

2018

The SEC's Forgotten Power of Exemption: How the SEC Can Receive Deference in Favor of Internal Whistleblowers Even When the Text Is Clear

Lesley Chen

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Lesley Chen, *The SEC's Forgotten Power of Exemption: How the SEC Can Receive Deference in Favor of Internal Whistleblowers Even When the Text Is Clear*, 67 Emory L. J. 1043 (2018).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol67/iss5/3>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

THE SEC'S FORGOTTEN POWER OF EXEMPTION: HOW THE SEC CAN RECEIVE DEFERENCE IN FAVOR OF INTERNAL WHISTLEBLOWERS EVEN WHEN THE TEXT IS CLEAR

ABSTRACT

In 2008, the United States suffered its worst financial crisis since the Great Depression. This crisis was precipitated by corporate fraud committed by some of the largest Wall Street firms. Congress responded by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) to improve accountability and transparency in the financial system. Recognizing the importance of whistleblowers in exposing corporate fraud, Congress included an anti-retaliation provision in Dodd-Frank, which was designed to protect whistleblowers from retaliation after coming forward with evidence of corporate wrongdoings.

*However, until recently, it was unclear who qualified as a whistleblower under this provision. On the one hand, the statute expressly defines "whistleblower" as an individual who discloses corporate wrongdoing externally to the Securities and Exchange Commission (SEC), and the anti-retaliation provision prohibits employers from retaliating against a "whistleblower" who engaged in various protected activities. On the other hand, the anti-retaliation provision lists three categories of protected activities, one of which does not require disclosure to the SEC. The SEC attempted to clarify the scope of anti-retaliation protection by creating a rule that included internal whistleblowers as "whistleblowers" for anti-retaliation purposes, regardless of whether they satisfied the requirement of reporting "to the Commission." Rather than resolving the issue, the SEC's rule introduced a new and related question: Should a court defer to the SEC's rule under the two-step framework established by the U.S. Supreme Court in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*? This issue created a circuit split, primarily derived from divergent court interpretations of the anti-retaliation provision's text. Recently, in *Digital Realty Trust, Inc. v. Somers*, the Supreme Court resolved this split by applying *Chevron* and holding that one must disclose to the SEC to qualify as a "whistleblower" under Dodd-Frank. The Supreme Court reasoned that Dodd-Frank explicitly defined "whistleblower" as requiring disclosure to the SEC, leaving no room to defer to the SEC's interpretation.*

The Supreme Court, however, left open the question of whether the SEC could nevertheless relieve internal whistleblowers from this requirement through the SEC's general exemptive authority, a power explicitly granted by Congress that allows the SEC to broadly exempt any person or class from Dodd-Frank requirements. This Comment surveys existing case law to highlight how the SEC may still extend Dodd-Frank anti-retaliation protection to internal whistleblowers while conforming to Chevron and the recent Supreme Court ruling. The SEC can accomplish this by exempting internal whistleblowers from disclosing to the SEC. Ultimately, this Comment argues that the SEC can advance Dodd-Frank's goals of expanding whistleblower protections by exercising its forgotten general exemptive authority to protect internal whistleblowers, even if Dodd-Frank's text clearly requires disclosure to the SEC.

INTRODUCTION	1046
I. BACKGROUND OF THE SARBANES-OXLEY ACT, THE DODD-FRANK ACT, AND THE SEC'S REJECTED INTERPRETATION OF "WHISTLEBLOWER"	1050
A. <i>The Sarbanes-Oxley Act of 2002</i>	1050
B. <i>The Dodd-Frank Act of 2010</i>	1053
C. <i>The SEC's Invalidated Rule</i>	1054
D. <i>The SEC's General Exemptive Authority</i>	1055
II. COURT DECISIONS APPLYING <i>CHEVRON</i> TO "WHISTLEBLOWER" PROTECTION	1059
A. <i>The Berman Approach: Dodd-Frank's Text Is Ambiguous, So the SEC's Rule Is Entitled to Deference</i>	1060
B. <i>The Asadi and Bussing Approaches: The SEC Is Not Entitled to Deference Under Chevron Step One</i>	1063
1. <i>The Asadi Approach: Dodd-Frank's Text Is Unambiguous That an Individual Must Report to the SEC for Protection</i>	1063
2. <i>The Bussing Approach: Dodd-Frank's Text Is Unambiguous That an Individual Does Not Need to Report to the SEC for Protection</i>	1064
C. <i>The U.S. Supreme Court's Decision in Somers</i>	1065
III. THE SEC SHOULD RECEIVE DEFERENCE IN LIGHT OF ITS GENERAL EXEMPTIVE AUTHORITY EVEN IF THE DODD-FRANK ANTI-RETALIATION PROVISION IS CLEAR	1066
A. <i>The SEC's New Rule Would Satisfy Chevron Step One Because the Language of the SEC's General Exemptive Authority Is Sufficiently Broad</i>	1068

<i>B. The SEC's New Rule Would Satisfy Chevron Step One Under Its General Exemptive Authority Because the Rule Is Consistent with Public Interest</i>	1071
CONCLUSION	1074

INTRODUCTION

The financial crisis of 2008 was estimated to have cost Americans more than \$12.8 trillion, including the jobs of 23.1 million Americans and the destruction of household net worth.¹ This crisis was escalated in part by corporate fraud committed by a string of Wall Street firms,² some of which were exposed by persistent whistleblowers.³

In response to the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act⁴ (Dodd-Frank) in 2010 “[t]o promote . . . financial stability by . . . improving accountability and transparency in the financial system.”⁵ Section 21F of Dodd-Frank, entitled “Securities whistleblower incentives and protection,” was drafted with the goal of strengthening the corporate-whistleblower incentives and protections of existing legislation, particularly those of the Sarbanes-Oxley (SOX) Act of 2002.⁶ To encourage whistleblowers to report securities laws violations, Dodd-Frank established a whistleblower awards program, which provides large monetary incentives to those who report securities violations under specified conditions.⁷ The Act also consists of an anti-retaliation section, which prohibits employers from retaliating against whistleblowers who report securities laws violations.⁸

However, until recently, it was unclear who qualified as a whistleblower for Dodd-Frank anti-retaliation protection. For instance, when an employee discovers corporate fraud, she typically faces two reporting routes. She could choose to first report internally by alerting a supervisor or “higher-up” within

¹ See DENNIS KELLEHER ET AL., BETTER MARKETS, THE COST OF THE WALL-STREET CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN \$12.8 TRILLION 1 (2012).

² *SEC Enforcement Actions: Addressing Misconduct That Led to or Arose from the Financial Crisis*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/spotlight/enf-actions-fc.shtml> (last modified Feb. 22, 2017) (detailing the 204 individuals and entities charged with misconduct that led to or arose from the 2008 financial crisis).

³ See Rick Rothacker, *Bank of America Whistleblower Receives \$14.5 Million in Mortgage Case*, REUTERS, May 29, 2012, 7:28 PM, <http://www.reuters.com/article/us-bankofamerica-whistleblower-idUSBRE84S1GP20120529>.

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.).

⁵ *Id.*

⁶ 15 U.S.C. § 78u-6 (2012) (codifying Dodd-Frank Wall Street Reform and Consumer Protection Act § 21F); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified in scattered sections of U.S.C.).

⁷ 15 U.S.C. § 78u-6(b) (awarding up to 30% of monetary sanctions imposed in a successful action to which a whistleblower contributes significant information).

⁸ *Id.* § 78u-6(h)(1)(a)(i)–(iii).

the company.⁹ Alternatively, she could first report externally, to someone outside of the company, such as a government regulatory agency.¹⁰ While one might think that an employee should be protected from retaliation under Dodd-Frank regardless of which route she takes, some courts have limited protection to only those who report externally.¹¹

In *Asadi v. G.E. Energy (USA), L.L.C.*,¹² the Fifth Circuit did not extend Dodd-Frank protection to a whistleblower who was fired after reporting securities violations to his supervisor instead of to the Securities and Exchange Commission (SEC), and in doing so, declined to defer to the SEC's rule,¹³ which extends protection to internal whistleblowers.¹⁴ The Sixth Circuit in *Verble v. Morgan Stanley Smith Barney, LLC* also declined to defer to the SEC's rule, but dodged the issue of the scope of protection by dismissing the case on procedural grounds (insufficient pleading).¹⁵ However, the Second Circuit's recent decision in *Berman v. Neo@Ogilvy LLC*¹⁶ created a circuit split by deferring to the SEC's rule.¹⁷ On February 21, 2018, the Supreme Court ultimately resolved the split and declined to defer to the SEC's rule, holding that Dodd-Frank's text explicitly required a whistleblower to report to the SEC to qualify for anti-retaliation protection, leaving no room for the SEC's interpretation.¹⁸ The Supreme Court did not discuss whether the SEC may nevertheless exempt internal whistleblowers from this requirement of reporting to the SEC because this precise issue was never raised by the parties or discussed in any case law on Dodd-Frank's anti-retaliation provision.¹⁹ This would be an appropriate way for the SEC to still provide internal

⁹ Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 548 (2004).

¹⁰ *Id.* This Comment will refer to any reports made to the Securities and Exchange Commission (SEC) as "external whistleblowing," and any other reports, including those made to higher-ups within the company or to law enforcement, as "internal whistleblowing."

¹¹ *See, e.g., Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621, 630 (5th Cir. 2013).

¹² *Id.*

¹³ This rule will be discussed in detail in section I.C. *See infra* notes 63–68 and accompanying text.

¹⁴ *Asadi*, 720 F.3d at 621–30. This Comment will refer to this decision as the "Asadi approach."

¹⁵ 676 Fed. App'x 421, 425–26 (6th Cir. 2017). The whistleblower in *Verble* was the first to petition the Supreme Court for a writ of certiorari to clarify whether Dodd-Frank should protect internal whistleblowers, but the Supreme Court declined to grant certiorari. *Verble v. Morgan Stanley Smith Barney, LLC*, 137 S. Ct. 1348 (2017) (mem.).

¹⁶ 801 F.3d 145 (2d Cir. 2015).

¹⁷ *Id.* at 155. This Comment will refer to this decision as the "Berman approach." The *Berman* approach was recently followed by the Ninth Circuit in *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1050 (9th Cir. 2017).

¹⁸ *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781–82 (2018).

