out of the definition of whistleblower when Section 21F(a)(6) applies to subsection (iii).[65] However, a contrary interpretation would render subsection (i)'s prohibition for employer retaliation against a whistleblower "in providing information to the Commission in accordance with this Section" as surplusage because the only people who can be considered whistleblowers are those who provide information to the SEC.[66] Given that subsection (iii) was added to the DFA at the last minute, it is likely that Congress did not notice the conflict between the two older subsections.[67] Thus, there is sufficient ambiguity with either interpretation to defer to the SEC's 2015 clarification of the DFA.[68]

Under the second step of *Chevron*, the Supreme Court should have ruled that SEC Rule 21F-2(b)(1) was a reasonable construction of the DFA for three reasons.[69] First, the SEC's interpretation is reasonable because it promotes the

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[59] *Somers*, 119 F. Supp. 3d at 1097 (*citing* Navarro v. Encino Motorcars, LLC, 780 F.3d 1267, 1273 (9th Cir. 2015)).
[60] *Berman*, 801 F.3d at 151.
[61] *Id.*
[62] *Id. See also* 15 U.S.C. §§ 78uj-1, § 78uj-1(b)(1)(B), 78uj-1(b)(2), 78uj-1(b)(3)(B) (2012).
[63] *Berman*, 801 F.3d at 151.
[64] *Somers*, 119 F. Supp. 3d at 1102.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 1103, (*citing* H.R. 4173, 111th Cong. (2010) (last version of Dodd–Frank before passage did not contain relevant subsection)).
[68] *Somers*, 119 F. Supp. 3d at 1102.
[69] *Id.* at 1105.

DFA's overall legislative purpose of transparency and accountability within the financial system.[70] Second, the SEC's interpretation resolves the dilemma attorneys and auditors face under conflicting securities regulatory requirements.[71] Third, the broad definition of "whistleblower" encourages internal reporting of securities violations and discourages accounting fraud.[72]

III. CIRCUIT SPLIT AND THE SUPREME COURT'S RULING IN *SOMERS*

A. Fifth Circuit's Interpretation

In *Asadi v. G.E. Energy (USA), L.L.C.*, Asadi reported to his supervisor, but not the SEC his belief that GE Energy violated the Foreign Corrupt Practices Act (FCPA) by hiring a woman close to a senior Iraqi official to negotiate a lucrative joint venture agreement.[73] As a result, Asadi received a surprisingly negative performance review, G.E. pressured Asadi to resign, and fired Asadi when he refused.[74] Asadi alleged that G.E. violated the DFA whistleblower-protection provision by terminating him for his internal reports of the possible FCPA violation.[75] Asadi argued that Section 21(h)(1)(A)(iii) of the DFA should be interpreted to protect whistleblowers who make disclosures protected under SOX, even if whistleblowers do not report the information to the SEC.[76] The district court granted G.E.'s motion to dismiss for failure to state a claim.[77]

On appeal, the Fifth Circuit rejected Asadi's argument and determined that the text of the DFA's whistleblower protection provision was unambiguous.[78] Specifically, the Fifth Circuit held that under the DFA's plain language, it only protected whistleblowers who provide the SEC with information relating to securities law violations. The Court believed the three categories listed in Section 21(h)(1)(A) of the whistleblower-protection provision specify the types of protected activity in a whistleblower protection claim, but do not define individuals that constitute whistleblowers.[79]

In determining that the language was unambiguous, the Fifth Circuit reasoned that the provisions of Section 21(h)(1)(A) specifically stating ". . . to the Commission" should be interpreted literally and that the language requires reporting to the SEC for retaliation protection.[80] The Fifth Circuit found that there are no conflicting definitions of "whistleblower," and that individuals who take actions falling within the third category of the whistleblower protection provision

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[70] *Id.* at 1104.
[71] *Bergman*, 801 F.3d at 152.
[72] *Somers*, 119 F. Supp. 3d at 1105.
[73] *Asadi*, 720 F.3d at 620.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 624.
[77] *Id.* at 621.
[78] *Id.*
[79] *Id.* at 625.
[80] *Id.*

fail to qualify under the narrow definition.[81] Additionally, the Fifth Circuit held that the interplay between Section 21(a)(6) and Section 21(h)(1)(A)(iii) does not render the latter DFA section superfluous because the third category of protected activity of the DFA refers to and is protected under 18 U.S.C. § 1514A of the SOX anti-retaliation provision.[82] Further, the Fifth Circuit determined that Asadi's construction of the DFA's whistleblower-protection provision is problematic because it would render the SOX anti-retaliation provision moot for practical purposes since it is unlikely that an individual would choose to raise a SOX anti-retaliation claim instead of a DFA whistleblower-protection claim.[83]

The Fifth Circuit refused to defer to the SEC's Rule 21F-2(b)(1), which adopts Asadi's interpretation of the DFA whistleblower-protection provision.[84] The Court acknowledged that Rule 21F-2(b)(1) broadly interpreted "whistleblower" to cover eligibility for an award under the DFA[85] However, the Fifth Circuit ruled that the plain language of Section 21 does not support the broad interpretation because of Congress's supposedly unambiguous definition of whistleblower in Section 21(a)(6).[86] The Court reasoned that because Congress specified that a whistleblower, not merely an individual, is protected from an employer's retaliation, Congress intended that individuals must report information to the SEC to receive the DFA's whistleblower protections.[87] Finally, the Fifth Circuit held that the two SEC regulations concerning the DFA's whistleblower-protection provision are inconsistent as to the definition of the term whistleblower and thus do not "reasonably effectuate Congress's intent."[88]

B. The Second and Ninth Circuits Create a Split

The Second Circuit disagreed with the Fifth Circuit's interpretation of the DFA's whistleblower protection provision and created a circuit split in *Berman v. Neo@Ogilvy L.L.C.*, which highlighted the large number of district courts in disagreement about the issue.[89] In *Berman*, Finance Director Daniel Berman reported internally that his employer Neo@Ogilvy L.L.C. (Neo) and its parent group's accounting practices were fraudulent and violated Generally Accepted Accounting Principles (G.A.A.P.), SOX, and the DFA.[90] Berman did not report the violations to the SEC during his employment and was subsequently terminated.[91] Berman provided information to the SEC in October 2013, after the limitations period on one of his SOX claims ended.[92] Berman sued Neo and the parent group,

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[81] *Asadi*, 720 F.3d at 626.
[82] *Id.* at 627.
[83] *Asadi*, 720 F.3d at 629.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 630.
[87] *Id.*
[88] *Id.* (*quoting* Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007)).
[89] *Berman*, 801 F.3d at 153.
[90] *Id.* at 149.
[91] *Id.*
[92] *Id.*

alleging that he was discharged in violation of the whistleblower protection provisions of the DFA.[93] The Magistrate Judge filed a Report & Recommendation that Berman was entitled to be considered a whistleblower under the DFA and dismissed the retaliation claims.[94] The District Court disagreed and dismissed the entire complaint, finding that the definition of "whistleblower" in Section 21F(a)(6) and 21F(h)(1)(A)(iii) of the DFA provided whistleblower protection only to those who provided information of the alleged violation to the SEC[95]

On appeal, the Second Circuit began by asking whether the whistleblower protection provision in the DFA applies to SOX, or "whether the answer to that question is sufficiently unclear to warrant *Chevron* deference to the [SEC]'s regulation."[96] First, the Court held because there is no conflict between the SEC notification requirement in the DFA's whistleblower protection provisions, an employee who suffers retaliation after reporting potential securities law violations to the employer and the SEC is eligible for both DFA and SOX remedies.[97] However, the Court still found there was a conflict in the definition of 'whistleblower' under 21F of the DFA, and ruled that applying the SEC reporting requirement to employees seeking SOX remedies pursuant to 21F(h)(1)(A)(iii) would render that subdivision extremely limited for various reasons.[98]

The Second Circuit reasoned there are not likely many whistleblowers who will report to both their employer and the SEC because reporting to the government bears a "substantial risk of retaliation."[99] Further, the Court explained that whistleblowers, such as attorneys and auditors, cannot report wrongdoing to the SEC until they have reported it to their employers under the SEC's Standards of Professional Conduct and SOX, and concluded that the SEC reporting requirement would render 21F(h)(1)(A)(iii) "extremely limited" in scope.[100] The Second Circuit then examined the legislative history of SOX and the DFA to determine if Congress intended to accomplish specific reporting requirements in 21F(h)(1)(A), but conceded that "unfortunately that inquiry yields nothing."[101] The Court then looked to disagreement over the whistleblower protection provision in other courts and found that "a far larger number of district courts have deemed the statute ambiguous and deferred to the SEC's rule."[102]