¹⁹ *See id.*; Brief for Respondent, *Somers*, 138 S. Ct. 767 (No. 16-1276); Reply Brief for Petitioner, *Somers*, 138 S. Ct. 767 (No. 16-1276).

whistleblowers with Dodd-Frank anti-retaliation protection because Congress expressly granted the SEC a broad exemptive authority that would allow the SEC to relax Dodd-Frank whistleblower requirements for *any* person or class, as long as doing so is within the public interest.²⁰

It is important for the SEC to exercise its broad exemptive authority to promulgate a new rule in favor of internal whistleblowers because the interests of internal whistleblowers, corporate employers, the SEC, and shareholders are at stake. For instance, more than half of Americans are corporate shareholders²¹ and depend on individuals with special information to report securities fraud and prevent catastrophic loss similar to that caused by the financial crisis.²² Nevertheless, even though reports of securities violations have both steadily risen since Congress implemented Dodd-Frank and played tremendous roles in exposing the largest securities violations,²³ retaliation rates remain at a record high.²⁴ If the SEC allows for a blanket requirement of reporting to the SEC to qualify for Dodd-Frank anti-retaliation protection, many potential internal whistleblowers would likely stay silent rather than risk their jobs and reputations by coming forward with material information. Accordingly, it is crucial for the SEC to promulgate a new rule that would maximize whistleblowing while minimizing retaliation in light of the recent Supreme Court ruling. Furthermore, corporations are affected because limiting protection to external whistleblowers has the potential to both thwart the internal compliance systems that employers are required to maintain under SOX,²⁵ and create a heavy financial burden for corporations to make internal whistleblowing more appealing to prevent employees from going directly to

²⁰ See *infra* note 71 and accompanying text.

²¹ Justin McCarthy, *Little Change in Percentage of Americans Who Own Stocks*, GALLUP (Apr. 22, 2015), <http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx> (describing the results from a survey which found that 55% of Americans are invested in the stock market as of 2015, compared to 62% from before the 2008 financial crisis).

²² See *supra* note 1 and accompanying text.

²³ See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290> (awarding \$30 million to a whistleblower who provided "key original information" about an ongoing fraud).

²⁴ See U.S. SEC. & EXCH. COMM'N, 2015 ANNUAL REPORT ON DODD-FRANK WHISTLEBLOWER PROGRAM 21 (2015) (charting a 30% increase in tips in the four years that Dodd-Frank had been in operation); ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 2013 26–27 (2014) (finding that although reporting has increased steadily since 2007, retaliation has remained a record high of 21% in 2013).

²⁵ See 15 U.S.C. § 78j-1(m)(4) (2012) (requiring audit committees of covered companies to establish internal procedures for receiving complaints of questionable accounting matters and for the anonymous submission of complaints).

the SEC.²⁶ Therefore, it is also imperative for the SEC to exercise its exemptive authority in a way that would maximize the effectiveness of the internal compliance systems of corporations.

This Comment argues that the SEC should promulgate a new rule pursuant to its broad exemptive authority that would extend Dodd-Frank protection to internal whistleblowers, a rule that would likely receive deference even though Dodd-Frank's text clearly requires external reporting. When agencies act pursuant to their broad exemptive authorities, courts have entitled agencies to *Chevron* deference regardless of whether the statute's substantive provision (in this case, the Dodd-Frank anti-retaliation provision) is clear on the issue.²⁷ Instead, courts have focused on the language of the authority-granting provision—which, in the case of the SEC's general exemptive authority, is incredibly broad—thus creating ambiguity as to whether Congress intended to allow the SEC to exempt internal whistleblowers from the “to the Commission” requirement for anti-retaliation protection.

This Comment proceeds in three parts. Part I discusses the historical background behind the enactment of Dodd-Frank; Dodd-Frank's statutory provisions that give rise to the issue of who qualifies for Dodd-Frank anti-retaliation protection; the SEC's invalidated rule, which attempts to clarify who qualifies for such protection; and the SEC's general exemptive authority. To highlight how the SEC may still protect internal whistleblowers by promulgating a new rule pursuant to its general exemptive authority, Part II discusses differing approaches among circuit and district courts on whether to defer to the SEC's rule and the Supreme Court's rejection of the SEC's rule under the two-step test established by the Supreme Court in *Chevron*.²⁸ Finally, Part III argues that the SEC should exercise its broad exemptive authority to extend Dodd-Frank anti-retaliation protection to internal whistleblowers because doing so would allow it to receive deference from the Supreme Court under *Chevron*.

²⁶ Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, LOY. U. CHI. L.J. 427, 456–58 (2012) (discussing how Dodd-Frank would place a significant financial burden on corporations by pushing them to improve internal systems of corporate governance at crippling expenses); Michael D. Wagner, *SEC Reduces Dodd-Frank Whistleblower Award for “Unreasonable Delay,” Announces Policy of “More Heavily” Punishing Delay After Award Program’s Implementation*, NAT'L L. REV. (Nov. 16, 2015), <http://www.natlawreview.com/article/sec-reduces-dodd-frank-whistleblower-award-unreasonable-delay-announces-policy-more> (describing concern that Dodd-Frank would “drive more whistleblowers to go directly to the SEC first, without elevating the issue at the company, making it even more imperative that companies have . . . reporting systems in place to address whistleblower complaints”).

²⁷ See *infra* note 149 and accompanying text.

²⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1983).

I. BACKGROUND OF THE SARBANES-OXLEY ACT, THE DODD-FRANK ACT, AND THE SEC'S REJECTED INTERPRETATION OF "WHISTLEBLOWER"

After a series of severe market collapses, Congress passed some of the most sweeping financial legislations in response: SOX, followed by Dodd-Frank.²⁹ This Part first discusses SOX and its special emphasis on reviving investor confidence and market stability by strengthening the internal corporate structure and expanding whistleblower protections and incentives.³⁰ Then it discusses Dodd-Frank's purpose and statutory provisions to provide insight into how the SEC can justify a new rule that provides internal whistleblowers with Dodd-Frank anti-retaliation protection in the public interest under its general exemptive authority.³¹ This Part then discusses the SEC's definition of "whistleblower," which if promulgated under the SEC's exemptive authority, would properly address policy concerns and be consistent with the public interest. This Part concludes by discussing how the purpose and history behind the SEC's general exemptive authority pave the way for the SEC to exercise the authority in favor of internal whistleblowers.

A. *The Sarbanes-Oxley Act of 2002*

Congress enacted SOX in response to major fraudulent corporate practices by once-prominent firms, including Enron and WorldCom.³² These corporate scandals led to a plummet of investor confidence in major companies and the stock market.³³ Because the scandals were attributed to a weak corporate structure, SOX aimed to "reduce fraud by forcing corporations to submit more reliable financial statements and to ensure that auditors could recognize problems [earlier]."³⁴ In drafting ways to achieve this, Senators were moved by their outrage from learning that employees at corporations were "discouraged [from whistleblowing] at nearly every turn" by retaliation.³⁵ Such discouragements, coupled with public outcry from the lack of state and federal

²⁹ See Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1832 (2011).

³⁰ *Id.* at 1832–34.

³¹ See Securities Exchange Act of 1934, 15 U.S.C. §78mm(a)(1) (2012) ("[T]he Commission . . . may . . . exempt any person . . . from any provision or provisions of [Dodd-Frank] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." (emphasis added)).

³² Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005).

³³ Robert E. Freer Jr. & Raymond W. Burroughs, *Unintended Consequences: Sarbanes-Oxley and Its Progeny*, 7 S.C. J. INT'L L. & BUS. 47, 51 (2010).

³⁴ Desai, *supra* note 26, at 442.

³⁵ See S. REP. NO. 107-146, at 4–5.

law protections to private-sector whistleblowers,³⁶ motivated Congress to include expansive whistleblower protections in SOX.³⁷

These expansive protections include an anti-retaliation section, which extends a private cause of action to employees of publicly traded companies who were retaliated against for reporting corporate fraud either internally or externally.³⁸ The section prohibits covered companies under SOX from retaliating against “an employee” who reports corporate fraud to “(A) a Federal regulatory or law enforcement agency; (B) any member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee.”³⁹

SOX also attempted to strengthen the internal corporate structure by requiring publicly traded companies to establish procedures for receiving complaints and for allowing employees to submit anonymous complaints.⁴⁰ As part of this structure, auditors and corporate attorneys must first disclose evidence of corporate fraud to the company’s internal management before reporting to outside federal agencies.⁴¹ These requirements were implemented as a means of “encouraging and supporting whistleblowing *before* any disclosure is made.”⁴²

SOX’s whistleblower protections have nevertheless been largely ineffective at encouraging whistleblowers or deterring retaliation, with the large majority of cases resolved in favor of the employer.⁴³ First, opponents

³⁶ Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 26 (2006). At the time, federal law only protected government employees and private employees in very specific industries, and less than half of the states had anti-retaliation laws for private-sector employees. See Richard Moberly, *Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 3 (2012).

³⁷ Moberly, *supra* note 36, at 5; Robert G. Vaughn, *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 2 (2005).

³⁸ Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(1) (2012).

³⁹ *Id.* § 1514A(a)(1).

⁴⁰ *Id.* § 78j-1(m)(4) (“Each audit committee shall establish [such] procedures . . .”).

⁴¹ See 15 U.S.C. § 78j-1(b)(1)–(3) (2012) (requiring auditors to report likely corporate violations to appropriate management, and to the SEC only after management fails to take remedial action); *id.* § 7245 (requiring an in-house attorney to report securities violations first to the chief executive officer (CEO) or counsel, and then to the board of directors if the CEO or counsel does not take appropriate remedial measures).

⁴² See Moberly, *supra* note 36, at 10 (quoting Richard E. Moberly, *Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1131 (2006)).

⁴³ See Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764–65 (2007) (“[O]f the 677 completed Sarbanes-Oxley complaints, 499 were dismissed and 95 were withdrawn. . . . Of the cases that went to an administrative law judge (“ALJ”), only 6 (two percent) of the 286 resulted in a decision for the employee.”); Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213,

note that SOX anti-retaliation claimants must go through procedural hurdles before they can successfully file suit in a district court. Claimants must first file a complaint with the Secretary of Labor (SOL), and then file suit in a district court only if the SOL has not issued a final decision within 180 days.⁴⁴ This limitation on filing suit is complicated by a very brief statute of limitations of 180 days after the violation occurred or after the employee became aware of the violation.⁴⁵ This brief statute of limitations has led various plaintiffs to file suit after the filing period for SOX claims has expired.⁴⁶ And even if the claimant successfully establishes liability, the remedies are limited to reinstatement, backpay, or compensation of various legal fees.⁴⁷ Many have therefore criticized SOX for providing insufficient incentives for whistleblowers to come forward.⁴⁸

In addition, the SEC has been censured post-SOX for failing to timely address the complaints of whistleblowers who attempted to expose what ultimately became one of the biggest corporate scandals.⁴⁹ Critics have attributed this failure to the SEC's lack of experience prior to Dodd-Frank in understanding the complexities of corporate fraud and its inefficient system in handling whistleblower complaints.⁵⁰

Not surprisingly, major companies continued to engage in corporate fraud, contributing significantly to the "worst financial crisis since the Great Depression."⁵¹ In response to the crisis, and while recognizing the assistance that whistleblowers have provided, Congress passed Dodd-Frank with the goal of expanding protections and incentives for corporate whistleblowers.⁵²

2250 (2010) (finding that the percentage of employee whistleblowers actually dropped from 18.4% to 13.2% after SOX was passed).

⁴⁴ 18 U.S.C. § 1514A(b)(1).

⁴⁵ *Id.* § 1514A(b)(2)(D).

⁴⁶ *See, e.g.*, Banko v. Apple Inc., 20 F. Supp. 3d 749, 754 (N.D. Cal. 2013).

⁴⁷ 15 U.S.C. § 1514A(e)(2) (2012).

⁴⁸ *See, e.g.*, Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of "Greedy," the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1285 (2010) ("[T]he Sarbanes-Oxley Act did not provide any true incentives to employees to provide information to outside authorities.").

⁴⁹ *See Madoff Whistleblower: SEC Failed to Do the Math*, NPR (Mar. 2, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=124208012> [hereinafter *Madoff Whistleblower*].

⁵⁰ *See, e.g.*, Moberly, *supra* note 36, at 52 ("Before Dodd-Frank, the SEC did not have an organized and efficient system in place to handle tips . . ."); *Madoff Whistleblower*, *supra* note 49 (illustrating the Madoff whistleblower's thoughts on how "the SEC is staffed by lawyers who don't understand the mathematically complex financial products that are traded on the markets").

⁵¹ Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 92 (2012).

⁵² *See, e.g.*, Hartmann, *supra* note 48, at 1287; Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 131 (2014).

B. *The Dodd-Frank Act of 2010*

Dodd-Frank attempted to strengthen the existing whistleblower protections and incentives in four ways.⁵³ First, Dodd-Frank attempted to address the inefficiencies of the prior system at handling whistleblower tips: it granted the SEC more authority and enforcement power by creating the SEC's Office of the Whistleblower, which includes attorneys and staff members who are specialized in investigating whistleblower claims.⁵⁴ Second, Dodd-Frank removed the procedural complications of filing SOX anti-retaliation claims, creating a new private right of action that allows whistleblowers to bring their claims directly in a district court without first having to exhaust administrative remedies.⁵⁵ Third, Dodd-Frank significantly lengthened the statute of limitations⁵⁶ and expanded available remedies.⁵⁷ Finally, Dodd-Frank created a bounty program that awards whistleblowers large amounts under specified conditions of the Act.⁵⁸

While Dodd-Frank increased whistleblower protections and incentives in many ways, the scope of protection it provides to whistleblowers is less clear. Dodd-Frank protects whistleblowers as follows:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

- (i) in providing information to the Commission in accordance with this section;
- (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
- (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law,

⁵³ See 15 U.S.C. § 78u-6(h) (2012).

⁵⁴ This is an important move in light of complaints prior to Dodd-Frank's enactment regarding the SEC's capabilities of handling reports of securities violations. See, e.g., Moberly, *supra* note 36, at 52; Madoff Whistleblower, *supra* note 49.

⁵⁵ Compare 15 U.S.C. § 78u-6(h), with 18 U.S.C. § 1514A(b)(1) (2012).

⁵⁶ See 15 U.S.C. § 78u-6(h)(1)(B)(iii) (providing claimants with six years after the violation occurred or three years after the claimant becomes aware of the violation).

⁵⁷ See *id.* § 78u-6(h)(1)(C) (allowing for recovery of two times back pay compared to only back pay provided under the SOX anti-retaliation section).

⁵⁸ *Id.* § 78u-6(b) (awarding up to 30% of monetary sanctions imposed in a successful action to which a whistleblower contributes significant information).

rule, or regulation subject to the jurisdiction of the Commission.⁵⁹

Most notable and uncontroversial about this provision is that it protects whistleblowers from retaliation if they engage in protected activities under (i)–(iii).⁶⁰ Under Dodd-Frank’s definition section, “whistleblower” is defined as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”⁶¹ Therefore, should this statutory definition be read into the anti-retaliation provision, individuals would be protected only if they report securities laws violations externally to the SEC.⁶² While some courts supported such a reading, others found that the text warrants a broader reading, leading the SEC to promulgate a rule to clarify the scope of protection.

C. *The SEC’s Invalidated Rule*

The SEC used its notice-and-comment rulemaking authority⁶³ on August 12, 2011 to promulgate a final rule, clarifying that individuals are whistleblowers protected under Dodd-Frank regardless of whether they report violations internally or externally.⁶⁴ Specifically, the SEC defined “whistleblower” for purposes of the anti-retaliation section as a person who provides information relating to possible securities laws violations “in a manner described by [the Dodd-Frank anti-retaliation section],” which includes

⁵⁹ *Id.* § 78u-6(h)(1)(a)(i)–(iii).

⁶⁰ *Id.*

⁶¹ *Id.* § 78u-6(a)(6) (emphasis added).

⁶² *Id.* § 78u-6(h) (“No employer may [retaliate] against, a *whistleblower* . . . because of any lawful act done by the whistleblower [in engaging in the activities listed in (i)–(iii)].” (emphasis added)).

⁶³ *Id.* § 78u-6(j); see SEC Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249) [hereinafter Final Comments]. Notice-and-comment rulemaking requires the agency to publish notice of its proposed rulemaking in the Federal Register and provide the public the opportunity to comment on the proposed rule. Administrative Procedure Act, 5 U.S.C. § 553(b) (2012). Unlike other forms of agency actions, notice-and-comment rulemaking carries the force of law. Brian Wolfman & Bradley Girard, *Argument Preview: The Administrative Procedure Act, Notice-and-Comment Rule Making, and “Interpretive” Rules*, SCOTUSBLOG (Nov. 26, 2014, 10:13 AM), <http://www.scotusblog.com/2014/11/argument-preview-the-administrative-procedure-act-notice-and-comment-rule-making-and-interpretive-rules>. Agency actions that carry the force of law are entitled to *Chevron* deference from courts rather than having a mere persuasive effect. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

⁶⁴ See 17 C.F.R. § 240.21F-2(b)(1) (2013) (“For purposes of the anti-retaliation protections afforded by [Dodd-Frank], you are a whistleblower if . . . you possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . [and] provide that information in a manner described by [the Dodd-Frank anti-retaliation section].”).

the cross-reference in subdivision (iii) to protected activity under SOX.⁶⁵ As discussed earlier, SOX protects public company employees who engage in a broad range of activities, which not only include employees who report violations externally, *but also* those who report internally to “a person with supervisory authority over the employee” and “law enforcement.”⁶⁶ Accordingly, the SEC broadly defined “whistleblower” under Dodd-Frank to also protect those who only report violations to their employers or the police, contrary to the narrow statutory definition of “whistleblower.”⁶⁷

However, recently, the Supreme Court held in *Digital Realty Trust, Inc. v. Somers* that the SEC’s rule should not be entitled to deference under *Chevron* because Dodd-Frank’s text explicitly defined “whistleblower” to require reporting to the SEC.⁶⁸ This Comment argues that the SEC can nevertheless promulgate a new rule that would exempt internal whistleblowers from this requirement pursuant to the SEC’s general exemptive authority.

D. The SEC’s General Exemptive Authority

During the past few decades, Congress has recognized the “rapidly changing” nature of the securities industry and found it necessary to expand the scope of the SEC’s ability to exempt certain persons, securities, or transactions from various statutory requirements.⁶⁹ In 1996, Congress added section 36 to the Exchange Act of 1934 (under which Dodd-Frank falls), providing the SEC with the following sweeping general exemptive authority:⁷⁰

[T]he Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person . . . or *any* class or classes of persons . . . from *any* provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.⁷¹

Congress expressly stated that this general exemptive authority is “broad” and “w[as] designed to provide the Commission with the maximum flexibility to

⁶⁵ *Id.*

⁶⁶ *See supra* note 39 and accompanying text.

⁶⁷ Final Comments, 76 Fed. Reg. at 34,304.

⁶⁸ 138 S. Ct. 767, 781–82 (2018).

⁶⁹ S. REP. NO. 104-293, at 15 (1996) (“The Committee recognizes that the rapidly changing marketplace dictates that effective regulation requires a certain amount of flexibility.”).

⁷⁰ THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATIONS* § 4.27, at 245 (7th ed. 2017) (“Until 1996, all [exemptions] had to fit within the guidelines established by [specific sections] of the 1933 Act.”).

⁷¹ 15 U.S.C. § 78mm(a)(1) (2012) (emphasis added).

reduce or otherwise alter” statutory requirements under the Securities Exchange Act of 1934 (1934 Act).⁷² This power has accordingly been described as “virtually unlimited,” with the only meaningful limitations being that it is in the public interest and consistent with investor protection.⁷³

Although Congress intended for this power to be far-reaching, the SEC has used its general exemptive authority in the context of Dodd-Frank whistleblower provisions very sparingly.⁷⁴ In one notable instance, the SEC exercised its general exemptive authority to waive the requirement that a report of corporate fraud must be “voluntary” to qualify for a monetary award under Dodd-Frank.⁷⁵ A report is “voluntary” only if the whistleblower makes the report before the SEC or another appropriate agency requests it.⁷⁶ For example, one whistleblower was initially approached by a self-regulatory organization before reporting corporate fraud, making his report involuntary.⁷⁷ However, after persistently reporting the fraud internally with no response from the company, the whistleblower provided the SEC with “specific, timely, and credible information” that enabled the SEC to expedite its investigation of the fraud.⁷⁸ Recognizing the importance of this whistleblower’s efforts, the SEC “found it in the public interest and consistent with the protection of investors to invoke its general exemptive authority under Section 36(a) of the Exchange Act and waive the ‘voluntary’ requirement” to make a \$400,000 award to the whistleblower.⁷⁹ This exemption is significant because it demonstrates that the SEC has been willing “to reach as far as the law allows to reward individuals who assist in enforcing the nation’s securities laws,”⁸⁰ setting the stage for the

⁷² See H.R. REP. NO. 108-19, at 2 (2003).