Lastly, the Second Circuit examined the definition of 'whistleblower' in the DFA, and used methods of statutory interpretation to determine the functionality of the term as applied to the later-added subsection 21F(h)(1)(A).[103] The Court was not persuaded by a narrow interpretation that would render the DFA's language

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[93] *Id.*
[94] *Berman*, 801 F.3d at 149.
[95] *Id.*
[96] *Id.* at 150.
[97] *Id.*
[98] *Id.* at 151.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 153.
[103] *Id.* at 154.

superfluous because the legislative process is likely to insert a new provision like subdivision (iii) that does not fit together neatly with the definition of 'whistleblower' under the DFA.[104] The Court doubted that the drafters who added subdivision (iii) would expect it to have the "extremely limited scope" if restricted by the SEC reporting requirement, but held that the tension in the whistleblower definition under 21F(a)(6) and limited protection provided by 21F(h)(1)(A) is sufficiently ambiguous for *Chevron* deference to the SEC's reasonable interpretation of the statute.[105] The Court then held, under SEC Rule 21F-2(b)(1), Berman was entitled to pursue DFA remedies for his alleged wrongful termination and reversed and remanded.[106] The dissent sided with the Fifth Circuit in *Asadi*.[107]

C. Digital Realty Trust, Inc. v. Somers: The Supreme Court Strikes Back

The Northern District of California contributed to the judicial split in *Somers v. Digital Realty Trust, Inc*.[108] In *Somers*, Digital Realty terminated Paul Somers for his internal reports to management of potential securities violations under SOX, which Somers did not bring to the SEC.[109] Somers alleged that he was wrongfully terminated and argued that he was entitled to whistleblower protection under the DFA. Digital Realty argued that Somers did not qualify as a whistleblower under the DFA because of his failure to report to the SEC[110] The lower Court joined the majority of district courts holding that the rule is entitled to *Chevron* deference, determined there were sufficient facts to establish a claim, and denied Digital Realty's motion to dismiss.[111] The California Court found that the broad interpretation of 'whistleblower' promotes the DFA's purpose of improved accountability, stability, and transparency in the financial system.[112] The Court also found that the SEC's interpretation is beneficial public policy because it encourages internal reporting of securities law violations.[113] The Ninth Circuit Court of Appeals affirmed and held that the SEC resolved any ambiguity in the term whistleblower sufficient for *Chevron* deference.[114] The Supreme Court granted certiorari on the controversy and is expected to rule on the DFA whistleblower protection issue soon.[115]

Nonetheless, the Supreme Court reverted to a narrower interpretation of the DFA, determining that the anti-retaliation provisions do not extend to an

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[104] *Id.* at 154.
[105] *Berman*, 801 F. 3d at 155.
[106] *Id.*
[107] *Id.*
[108] *Somers v. Digital Realty Tr., Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015), *aff'd*, 850 F.3d 1045 (9th Cir.), *reversed and remanded*, 138 S.Ct. 767 (2018).
[109] *Somers*, 119 F. Supp. 3d at 1091.
[110] *Id.* at 1094.
[111] *Id.* at 1108.
[112] *Id.* at 1104.
[113] *Id.* at 1105.
[114] Somers v. Digital Realty Tr. Inc., 850 F.3d 1045, 1050 (9th Cir.), *reversed and remanded*, 138 S.Ct. 767 (2018).
[115] *Id.*

"individual who has not provided information relating to a violation of the securities laws to the Commission."[116] Said analysis from the Court follows an explicit definition of an individual who qualifies as a whistleblower which, according to their judgement, removes any ambiguity from the provision's scope.[117] As Somers did not provide information to the Commission before his termination, as pursuant to § 78u-6(a)(6), the Court concluded that he did not qualified as a whistleblower at the time Digital Realty Trust's retaliation took placed.[118] Thus, the Court sustained that it must expressively enforce the language of the statute, even if it may limit the number of individuals qualifying for protection under clause (iii).[119]

IV. BENEFITS OF A BROADER PROTECTION OF DODD-FRANK WHISTLEBLOWERS

There was a correct speculation that the Supreme Court's decision could be a landmark decision to end *Chevron* deference to administrative agencies.[120] Justice Gorsuch famously expressed his skepticism of the *Chevron* doctrine in his concurrence in *Gutierrez-Brizuela v. Lynch*, stating that the doctrine permits "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[121] Gorsuch called the *Chevron* doctrine "no less than a judge-made doctrine for the abdication of judicial duty."[122] Even though the Supreme Court went with a narrow definition, and did not apply the *Chevron* deference doctrine to the SEC rules and provisions, there still are practical considerations concerning whistleblowers under both SOX and the DFA that support the SEC's current interpretation.[123] When weighing the competing interpretations of the DFA, the Supreme Court should have considered the benefits of both the SOX and DFA's whistleblower-protection provisions and rule that reporting to the SEC is an unnecessary burden on wrongfully terminated employees that is inconsistent with the DFA's purpose to protect investors and the public from financial industry fraud.[124]

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[116] *Somers*, 138 S. Ct at 772.
[117] *Somers*, 138 S. Ct at 777.
[118] *Id.* at 778.
[119] *Id.* at 780.
[120] *See, e.g.*, Alison Frankel, *Chevron deference landmine lurks in new brief in SCOTUS whistleblower case*, Reuters, (Nov. 9, 2017), https://www.reuters.com/article/legal-us-otc-chevron/chevron-deference-landmine-lurks-in-new-brief-in-scotus-whistleblower-case-idUSKBN1D92YZ (last visited Jun. 16, 2018); Kevin LaCroix, *Supreme Court to Review Whether Dodd-Frank Anti-Retaliation Provisions Protect Internal Whistleblowers*, THE D&O DIARY, (Jun. 28, 2017), https://www.dandodiary.com/2017/06/articles/employment-practices-liability-2/supreme-court-review-whether-dodd-frank-anti-retaliation-provisions-protect-internal-whistleblowers/ (last visited Jun. 16, 2017).
[121] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016).
[122] *Id.* at 1152.
[123] *Asadi*, 720 F.3d at 628-29; *Somers*, 119 F. Supp. 3d at 1095–96.
[124] *Id.*

A. A Broad Interpretation of "Whistleblower" Would Not Render SOX's Anti-Retaliation Provisions Moot

The Fifth Circuit in *Asadi* misguidedly believed that the broadened definition of 'whistleblower' would render the SOX anti-retaliation provision and its administrative scheme moot.[125] Admittedly, it is unlikely that an individual would choose to raise a SOX anti-retaliation claim instead of a DFA whistleblower-protection claim because the remedies and procedures of a SOX anti-retaliation claim significantly differ in three main ways.[126] First, the DFA whistleblower-protection provision gives a greater monetary incentive for whistleblowers to come forward because it allows for recovery of two times back pay, whereas SOX provides only for back pay without a multiplier.[127] Second, claimants seeking refuge under SOX must file a complaint with the Secretary of Labor and may pursue a claim only if the Secretary of Labor has not issued a final decision within 180 days.[128] DFA claimants do not need to jump through the same administrative hoops to file for a remedy.[129] Third, the DFA whistleblower-protection provision has a much longer statute of limitations for claimants seeking a remedy.[130] The DFA's statute of limitations allows between six and ten years to file suit from the date of the alleged violation, whereas SOX claimants must file within 180 days after the alleged violation date or 180 days after the employee became aware of the violation.[131]

However, the Fifth Circuit mistakenly assumed that the advantages of a broad 'whistleblower' interpretation would render SOX whistleblower remedies irrelevant.[132] *Somers* highlights two reasons why a claimant might choose to file a claim under SOX's whistleblower provisions instead of or in addition to a DFA claim.[133] First, an individual may prefer the administrative forum provided in SOX because the OSHA, rather than the plaintiff, presents its findings to an administrative law judge.[134] This process would likely be significantly less costly and stressful for whistleblowers as opposed to filing an action in federal court.[135] Second, SOX allows plaintiffs to recover noneconomic compensatory damages, such as emotional distress and reputational harm, whereas the DFA does not.[136] Wrongfully terminated whistleblowers eligible for large amounts of damages for

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[125] *Asadi*, 720 F.3d at 628–29.
[126] *Id.*
[127] *Somers*, 119 F. Supp. 3d at 1095 (*comparing* 15 U.S.C. § 78u-6(h)(1)(c) and 18 U.S.C. § 1514A(c) (2012)).
[128] *Id. See* 18 U.S.C. §1514A(b)(1) (2012).
[129] *Id. See* 15 U.S.C. 78u-6(h) (2012).
[130] *Id.*
[131] *Id. See also* 15 U.S.C. 78u-6(h)(1)(B)(iii) and 18 U.S.C. § 1514A(b)(2)(D).
[132] *Asadi*, 720 F.3d at 629.
[133] Somers v. Digital Realty Tr. Inc., 850 F.3d 1045, 1050 (9th Cir. 2017).
[134] *Id.*
[135] *Id.*
[136] *Id.*

emotional distress or reputational harm will continue to find SOX's anti-retaliation provisions appealing.[137]