⁷³ THOMAS LEE HAZEN, *FEDERAL SECURITIES LAW* 60 & n.249 (3d ed. 2011) (describing how broad the SEC’s general exemptive authority is under the Securities Act of 1933 (1933 Act) and noting that it is even broader under section 36 of the 1934 Act). The 1934 Act also laid out specific provisions that were immune from the SEC’s general exemptive authority, but none of these provisions correspond to the Dodd-Frank whistleblower provisions, so they will not be considered limitations for purposes of this Comment. See 15 U.S.C. § 78mm(b)–(c) (2012).

⁷⁴ RESEARCH HANDBOOK ON SECURITIES REGULATION IN THE UNITED STATES 153–54 (Jerry W. Markham & Rigers Gjyshi eds., 2014) (“The SEC has not used this general exemptive authority with great frequency.”).

⁷⁵ See U.S. SEC. & EXCH. COMM’N, 2014 ANNUAL REPORT TO THE CONGRESS ON DODD-FRANK WHISTLEBLOWER PROGRAM 11 (2014).

⁷⁶ See 17 C.F.R. § 240.21F-4(a)(2) (2013).

⁷⁷ See U.S. SEC. & EXCH. COMM’N, *supra* note 75, at 11.

⁷⁸ Press Release, U.S. Sec. & Exch. Comm’n, SEC Announces Award for Whistleblower Who Reported Fraud to SEC After Company Failed to Address Issue Internally (July 31, 2014), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542578457#.U9qeu_idXxo.

⁷⁹ See U.S. SEC. & EXCH. COMM’N, *supra* note 75, at 11.

⁸⁰ DAVID J. MARSHALL, *THE SEC WHISTLEBLOWER PRACTICE GUIDE* 9–10 (2016).

SEC to do the same to protect individual whistleblowers who likewise assist in exposing corporate fraud.

Before engaging in an analysis of why the SEC would receive deference for a rule promulgated pursuant to the SEC's general exemptive authority in the Dodd-Frank anti-retaliation protection context, it is important to discuss what the exercise of this power would specifically look like. As discussed earlier, the SEC may exercise this authority by "rule, regulation, or order."⁸¹ Doing so by notice-and-comment rulemaking as the SEC did in promulgating its invalidated rule would be appropriate because it would provide whistleblowers with predictability on the consequences of internal whistleblowing.⁸² Regarding the scope of the exemption, courts have allowed for a very broad scope of exemption from a requirement (for example, exempting all but one group from the requirement) as long as the requirement still applies to *some* entity.⁸³ In addition, the SEC may exempt "*any* person . . . or classes of persons."⁸⁴ Accordingly, the SEC may promulgate a rule that would exempt internal whistleblowers as a class from the Dodd-Frank requirement of reporting "to the Commission" for anti-retaliation protection. Here, "internal whistleblowers" would include those that have not reported to the SEC, but have reported in a manner required or protected under SOX: to a law enforcement agency, member of Congress, or to a supervisor.⁸⁵ It would not include other classes of whistleblowers, such as those who report to the media.⁸⁶ Essentially, this new rule would mirror the effect of the SEC's recently invalidated rule, but the SEC would have to state some additional justifications to receive deference. The SEC should (1) state that it is exercising its general exemptive authority, given that courts and interested

⁸¹ See *supra* note 71 and accompanying text.

⁸² See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012) (asserting that predictability is the purpose of rulemaking).

⁸³ See, e.g., *Pharm. Research & Mfrs. of Am. v. Fed. Trade Comm'n*, 44 F. Supp. 3d 95, 118 (D.D.C. 2014) (quoting BLACK'S LAW DICTIONARY 653 (9th ed. 2009)) (defining exempt as "to free or release from a duty or liability to which others are held" and holding that broad applicability of an exemption does not violate that plain meaning).

⁸⁴ See *supra* note 71 and accompanying text.

⁸⁵ See *supra* note 39 and accompanying text.

⁸⁶ Congress has consistently displayed a lack of encouragement of media whistleblowers, and it is plausible in this context to reason that media whistleblowing would run contrary to Dodd-Frank's purpose of promoting financial stability because it does not allow companies to clarify misunderstandings before negative information becomes public. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 151 (1994); Kevin Rubinstein, Note, *Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer*, 52 N.Y.L. SCH. L. REV. 637, 650 (2007).

parties seemed to have forgotten that it exists,⁸⁷ and (2) state how a rule exempting internal whistleblowers from the requirement of reporting to the SEC would be “necessary or appropriate in the public interest, and is consistent with the protection of investors.”⁸⁸

No court has explicitly analyzed whether it would be proper for the SEC to use its general exemptive authority under *Chevron*, likely because the SEC has used the power very sparingly.⁸⁹ However, courts have analyzed when it is proper to exercise the SEC’s narrower forms of exemptive authority⁹⁰ as well as similarly drafted exemptive authorities of other agencies,⁹¹ lending great insight into how powerful the SEC’s general exemption authority is. This Comment explores these court decisions in Part III, highlighting how agencies can prevail under *Chevron* when they exercise their broad exemptive authorities. In light of Congress’s intent to provide the SEC with flexibility to uphold financial transparency,⁹² this Comment argues that the SEC would be able to receive deference by exercising its general exemptive authority to promulgate a new rule that exempts internal whistleblowers from reporting to the SEC.

⁸⁷ See *infra* Part II. Although in practice, the SEC is not required to frame its rule as an exemption in a situation where the rule has the same effect as a rule formulated under its general exemptive authority, it would be safer for the SEC to do so here where the exemptive authority has been overlooked. See *Pharm. Research & Mfrs. of Am. v. Fed. Trade Comm’n*, 44 F. Supp. 3d 95, 119 (9th Cir. 2009) (stating that to require an agency to frame its rule as an exemption in this sort of situation would “elevate form completely over substance” (quoting *Simmons v. ICC*, 697 F.2d 326, 332–34 (D.C. Cir. 1982))).

⁸⁸ 15 U.S.C. § 78mm(a)(1) (2012). Section III.B discusses strong arguments that the SEC can make for how exempting internal whistleblowers from reporting to the SEC is in the public interest.

⁸⁹ See *supra* note 74.

⁹⁰ See, e.g., *Levy v. Sterling Holding Co.*, 475 F. Supp. 2d 463, 470–72 (D. Del. 2007) (finding the SEC’s exercise of its exemptive authority appropriate because the authority-granting provision did not “unambiguously foreclose the SEC’s interpretation”).

⁹¹ *Pharm. Research*, 44 F. Supp. 3d at 101 (holding the agency’s rule was proper when the granting provision allowed it to “exempt, from the requirements of [the HSR Act], classes . . . which are not likely to violate the antitrust laws” (quoting 15 U.S.C. § 18a(d)(2)(B) (2008))); *Am. Ass’n of Retired Pers. v. Equal Emp’t Opportunity Comm’n*, 489 F.3d 558, 563–64 (3d Cir. 2007) (finding in favor of the agency’s rule when the exemptive authority-granting provision allowed the agency to “establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest” (quoting 29 U.S.C. § 628 (2004))).

⁹² S. REP. NO. 104-293, at 15 (1996) (“The Committee recognizes that the rapidly changing marketplace dictates that effective regulation requires a certain amount of flexibility.”).

II. COURT DECISIONS APPLYING *CHEVRON* TO “WHISTLEBLOWER” PROTECTION

The Fifth Circuit and Second Circuit as well as several district courts split over whether to defer to the SEC's rule based on the text of the anti-retaliation provision. Primarily, this split derives from the different approaches used to apply the two-step test laid out in *Chevron*.⁹³ Under *Chevron* Step One, a court reviewing an agency's construction of a statute must first determine if Congress has “directly spoken to the precise question at issue.”⁹⁴ If Congress's intent is unambiguous, then that intent controls the court's interpretation regardless of the agency's construction.⁹⁵ However, if the statute is “silent or ambiguous” on the specific issue, then under *Chevron* Step Two, the court must defer to the agency's construction if it is a “permissible construction of the statute.”⁹⁶ Although all courts that have decided on this issue primarily analyze Dodd Frank's text and structure in applying *Chevron*, they diverge incredibly on whether to defer to the SEC.

A majority of courts follow the *Berman* approach and have deferred to the SEC's rule extending Dodd-Frank protection to internal whistleblowers. First, under *Chevron* Step One, these courts found the statute ambiguous because of the conflict between “whistleblower,” as narrowly defined by the definition section, and the broad inclusion of both internal and external reporting under subdivision (iii)⁹⁷ of the anti-retaliation section.⁹⁸ Second, under *Chevron* Step Two, these courts found the SEC's rule permissible because the SEC reasonably interpreted the statute.⁹⁹

⁹³ *Chevron*, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). The Separation of Powers Restoration Act of 2017 was introduced to Congress in attempts to eliminate this *Chevron* framework and is now awaiting Senate confirmation. See *H.R. 76: Separation of Powers Restoration Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr76> (last visited Feb. 28, 2018). However, available data indicates that this bill is not likely to become law. See *id.* (predicting only an 11% chance of enactment).

⁹⁴ *Chevron*, 467 U.S. at 842.

⁹⁵ *Id.* at 842–43.

⁹⁶ *Id.* at 843–44.

⁹⁷ See *supra* text accompanying notes 65–66 for how subdivision (iii) can include external *and* internal reporting.

⁹⁸ See, e.g., *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015); *Wiggins v. ING U.S., Inc.*, No. 14-CV-01089, 2015 WL 8779559, at *1–2 (D. Conn. Dec. 15, 2015); *Dressler v. Lime Energy*, No. 14-CV-07060, 2015 WL 4773326, at *8 (D.N.J. Aug. 13, 2015); *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1104–05 (N.D. Cal. 2015); *Lutzeier v. Citigroup Inc.*, No. 14-CV-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2005).

⁹⁹ *Berman*, 801 F.3d at 155; *Wiggins*, 2015 WL 8770559 at *3; *Dressler*, 2015 WL 4773326 at *16; *Somers*, 119 F. Supp. 3d at 1106; *Lutzeier*, 2015 WL 7306443 at *2.

Conversely, a minority of courts declined to defer to the SEC's rule under *Chevron* Step One without reaching *Chevron* Step Two. Of these courts, some follow the *Asadi* approach and found that the statute's text clearly limited protection to external whistleblowers.¹⁰⁰ Others follow the approach laid out in *Bussing v. COR Clearing, LLC* and found that the statute's text clearly extended protection to internal whistleblowers, leaving no need to defer.¹⁰¹

Recently, the Supreme Court resolved the issue in favor of the *Asadi* approach, holding that the statute clearly defined "whistleblower" as requiring reporting to the SEC, and therefore, refused to defer to the SEC's rule under *Chevron* Step One.¹⁰²

This Comment argues that despite the Supreme Court's holding under *Chevron* Step One that Dodd Frank's text clearly requires external reporting, the SEC can nevertheless receive deference by using its broad exemptive authority to promulgate a new rule that would extend Dodd-Frank's anti-retaliation protection to internal whistleblowers.¹⁰³ To demonstrate how the case law on Dodd-Frank anti-retaliation protection has left room for the SEC to exercise its exemptive authority, this Part discusses the *Asadi* approach, the *Berman* approach, the *Bussing* approach, and the Supreme Court's recent resolution of this split in authority.

A. *The Berman Approach: Dodd-Frank's Text Is Ambiguous, So the SEC's Rule Is Entitled to Deference*

The Second Circuit in *Berman* and a large majority of district courts held that Dodd-Frank protection extended to internal whistleblowers under *Chevron* because (1) the definition of "whistleblower" is sufficiently ambiguous under

¹⁰⁰ See, e.g., *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013); *Lamb v. Rockwell Automation Inc.*, No. 15-CV-1415, 2016 WL 4273210, at *4 (E.D. Wis. Aug. 12, 2016); *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 664–65 (E.D. Va. 2015); *Davies v. Broadcom Corp.*, 130 F. Supp. 3d 1343, 1350 (C.D. Cal. 2015).

¹⁰¹ See, e.g., *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 & n.13 (D. Neb. 2014); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013).

¹⁰² *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781–82 (2018).

¹⁰³ Although every court that decided this issue under *Chevron* focused primarily on whether "whistleblower" is ambiguous for purposes of Dodd-Frank anti-retaliation protection under *Chevron* Step One, that is not this Comment's focus. Instead, this Comment provides a new lens on the issue by illustrating how the SEC may receive deference for a new rule promulgated pursuant to its exemptive authority that would protect internal whistleblowers, even if Dodd-Frank's text clearly requires a whistleblower to report to the SEC under Step One. Accordingly, this Comment provides just enough background to understand the different ways that courts have analyzed the issue under Step One. For a more extensive discussion of this issue under Step One, see Zizi Petkova, Comment, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act*, 18 U. PA. J. BUS. L. 573, 580–92 (2016).

the anti-retaliation provision, and (2) the SEC's construction of "whistleblower" to include internal whistleblowers was permissible and should accordingly receive *Chevron* deference.¹⁰⁴

In applying *Chevron* Step One, these courts find the definition of "whistleblower" sufficiently ambiguous under the anti-retaliation provision because a "significant tension" exists between the statutory definition of "whistleblower" and subdivision (iii) of the anti-retaliation provision.¹⁰⁵ Subdivision (iii) prohibits employers from retaliating against a "whistleblower . . . in making disclosures that are required or protected under [SOX]," which does not require disclosing to the SEC.¹⁰⁶ Meanwhile, the "whistleblower" is defined in the definition section as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC]."¹⁰⁷ While these courts agree that a clear definitional term typically controls, it must yield when that definition would cause a provision to contradict another provision.¹⁰⁸ Since subdivision (iii) appears to allow a broader scope of protections for individuals who do not make reports to the SEC, courts find that subdivision (iii) would be rendered either superfluous or extremely limited in scope by a strict application of the definition of "whistleblower" under the definition section, and therefore, the strict definition should not control under the anti-retaliation section.¹⁰⁹

Courts have also found another area of tension between subdivision (iii) and the definition section: certain categories of whistleblowers who are *required* to engage in protected activity under subdivision (iii) would in reality never get Dodd-Frank protection under the narrow interpretation of "whistleblower."¹¹⁰ Subdivision (iii) expressly protects whistleblowers for

¹⁰⁴ See *supra* note 98.

¹⁰⁵ *Berman v. Neo@Ogilvy, LLC*, 801 F.3d 145, 151 (2d Cir. 2015); see *Dressler v. Lime Energy, No. 14-CV-07060*, 2015 WL 4773326, at *12 (D.N.J. Aug. 13, 2015).

¹⁰⁶ 15 U.S.C. § 78u-6(h)(1)(a)(iii) (2012).

¹⁰⁷ *Id.* § 78u-6(a)(6).

¹⁰⁸ *Berman*, 801 F.3d at 154 ("Definitions are, after all, just one indication of meaning—a very strong indication . . . but nonetheless one that can be contradicted by other indications." (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 227–28 (2012))); see also *Dig. Realty Tr., Inc. v. Somers*, 119 F. Supp. 3d 1088, 1099 (N.D. Cal. 2015) ("'[C]hemical weapon' could not be given its defined meaning because doing so would violate other principles of statutory interpretation—namely [federalism].").

¹⁰⁹ See, e.g., *Berman*, 801 F.3d at 155; *Somers*, 119 F. Supp. 3d at 1101–02; *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013). For responses to counterarguments of this view, see *Berman*, 801 F.3d at 151–52; *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627–28 (5th Cir. 2013); *Somers*, 119 F. Supp. 3d at 1101–04.

¹¹⁰ See, e.g., *Berman*, 801 F.3d at 151; *Dressler*, 2015 WL 4773326, at *10; *Somers*, 119 F. Supp. 3d at 1101–02.

making required or protected disclosures under section 78j-1 of the Exchange Act,¹¹¹ which requires an auditor of a company to first report corporate wrongdoings to internal management, and then to the SEC *only* if the internal management failed to take remedial measures.¹¹² Furthermore, subdivision (iii) also expressly protects whistleblowers for making required or protected disclosures under section 307 of SOX¹¹³ and the SEC's Standards of Professional Conduct,¹¹⁴ both of which when read together require an attorney to report securities violations to the company's internal management and then to the SEC only after internal reporting.¹¹⁵ Courts reason that if reporting to the SEC were required for Dodd-Frank protection, auditors and attorneys would get almost no Dodd-Frank protection because auditors must wait for a company's response to internal reporting before reporting to the SEC, and "any retaliation would almost always precede [the SEC] reporting."¹¹⁶ Therefore, these courts find that subdivision (iii) and the definition section are in tension and ambiguous.¹¹⁷

Once a court finds that the statute's text is ambiguous, it must defer to the agency's construction under *Chevron* Step Two if it is permissible.¹¹⁸ All courts to date that have found Dodd-Frank's text ambiguous have also found the SEC's rule extending Dodd-Frank protection to internal whistleblowers permissible¹¹⁹ and accordingly deferred to the SEC. This Comment will therefore not analyze the issue under Step Two.

¹¹¹ 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012) ("No employer may [retaliate against] . . . a whistleblower . . . (iii) in making disclosures that are required or protected under . . . section 78j-1(m) of this title[.]").

¹¹² *See id.*; *id.* § 78j-1(b)(1)–(3).

¹¹³ *Id.* § 7245(1) (requiring an in-house attorney to report securities violations first to the CEO or counsel, and then to the board of directors if the CEO or counsel does not take appropriate remedial measures).

¹¹⁴ 17 C.F.R. § 205.3(b)(1) (2016) (requiring an in-house attorney to report securities violations to internal management first so as to "not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer").

¹¹⁵ 15 U.S.C. § 78u-6(h)(1)(a)(iii) (2012) ("No employer may [retaliate against] . . . a whistleblower . . . (iii) in making disclosures that are required or protected under [SOX] . . . and any other law, rule, or regulation subject to the jurisdiction of the [SEC].").

¹¹⁶ *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015); *see Dressler v. Lime Energy, No. 3:14-cv-07060*, 2015 WL 4773326, at *10 (D.N.J. Aug. 13, 2015); *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1102 (N.D. Cal. 2015).

¹¹⁷ *Berman*, 801 F.3d at 151; *see Dressler*, 2015 WL 4773326, at *8; *Somers*, 119 F. Supp. 3d at 1102.

¹¹⁸ *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹¹⁹ *See supra* note 98.

B. The Asadi and Bussing Approaches: The SEC Is Not Entitled to Deference Under Chevron Step One

In contrast, a minority of courts have declined to defer to the SEC under *Chevron* Step One without reaching Step Two. Of these courts, some apply the *Asadi* approach, finding that the statute's text clearly limited protection to external whistleblowers.¹²⁰ Others apply the *Bussing* approach, finding that the statute's text clearly extended protection to internal whistleblowers and left no need to defer.¹²¹

1. The Asadi Approach: Dodd-Frank's Text Is Unambiguous That an Individual Must Report to the SEC for Protection

In *Asadi v. G.E. Energy (USA), L.L.C.*,¹²² the Fifth Circuit considered the issue of whether an internal whistleblower qualifies for Dodd-Frank protection, and held that the employee did not qualify after applying *Chevron* Step One and finding the statute clear on the issue.¹²³ The plaintiff claimed that his employer violated the Dodd-Frank anti-retaliation provision by terminating him after he made a report of a possible securities laws violation to his supervisor but not to the SEC.¹²⁴ After examining Dodd-Frank's text, the court held that Dodd-Frank did not extend protection to internal whistleblowers.¹²⁵

In applying *Chevron* Step One, the court looked to the plain language and structure of Dodd-Frank and found that Congress had directly spoken on the issue, so the court rejected the SEC's broad interpretation of "whistleblower" for purposes of the anti-retaliation section.¹²⁶ The court focused on how "whistleblower," under the Act's definition section, "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower,'" and how even the plaintiff himself admitted that he was not a whistleblower as defined by the definition section because he did not disclose to the SEC.¹²⁷ The emphasis was on Congress's choice to use the

¹²⁰ See *supra* note 100.

¹²¹ See *supra* note 101.