Because of the likely resource imbalance between the employer and the wrongfully terminated whistleblower, in addition to the "lack of recourse available after retaliatory actions have been taken against them," whistleblowers and their attorneys should have the option to choose which remedy is best under the circumstances.[138] There have been at least three occasions in which DOL Administrative Law Judges ruled that SOX's anti-retaliation provisions do not protect whistleblower employees working outside of the United States.[139] It is left undecided by the Supreme Court's decision in *Somers* if a wrongfully terminated employee would be left remediless under SOX if the case were presented to the DOL simply because the employee worked overseas.[140] This potentially leaves employees like Khaled Asadi, who worked as GE's Iraq Country Executive in Jordan during his employment, without recourse under SOX's anti-retaliation provisions if the case were heard before a DOL Administrative Law Judge because of an overseas assignment.[141] Therefore, SOX and the DFA serve concurrent purposes to protect whistleblowers and a broadened definition of the term 'whistleblower' is essential to assure that no whistleblowing victim of employer retaliation will go remediless.

B. Public Policy Considerations

The SEC emphasized that internal reporting should be encouraged, and it designed the monetary relief of the DFA to incentivize internal whistleblowing to comport with the overall goals of the whistleblower program.[142] The SEC also launched a variety of initiatives to encourage companies to self-report potential securities fraud violations to further the goals of the whistleblower program.[143] When the SEC proposed Rule 21F, corporations suggested that the SEC condition its award eligibility on the use of an internal reporting system because "effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of noncompliance."[144] They believed

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[137] *Somers*, 850 F.3d at 1050.

[138] Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 437–38 (2012).

[139] Carnero v. Boston Sci. Corp., 433 F.3d 1, 17–18 (1st Cir. 2006); (*citing* Carnero v. Boston Scientific Corp., 2004-SOX-22 (OSHA Reg'l Adm'r) (Dec. 19, 2003); Concone v. Capital One Fin. Corp., 2005-SOX-6 (ALJ) (Dec. 3, 2004); Ede v. Swatch Group, 2004–SOX–68, 69 (ALJ) (Jan. 14, 2005)).

[140] Desai, *supra* note 138, n.72.

[141] *Asadi*, 720 F.3d at 621.

[142] 17 C.F.R. §§ 240.21 F-6(a)(4), 240.21 F-4(c)(3), 240.21 F-4(b)(7).

[143] Johnson *et al*, *Don't Blow It: Avoiding Pitfalls under the SEC's Whistleblower Regime*, BUSINESS LAW TODAY (Nov. 1, 2017), https://businesslawtoday.org/2017/11/dont-blow-it-avoiding-pitfalls-under-the-secs-whistleblowerregime/?utm_source=newsletter&utm_medium=email&utm_campaign=november17_articles (last visited Jun. 16, 2018). *See* section 3. "The Whistleblower Program's Impact on Whether to Self-Report Potential Violations" in article.

[144] Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. CIN. L. REV. 451, 454 (2016).

that without internal compliance, whistleblowers would attempt to take advantage of the situation for monetary reasons by notifying the SEC for a reward.[145] A whistleblower's participation in an employer's internal compliance procedures is a "plus-factor" when determining the amount of an award under the DFA.[146] The broadened interpretation of 'whistleblower' under the DFA provides employment retaliation protections for individuals who report internally within a company, which has the authority to alter or stop the misconduct, and perhaps avoids discouraging individuals from reporting misconduct in the first place.[147] Individuals who do not report to the SEC are just as protected as those who do under the broadened definition of whistleblower, so there is no disincentive for employees to report internally.[148]

The Fifth Circuit's holding in *Asadi* that whistleblowers must provide information to the SEC to obtain the DFA's protection is counterproductive to the DFA's purpose of protecting investors and consumers because it discourages employees from resolving securities fraud internally, which denies the entity an opportunity mitigate the damage of the alleged fraud or change practices to prevent any future fraud.[149] Instead, the Fifth Circuit's holding requires an SEC investigation as the sole means of conflict resolution, which entails a costly governmental intervention and undermines the entire internal resolution process.[150] Further, any proven fraud, whether or not material, that involves management or employees with a significant amount of oversight must be disclosed in the company's public filings.[151] Whistleblowers who do not report securities fraud to the SEC but instead report internally act consistently with DFA's purpose of transparency and protect shareholders who consider fraud to be material information when making investing decisions.[152]