¹²² 720 F.3d 620 (5th Cir. 2013).

¹²³ *Id.* at 622, 630. Notably, the Fifth Circuit was the first U.S. Court of Appeals to weigh in on this issue and was later followed by a minority of district courts. See *supra* note 100.

¹²⁴ *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013).

¹²⁵ *Id.* at 630.

¹²⁶ *Id.*

¹²⁷ *Id.* at 623–24. The court also notes that the title of the anti-retaliation provision is "[P]rotection of Whistleblowers," which lends additional support that the anti-retaliation provision applies only to those who qualify as whistleblowers under the definition section and plain meaning of the text. *Id.* at 626 n.8 (emphasis added) (quoting 15 U.S.C. § 78u–6(h) (2012)).

term “whistleblower” in the anti-retaliation section,¹²⁸ instead of using broader terms like “employee” or “individual,” which is significant evidence of congressional intent to limit the scope of Dodd-Frank protection to external whistleblowers.¹²⁹ Accordingly, the court ended its analysis at the text.

2. *The Bussing Approach: Dodd-Frank’s Text Is Unambiguous That an Individual Does Not Need to Report to the SEC for Protection*

Other courts have ended their analysis at *Chevron* Step One, but held instead that a whistleblower does not need to report to the SEC for Dodd-Frank protection because subdivision (iii) should be read as an exception to the statutory definition of “whistleblower” for purposes of Dodd-Frank anti-retaliation protection.¹³⁰ For instance, the court in *Ellington v. Giocoumakis*¹³¹ analyzed the text and structure of Dodd-Frank and held that the text was clear in favor of protecting internal whistleblowers.¹³² The court reasoned that it is “apparent from the wording and positioning of § 78u-6(h)(1)(B)(i) [the ‘Cause of Action’ section¹³³ of Dodd-Frank] that Congress intended that an employee terminated for reporting [SOX] violations to a supervisor or an outside compliance officer . . . ha[s] a private right of action under Dodd-Frank” regardless of whether the employee reports to the SEC.¹³⁴ Accordingly, the court found that the text clearly supported a broad interpretation without analyzing the SEC’s rule under *Chevron* Step Two.¹³⁵

¹²⁸ See 15 U.S.C. § 78u-6(h)(1)(A) (“No employer may discharge . . . a whistleblower” (emphasis added)).

¹²⁹ See *Asadi*, 720 F.3d at 626 (“If Congress had selected the terms ‘individual’ or ‘employee,’ . . . [extending protection to internal whistleblowers] would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee . . . to be protected from retaliatory actions”); see also *id.* at 622 (“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’” (alteration in original) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))). For a discussion of the *Asadi* court’s additional support for the text’s unambiguity and response to counterarguments, see *id.* at 622–29.

¹³⁰ See, e.g., *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 n.13 (D. Neb. 2014) (“Some courts have held that the tension between the statute’s definition of ‘whistleblower’ and the scope of conduct protected by subdivision (iii) renders the statute ambiguous, such that deference to the SEC’s regulation is appropriate under *Chevron*. . . . However, this Court’s reading of the statute, in context, offers a more direct resolution of this tension.” (citations omitted)); *Ellington v. Giocoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013).

¹³¹ 977 F. Supp. 2d at 45.

¹³² *Id.* at 45.

¹³³ 15 U.S.C. § 78u-6(h)(1)(B)(i) (“An individual who alleges discharge or other discrimination in violation of [the Dodd-Frank anti-retaliation section] may bring an action under this subsection in the appropriate district court of the United States”).

¹³⁴ *Giocoumakis*, 977 F. Supp. 2d at 45.

¹³⁵ *Id.*

More recently in *Bussing v. COR Clearing, LLC*,¹³⁶ the court held that the statute was clear, arguing that the term “whistleblowers” should be given its ordinary meaning rather than its statutory meaning for purposes of the anti-retaliation section, which would extend Dodd-Frank protection to internal whistleblowers.¹³⁷ Although the court recognized that a statutory definition usually governs, it found that this was an “unusual” case that warranted applying the ordinary meaning because applying the statutory definition would render subdivision (iii) insignificant and thwart its purpose of shielding a broad range of employee disclosures.¹³⁸ As a result, the court applied the dictionary definition, which defines a whistleblower as “a person who tells police, reporters, etc., about something (such as a crime) that has been kept secret,” or an “employee who reports employer wrongdoing to a governmental or law-enforcement agency.”¹³⁹ Reading this definition into the anti-retaliation section, the court held that the statute clearly protected internal whistleblowers.¹⁴⁰ Therefore, the court stopped at the text and found no need to defer to the SEC.¹⁴¹

C. *The U.S. Supreme Court’s Decision in Somers*

On February 21, 2018, the U.S. Supreme Court in *Somers* resolved the split in approaches by primarily relying on the same reasoning as the Fifth Circuit did in *Asadi*: that the definition section of Dodd-Frank clearly defines a “whistleblower” as requiring reporting to the SEC.¹⁴² The Court found that when a statute’s definition of a term is clear, it is conclusive.¹⁴³ Because the statutory definition is conclusive, then under *Chevron* Step One, “Congress has directly spoken to the precise question at issue.”¹⁴⁴ Accordingly, the Supreme Court found that it could not defer to the SEC’s rule, which interpreted Dodd-Frank’s text as permitting internal reporting for anti-retaliation purposes.¹⁴⁵

¹³⁶ 20 F. Supp. 3d 719, 733 n.13 (D. Neb. 2014).

¹³⁷ *Id.* at 730.

¹³⁸ *Id.* at 729 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206–07 (2009)).

¹³⁹ *Id.* (first quoting *Whistleblower*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriamwebster.com/dictionary/whistleblower> (last visited May 9, 2014); then quoting *Whistleblower*, BLACK’S LAW DICTIONARY 1734 (9th ed. 2009)).

¹⁴⁰ *Id.* at 729–30.

¹⁴¹ *Id.* at 733.

¹⁴² *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781–82 (2018).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 782.

¹⁴⁵ *Id.*

However, most notable about the Supreme Court's opinion and that of the *Berman*, *Asadi*, and *Bussing* approaches is that they did not foreclose the possibility for the SEC to exempt internal whistleblowers from Dodd-Frank's clear requirement of reporting to the SEC.

IV. THE SEC SHOULD RECEIVE DEFERENCE IN LIGHT OF ITS GENERAL EXEMPTIVE AUTHORITY EVEN IF THE DODD-FRANK ANTI-RETALIATION PROVISION IS CLEAR

Going forward, the SEC would receive deference for promulgating a new rule protecting internal whistleblowers under Dodd-Frank pursuant to the SEC's broad general exemptive authority under the statute, which allows it to exempt *any* person or classes of persons from Dodd-Frank requirements.¹⁴⁶ Courts typically apply the *Chevron* framework to determine whether to defer to an agency's exercise of its exemptive authority by notice-and-comment rulemaking because *Chevron* applies to agency actions that carry the force of law, as would be the case with notice-and-comment rulemaking pursuant to any type of authority.¹⁴⁷ The SEC's new rule under its general exemptive authority should receive *Chevron* deference *even* in light of the Supreme Court's holding that the statutory requirement of reporting "to the Commission" for anti-retaliation purposes is clear. The new rule would be entitled to deference because courts, in analyzing *Chevron* Step One when an agency exercises its explicit grant of exemptive authority, look at whether Congress has spoken on foreclosing the agency's exercise of exemptive authority on the statutory requirement at issue—in other words, whether Congress left the exemption issue ambiguous.¹⁴⁸ In doing so, courts focus on the language of the exemptive authority-granting provision rather than on whether the language of the substantive provision at issue is clear—in this case, that of the Dodd-Frank anti-retaliation provision.¹⁴⁹

¹⁴⁶ See *supra* note 71 and accompanying text.

¹⁴⁷ See, e.g., *Pharm. Research & Mfrs. of Am. v. Fed. Trade Comm'n*, 44 F. Supp. 3d 114, 118 (D.D.C. 2014) (applying *Chevron* in the context of an agency's rule that was promulgated pursuant to the agency's exemptive authority); see *supra* note 63.

¹⁴⁸ See, e.g., *Levy v. Sterling Holding Co.*, 475 F. Supp. 2d 463, 470–72 (D. Del. 2007) (holding that the SEC properly exercised its exemptive authority because the authority-granting provision did not "unambiguously foreclose the SEC's interpretation").

¹⁴⁹ See, e.g., *Pharm. Research*, 44 F. Supp. 3d at 116 (holding in favor of the SEC's exercise of its exemptive authority because the "plain language [of the authority-granting provision] is sufficiently broad"); *Am. Ass'n of Retired Pers. v. Equal Emp't Opportunity Comm'n*, 489 F.3d 558, 565 (3d Cir. 2007) ("[W]e do not find . . . that ambiguity must be present in the ADEA in order for the EEOC to exercise its authority under [the relevant exemptive authority provision]."). This makes sense because in granting an agency broad exemptive powers, Congress intended to provide the agency with the ability to "deal[] with the host of

During this *Chevron* Step One analysis, courts look at (1) whether the grant of exemptive authority is “sufficiently broad,”¹⁵⁰ and (2) whether the agency worked within the limitations of the exemptive authority provision (i.e., a requirement that the rule is consistent with the public interest).¹⁵¹ Here, the language of the SEC’s general exemptive authority is “very broad,” and the SEC’s new rule, which would exempt internal whistleblowers from the requirement of reporting to the Commission for anti-retaliation protection, is consistent with the public interest.¹⁵² Therefore, congressional intent on whether internal whistleblowers should be exempt is ambiguous, leaving room for courts to defer to the SEC’s new rule.

This Part discusses how courts apply *Chevron* Step One to rules promulgated pursuant to an agency’s express exemptive authority. Because no court rejected the SEC’s invalidated rule under Step Two,¹⁵³ whether the SEC may receive deference for its new rule hinges on if deferring to the SEC’s general exemptive authority is consistent with Step One. Therefore, this Part will only analyze the SEC’s exemptive authority under Step One. Ultimately, this Part argues that the SEC can receive deference from the Supreme Court by

unforeseeable problems which might arise in the administration of the Act.” *Kornfeld v. Eaton*, 217 F. Supp. 671, 679 (S.D.N.Y. 1963). Therefore, an agency should be able to exempt persons from the requirements of the substantive provision, even if that provision is clear, as long as the agency’s exemptive authority is sufficiently broad. *See Am. Ass’n of Retired Pers.*, 489 F.3d at 565. The petitioner in *American Ass’n of Retired Persons v. Equal Employment Opportunity Commission* challenged this approach in a petition for writ of certiorari, arguing that a court must find ambiguity in the substantive provision before it can defer to an agency’s exercise of exemptive authority. Petition for Writ of Certiorari at 12–14, *AARP v. Equal Emp’t Opportunity Comm’n*, 552 U.S. 1279 (2008) (No. 07-662). However, the Supreme Court denied the petition, which is promising news for agencies with broad exemptive authorities that are faced with a substantive provision that could lead to widely impractical results when applied indiscriminately to all persons or classes, as is the case here. *See AARP v. Equal Emp’t Opportunity Comm’n*, 552 U.S. 1279, 1279 (2008) (mem.).

¹⁵⁰ *See Fin. Planning Ass’n v. Sec. & Exch. Comm’n*, 482 F.3d 481, 484–85, 492–93 (D.C. Cir. 2007) (finding that the agency exceeded its exemptive authority when the granting provision narrowly construed its authority to apply to “other persons” that Congress had not already carved out an exception for); *Pharm. Research*, 44 F. Supp. 3d at 117 (holding in favor of the agency’s exercise of its exemptive authority because the plain language of the authority-granting provision is “sufficiently broad”); *Am. Ass’n of Retired Pers.*, 489 F.3d at 563–65 (holding that the agency satisfied *Chevron* Step One in exercising its exemptive authority when the granting provision broadly permitted the SEC to “establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest” (quoting 29 U.S.C. § 628 (2004))).

¹⁵¹ *See infra* notes 178–79 and accompanying text.

¹⁵² *See Pharm. Research*, 44 F. Supp. 3d at 118 (noting that the “consistent with the public interest” language that is part of an agency’s exemptive authority-granting provision provides the agency “very broad discretion” (quoting *Nat’l Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 827 (D.C. Cir. 1980))); *infra* notes 168–92 and accompanying text.

¹⁵³ *See supra* note 119 and accompanying text.

providing internal whistleblowers with Dodd-Frank anti-retaliation protection under its broad general exemptive authority.

A. *The SEC's New Rule Would Satisfy Chevron Step One Because the Language of the SEC's General Exemptive Authority Is Sufficiently Broad*

In determining if Congress has clearly foreclosed an agency's exemptive authority under *Chevron* Step One, courts look at whether the exemptive authority provision is "sufficiently broad" to apply to the exemption at issue.¹⁵⁴ The substantive provision (in this case, the Dodd-Frank anti-retaliation provision) only matters as far as its text does not *expressly* foreclose the agency's exemptive authority (i.e., by mandating that the provision apply uniformly).¹⁵⁵

In *Pharmaceutical Research and Manufacturers of America v. Federal Trade Commission*,¹⁵⁶ the agency was expressly granted broad exemptive authority, similarly drafted to the SEC's general exemptive authority in this case, which allowed the agency to "exempt, from the requirements of [the HSR Act], *classes* of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws[.]"¹⁵⁷ The court looked at the plain language of the granting provision and found that the agency could exempt any of the above groups, provided that the agency was not exempting individual entities, since the granting provision allowed the agency to exempt "classes."¹⁵⁸ Accordingly, the court held that the exemptive authority was "sufficiently broad" to allow the agency to exempt all but one industry from a requirement.¹⁵⁹ The court also recognized that even if the substantive provision contained a requirement with sweeping language,¹⁶⁰ there was no indication that Congress explicitly barred the agency's exemptive authority,¹⁶¹ for instance, by stating that the requirement *must* apply uniformly across all classes.¹⁶²

¹⁵⁴ See *supra* note 150.

¹⁵⁵ See *infra* notes 156–67 and accompanying text.

¹⁵⁶ 44 F. Supp. 3d 95 (D.D.C. 2014).

¹⁵⁷ *Id.* at 101 (second alteration in original) (emphasis added) (quoting 15 U.S.C. § 18(d)(2)(B) (2012)).

¹⁵⁸ *Id.* at 116 ("While the FTC is not permitted to exempt a specific 'person' from the reporting requirements, [the granting provisions] authorize the FTC to exempt general 'classes' of persons or transactions.").

¹⁵⁹ *Id.* at 116, 136–37.

¹⁶⁰ See *id.* at 115 ("[N]o person shall . . ." (emphasis omitted)).

¹⁶¹ *Id.* at 118 ("[T]here [is no] indication in the statute that Congress intended to foreclose the FTC's effective grant of such broad exemptions.").

¹⁶² See *id.* at 115–16 (indicating that the agency's exemptive authority would have been foreclosed had Congress expressly indicated its intent for the substantive provision to apply uniformly); see also *Env'tl. Def.*

In contrast, a court is more likely to find an agency's exemptive authority foreclosed when the language of the granting provision is narrower, for instance, when the provision only allows the agency authority to exempt persons that have not already been exempted by Congress.¹⁶³ In *Financial Planning Ass'n v. Securities and Exchange Commission*,¹⁶⁴ a case that concerned a narrower form of the SEC's exemptive authority under a different act, the granting provision only allowed the SEC to exempt from the definition of investment broker "such *other* persons" not within the intent of the paragraph where Congress had already listed five groups of exempt persons.¹⁶⁵ Among these exempt persons was "any broker or dealer . . . [w]hose performance of such services is solely incidental to the conduct of his business as a broker or dealer."¹⁶⁶ The court found that the SEC exceeded its exemptive authority when it provided additional exemptions to broker-dealers, reasoning that Congress had spoken on the extent that broker-dealers should be exempt when (1) Congress already carved out an exemption for broker-dealers, and (2) the SEC only had exemptive authority to exempt "such *other* persons" not within congressional intent.¹⁶⁷

Here, the Court should find that promulgating a new rule that exempts internal whistleblowers from the requirement of reporting "to the Commission" for Dodd-Frank anti-retaliation protection satisfies *Chevron* Step One because of how incredibly broad the language of its general exemptive authority is, thereby generating ambiguity as to whether internal whistleblowers should be exempt. From the plain language of the granting provision, the SEC is permitted to, "by rule, regulation, or order, . . . conditionally or unconditionally exempt *any* person . . . or *any* class or classes of persons . . . from *any* provision or provisions of this chapter or of *any* rule or regulation."¹⁶⁸ As further support, the 1934 Act also laid out only a few specific provisions that

Fund, Inc. v. Env'tl. Prot. Agency, 82 F.3d 451, 466–67 (D.C. Cir. 1996) (holding that despite the substantive provision's sweeping language, nothing in the language precluded the agency from exempting certain activities from the statute's requirements).

¹⁶³ See, e.g., *Fin. Planning Ass'n v. Sec. & Exch. Comm'n*, 482 F.3d 481, 484–85, 492–93 (D.C. Cir. 2007); see also *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, 537 F.3d 1006, 1021–22 (9th Cir. 2008) (holding that the agency clearly did not have the authority to exempt various categories when the language of its exemptive authority-granting provision only allowed the agency to "issue a permit for the discharge of any pollutant" and only in limited circumstances).

¹⁶⁴ 482 F.3d 481 (D.C. Cir. 2007).

¹⁶⁵ *Id.* at 484–85.

¹⁶⁶ *Id.* at 484.

¹⁶⁷ *Id.* at 484–85, 492–93. This suggests that had the language of the granting provision been broader (i.e., not limiting the agency to exempting "*other*" persons), the agency may have had authority to broaden the exemption of broker-dealers, even when Congress had already carved out an exemption for broker-dealers. *Id.*

¹⁶⁸ 15 U.S.C. § 78mm(a)(1) (2012) (emphasis added).

the SEC's general exemptive authority would not apply to, none that corresponds to Dodd-Frank's whistleblower provisions.¹⁶⁹ The "narrowness" of these exceptions as explicitly laid out by Congress "suggests the broadness of the SEC's exemptive authority."¹⁷⁰ This general exemptive authority has been viewed as "virtually unlimited"¹⁷¹ and should enable the SEC to exempt internal whistleblowers from Dodd-Frank's "to the Commission" requirement for anti-retaliation protection. In fact, this authority is even broader than the already broad exemptive authority of the agency in *Pharmaceutical Research*, where the court deferred to the agency's exemption of all but one industry from certain requirements when the granting provision allowed the agency to exempt "classes of persons" from the act at issue.¹⁷² And while the anti-retaliation provision could be read as protecting only those who report "to the Commission," nothing in the statute indicates Congress's express intent to bar any relaxation of that standard, such as a provision stating that the standard must apply uniformly to all classes.¹⁷³ Therefore, the SEC's new rule should satisfy *Chevron* Step One under the SEC's general exemptive authority.¹⁷⁴

The SEC would also not have to worry about facing the same unsuccessful fate as it did in *Financial Planning Ass'n* because (1) the language of the SEC's general exemptive authority is drafted much more broadly than its narrower form of exemptive authority at issue in that case, and (2) Congress has not yet spoken on the issue by carving out any particular exemptions for internal whistleblowers. Here, the SEC's general exemptive authority is not limited to exempting "such other persons" not within the intent of Congress, but rather reaches "any person . . . or any classes of persons."¹⁷⁵ In addition, Congress has not yet created an exemption for internal whistleblowers under Dodd-Frank,¹⁷⁶ unlike in *Financial Planning Ass'n*, where Congress had already carved out an exemption for broker-dealers under the Act at issue, and the SEC in that case sought to expand that exemption. Accordingly, courts

¹⁶⁹ See 15 U.S.C. § 78mm(b)–(c).

¹⁷⁰ Steven J. Cleveland, *Resurrecting Court Deference to the Securities and Exchange Commission: Definition of "Security,"* 62 CATH. U. L. REV. 273, 306 n.171 (2013).

¹⁷¹ See *supra* note 73 and accompanying text.

¹⁷² Compare 15 U.S.C. § 78mm(a)(1), with *id.* § 18(d)(2)(B).

¹⁷³ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.); see also *supra* note 162.

¹⁷⁴ The only meaningful limitation under the granting provision is that the SEC must do so "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors," which will be discussed in section III.B below. 15 U.S.C. § 78mm(a)(1); see *Pharm. Research & Mfrs. of Am. v. Fed. Trade Comm'n*, 44 F. Supp. 3d 95, 118 (D.D.C. 2014).