The DFA's underlying purpose to increase the financial system's accountability and transparency is no better served by the Fifth Circuit's narrow interpretation of 'whistleblower.'[153] The SEC filed an amicus brief in *Somers* stating that under the Fifth Circuit's SEC reporting requirement scenario, "employers would not know that a report was made to the Commission, and clause (iii) would have no appreciable effect in deterring employers from taking adverse employment action for internal reports or to the other disclosures listed in clause (iii)."[154] The *Somers* Court agreed, and also found that the Fifth's Circuit's interpretation requiring a report to the SEC would be "utterly ineffective" at preventing

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[145] Claire Sylvia & Stabile, *supra* note 144.
[146] *See* 17 C.F.R. §§ 240.21 F-6(a)(4), 240.21F-4(c)(3), 240.21F-4 (b)(7) (2017).
[147] *Id.*
[148] *Id.*
[149] *Id. See generally Asadi*, 720 F.3d 620.
[150] *Id.*
[151] Elizabeth Tippett, *The Promise of Compelled Whistleblowing: What the Corp. Governance Provisions of Sarbanes Oxley Mean for Emp. Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 32 (2007); *see also* 17 C.F.R. § 229.601.
[152] *Id.*
[153] *Somers*, 119 F.Supp.3d at 1104, ("It is relevant to observe that the Fifth Circuit's resolution of that conflict—reading subsection (iii) narrowly to require a report to the Commission—seems at odds with public policy underlying the DFA.").
[154] *Somers*, 119 F.Supp.3d at 1104 *(citing Connolly*, 2014 WL 5473144, at 6).

employers from wrongfully terminating whistleblowers.[155] Even the hypothetical posed by the Fifth Circuit in *Asadi* — where a mid-level manager who discovered a securities law violation and reported the violation to the SEC before his company's CEO — acknowledged the reality that a CEO would be unaware of his mid-level manager's disclosure to the SEC and terminate the manager anyway.[156] A broadened interpretation of the term 'whistleblower' potentially deters retaliatory behavior because it effectively puts corporations on notice that an employee who discovers a securities law violation is protected under the DFA. A narrow interpretation that requires an employee to report to the SEC for DFA protection is inferior because it enables corporations to wage bets through retaliation as to whether an employee who discovers securities fraud would both successfully report and be eligible for a remedy.

A recent study found that the anti-retaliation provision of SOX "was not enough to incentivize employee whistleblowers to risk their careers" and that the introduction of the DFA whistleblower protection provisions reduced the probability of accounting fraud by 7% within firms.[157] Further, a 2015 study reported that 92% of whistleblowers turn to somebody inside the company when they first report misconduct.[158] The SEC's 2016 Annual Report also indicated that 80% of whistleblower award recipients who were current or former employees of the company they reported about raised their concerns internally or understood that the relevant compliance personnel knew of the violations before reporting to the SEC.[159] Thus, a strict reading of the term 'whistleblower' that requires reporting to the SEC for whistleblower protection would not deter employer retaliation, is not as effective at fraud deterrence, and appears contrary to the public policy of encouraging the reporting of securities violations and otherwise increasing transparency in the financial system.[160]

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[155] *Somers*, 119 F.Supp.3d at 1104 *(citing Connolly*, 2014 WL 5473144, at 6).

[156] *Asadi*, 720 F.3d at 627–28.

[157] Heemin Lee, *Does the Threat of Whistleblowing Reduce Accounting Fraud?*, at 12 (Oct. 25, 2017) https://knowledge.uchicago.edu/bitstream/handle/11417/595/Lee_uchicago_0330D_13793.pdf?sequence=1&isAllowed=y (last visited Jun. 17, 2018).

[158] Johnson *et al*, *supra* note 143 ("One 2015 study reported that 'the average whistleblower is someone who most likely went to the company first. A staggering 92% of reporters turn to somebody inside the company when they first report misconduct'.").

[159] *Id.*

> [T]he SEC's 2016 Annual Report indicates that '[o]f the award recipients who were current or former employees of the entity, approximately 80% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.

[160] *Somers*, 119 F.Supp.3d 1088, 1104 (N.D. Cal. 2015).

C. A Narrow Interpretation of 'Whistleblower' is Inconsistent with Congress's Intent

A recent article argues that there are two critical differences between the Supreme Court's *Burwell v. King* analysis and subsection (iii) that do not support a broad interpretation of "whistleblower" under the DFA.[161] First, the article argues that in *King*, the Supreme Court "had access to substantial information as to Congress' actual intentions when it created the statutory provision at issue," whereas subdivision (iii) of the DFA was added late in the legislative process without any explanation of its specific purpose, and therefore one cannot decipher Congress's actual intentions in the provision as a result.[162] This argument fails to acknowledge that the Supreme Court also held in *King v. Burwell that* "the court's duty is to construe statutes, not isolated provisions" and further added "[a statutory] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . .because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[163]

Looking to the statute's plain language, one could easily infer that Congress intended the DFA section titled "Protection of whistleblowers" to protect whistleblowers under the DFA, not leave them without remedy under the DFA.[164] Further, section 78u-6(j) explicitly grants the SEC authority to issue rules and regulations "as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section."[165] Although there is no direct statement explaining the legislative purpose of subsection (iii) from Congress at the time of that specific subsection's implementation, the SEC did issue two separate rules stating that employees who do not report to the SEC before whistleblowing nevertheless qualify as whistleblowers within the meaning of Section 21F and the anti-retaliation protections still apply.[166] Members of Congress also made apparent that the purpose of the DFA is to encourage the reporting of securities violations and improve accountability in the financial system. That public policy is better served by a broad whistleblower interpretation.

Second, the article argues that the Supreme Court's holdings in *King v. Burwell* and *Utility Air Regulatory Group v. E.P.A.* are limited to scenarios in which a narrow interpretation would cause disastrous consequences that Congress did not intend and that whistleblowers who do not report to the SEC still have SOX remedies available.[167] However, Congress could not have intended that attorneys and auditors be required to break other securities laws in order to comply with the

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[161] *See, e.g.*, Hugo Farmer, *How Do You Qualify as a Whistleblower Under the Dodd-Frank Act? Blowing the Whistle on a Circuit Split*, 36 JOURNAL OF LAW AND COMMERCE, FORTHCOMING 101 (2018).
[162] *Id.*
[163] King v. Burwell, 135 S.Ct. 2480, 2488 (2015) (*citing* United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988)).
[164] 15 U.S.C. § 78u-6(h) (2012).
[165] *Id.* § 78u-6(j) (emphasis added).
[166] *Interpretation of the SEC's Whistleblower Rules*, *supra* note 46.
[167] Farmer, *supra* note 161.

SEC reporting requirement.[168] Additionally, there are instances where DOL Administrative Law Judges determined that whistleblowers who work overseas and do not report to the SEC are left without a remedy.[169] Therefore, a narrow interpretation that requires whistleblowers to report to the SEC appears contrary to Congress's intent upon enacting the DFA's whistleblower protection provision because the narrow interpretation imposes a conflicting legal conundrum on attorneys and auditors and possibly leaves employee victims of retaliation remediless.

CONCLUSION

Whistleblowers who are victims of employment retaliation should not be required to report their suspected wrongdoing to the SEC in order to receive protection under the DFA. If an employee must report securities fraud to the SEC in order to receive whistleblower protection, he or she will be forced to undermine their employer's internal reporting measures and are incentivized to take advantage of discovered wrongdoings for a monetary reward.[170] An employee who suspects securities fraud should be encouraged to report the wrongdoing to the proper supervisory authority within the company and, if the situation is not redressed, the employee should bring the situation to management and the board of directors' attention, fot they are in the best position to ameliorate the problem.[171] Employers aware that any employee who discovers a securities law violation is statutorily protected by the DFA whistleblower-protection program, may be deterred from retaliating against the employee, whereas now, with the Supreme Court decision in *Somers*, employers fear no burden under the DFA for terminating whistleblowers who have not reported to the SEC.[172]

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[168] *Berman*, 801 F.3d at 155.
[169] *See* Carnero v. Boston Sci. Corp., 433 F.3d 1, 17–18 (1st Cir. 2006); *also see* Desai, *supra* note 138, n.72.
[170] Sylvia & Stabile, *supra* note 144.
[171] *Id.*
[172] *Somers*, 138 S.Ct. 767.