¹⁷⁵ Compare 15 U.S.C. § 78mm(a)(1) (emphasis added), with *id.* § 80b–2(a)(11) (emphasis added).

¹⁷⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.).

should find that the SEC's general exemption here is not foreclosed by Congress.

B. The SEC's New Rule Would Satisfy Chevron Step One Under Its General Exemptive Authority Because the Rule Is Consistent with Public Interest

While some may worry that not requiring ambiguity in the substantive provision under *Chevron* Step One would allow agencies to circumvent statutory provisions “under the guise of ‘exemption,’”¹⁷⁷ an agency exercising its exemptive authority is checked by the limitations established in the granting provision.¹⁷⁸ The SEC's general exemptive authority, as it pertains to Dodd-Frank requirements, is limited only by the requirement that it is exercised “to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”¹⁷⁹ Although courts recognize that the SEC has “very broad discretion” to determine how to best protect the public interest and investors,¹⁸⁰ they also recognize that even broad “public interest” mandates must be bound by “the purposes that Congress had in mind when it enacted [the] legislation.”¹⁸¹ This has been interpreted to mean that an agency may not advance just any policy reason for its exemption, but must advance a policy reason in an area that Congress contemplated as being within the agency's enforcement power.¹⁸²

The SEC can argue that its exemption of internal whistleblowers from the “to the Commission” requirement for Dodd-Frank anti-retaliation protection

¹⁷⁷ Petition for Writ of Certiorari at 11, *AARP v. Equal Emp't Opportunity Comm'n*, 552 U.S. 1279 (2008) (No. 07-662).

¹⁷⁸ *See, e.g., Pharm. Research*, 44 F. Supp. 3d at 118 (looking primarily at the language of the granting provision in determining the limitations of the agency's exemptive authority).

¹⁷⁹ 15 U.S.C. § 78mm(a)(1); *see, e.g., Lindeen v. Sec. & Exch. Comm'n*, 825 F.3d 646, 654–55 (D.C. Cir. 2016) (holding a narrower form of the SEC's exemption was appropriate because it was consistent with public interest); *Nat'l Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 825, 827 (D.C. Cir. 1980) (holding that the defendant agency could “grant an exemption merely upon finding that it is consistent with the public interest to do so” based on the “consistent with public interest” language of the granting provision (internal quotations omitted)).

¹⁸⁰ *Lindeen*, 825 F.3d at 650–54 (interpreting the “consistent with the public interest and the protection of investors” language to mean that Congress explicitly granted the SEC discretion to determine how best to protect the public and investors (quoting 15 U.S.C. § 77r(b)(3) (2012))); *Pharm. Research*, 44 F. Supp. 3d at 118 (noting that the “consistent with the public interest” language grants the agency “very broad discretion” (quoting *Nat'l Small Shipments Traffic Conference, Inc.*, 618 F.2d at 827)).

¹⁸¹ *Bus. Roundtable v. Sec. & Exch. Comm'n*, 905 F.2d 406, 413 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)).

¹⁸² *Id.* at 413 (holding that the SEC's exemption was not consistent with public interest and the protection of investors because it preempted “‘firmly established’ state jurisdiction” over the matter, which was an “advance into an area not contemplated by Congress”).

falls under the scope of its exemptive authority because it is in the best interests of whistleblowers, investors, corporations, and the SEC itself. First, this exemption benefits internal whistleblowers because they could take advantage of a significantly longer statute of limitations, larger monetary compensation, and direct access to federal courts under Dodd-Frank, rather than remaining limited to the weaker protections of SOX, as discussed earlier in section I.B.¹⁸³ Furthermore, internal whistleblowers, who are required under SOX to first report internally (i.e., auditors and in-house attorneys)¹⁸⁴ and have the greatest access to information about a company's fraudulent activities, will be protected under the SEC's rule. These stronger protections will further deter employers from retaliating against internal whistleblowers, incentivizing whistleblowers with material evidence to report corporate fraud more frequently.¹⁸⁵ This in turn would better protect investors from the crippling effects of corporate fraud, since internal whistleblowing is a crucial means of exposing fraud.¹⁸⁶

Corporations also benefit because exempting internal whistleblowers would help eliminate the two-tiered structure that exists if Dodd-Frank provided external whistleblowers with stronger protections.¹⁸⁷ A two-tiered structure has been consistently opposed by corporations because stronger incentives for reporting externally could “unravel the years of effort that have been put into maintaining healthy internal compliance systems” that SOX mandated them to put in place.¹⁸⁸ Finally, the exemption would also benefit the SEC by preserving the SEC's limited resources, because external reporting has the potential to result in “an overflow of noisy signals—that is, a large number of tips of varying quality—causing the Commission to incur costs to process and validate the information.”¹⁸⁹ Meanwhile, internal reporting can serve as a filter because of its potential to allow good-faith corporations to remedy complaints before they reach the SEC, enhancing the efficiency of the SEC's

¹⁸³ Recent Legislation, *supra* note 29, at 1834; *see supra* notes 44–57 and accompanying text.

¹⁸⁴ *See supra* notes 110–16 and accompanying text.

¹⁸⁵ Brief for the SEC as Amicus Curiae Supporting Appellant, *Safarian v. Am. DG Energy Inc.*, 622 Fed. App'x 149 (3d Cir. 2015) (No. 14-2734), 2014 WL 7240193, at *28.

¹⁸⁶ *See, e.g.*, Lilanthe Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, SANTA CLARA UNIV. (Feb. 4, 2003), <https://www.scu.edu/ethics/focus-areas/business-ethics/resources/encouraging-internal-whistleblowing> (discussing the importance of internal whistleblowers at exposing securities violations).

¹⁸⁷ Recent Legislation, *supra* note 29, at 1834–35.

¹⁸⁸ *See id.*; *see also* Rubinstein, *supra* note 86, at 650 (discussing the benefits of internal reporting over external reporting, including the “prevent[ion of] negative publicity, investigations, and legal actions,” and the potential to “allow the employer to clarify the misunderstanding before negative information becomes public”).

¹⁸⁹ Proposed Rules, 75 Fed. Reg. 70,488, 70,516 (Nov. 17, 2010) (codified at 17 C.F.R. pts. 240, 249).

enforcement power.¹⁹⁰ Moreover, these policy reasons are bounded by “the purposes that Congress had in mind when it enacted [the] legislation”¹⁹¹ because they relate to an area that Congress contemplated as being within the SEC’s expertise under Dodd-Frank: the regulation of securities fraud.¹⁹²

Of course, if the SEC wants an even higher chance of deference, it could exercise its general exemptive authority in a less sweeping manner. It could limit the exemption to a smaller class or subset of internal whistleblowers in which the public interest is greatest at stake (for example, to attorneys and auditors).¹⁹³ Alternatively, it could exercise its power even more narrowly by exempting individual whistleblowers on a case-by-case basis through executive orders, similarly to the context of whistleblower awards.¹⁹⁴ Even so, the SEC should be able to promulgate a rule that broadly exempts internal whistleblowers as a class, given how deferential courts have been towards broad exemptive authorities¹⁹⁵ and how “virtually unlimited” its general exemptive authority is.¹⁹⁶

Arguably, we should *require* the SEC to provide Dodd-Frank anti-retaliation protection to at least some internal whistleblowers pursuant to its exemptive authority because some courts have held that failing to do so on the basis that the statute is clear could be considered “arbitrary and capricious.”¹⁹⁷ If the SEC lets the current blanket requirement of reporting to the SEC stand, not only would internal whistleblowers be deterred from reporting material

¹⁹⁰ The SEC itself has stated that “whistleblowers increase [the SEC’s] efficiency and conserve [its] scarce resources.” See Mary Jo White, Chairman, U.S. Sec. & Exch. Comm’n, The SEC as the Whistleblower’s Advocate (Apr. 30, 2015), <https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html>. Some express concern that emphasizing internal over external whistleblowers would lead to greater securities violations because information that could have been used by the SEC will instead be either ignored by higher management or used to “attempt a cover up.” See Dworkin, *supra* note 43, at 1760. However, in large companies, “[s]ecurities violations often occur [because] of weak managerial oversight rather than [cover-ups],” especially when more “active involvement” in higher management becomes impractical as a company increases in complexity. See Petkova, *supra* note 103, at 594.

¹⁹¹ See *supra* note 181.

¹⁹² *What We Do*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 16, 2018) (detailing the purposes and responsibilities of the SEC).

¹⁹³ See *supra* notes 110–16 and accompanying text; see also text accompanying *supra* note 184.

¹⁹⁴ See 15 U.S.C. § 78mm(a)(1) (2012) (“[T]he Commission, by . . . order, may conditionally or unconditionally exempt any person . . . or any class or classes of persons . . . from any provision or provisions of this chapter . . . (emphasis added); *supra* notes 75–80 and accompanying text.

¹⁹⁵ See *supra* Section III.A.

¹⁹⁶ See *supra* note 73.

¹⁹⁷ See *e.g.*, *Am. Petroleum Inst. v. Sec. & Exch. Comm’n*, 953 F. Supp. 2d 5, 10–11 (D.D.C. 2013) (holding that the SEC was “arbitrary and capricious” when the SEC failed to exercise its exemptive authority to relieve four specific countries of various public disclosure requirements under Dodd-Frank on the basis that Dodd-Frank’s text clearly required public disclosure).

information at risk of losing their jobs and reputations, but also investors, companies, and the SEC would face heavy burdens at the expense of financial stability.¹⁹⁸ Therefore, the SEC should exempt internal whistleblowers from external reporting, with the reassurance that such a rule should likely be entitled to deference under *Chevron*.

CONCLUSION

Internal whistleblowers who risk their careers and reputations to come forward and expose corporate wrongdoing should not be punished with limited retaliation protections under Dodd-Frank. The enactment of Dodd-Frank, while motivated by congressional intent to expand incentives and protections for whistleblowers, introduced an important issue: do internal whistleblowers qualify for the expanded anti-retaliation protections under Dodd-Frank? Unfortunately, the Supreme Court recently held that Dodd-Frank's text clearly requires whistleblowers to report to the SEC to qualify as "whistleblowers" for Dodd-Frank anti-retaliation protection.

However, the Supreme Court left open the separate issue of whether the SEC could nevertheless exempt internal whistleblowers from this requirement. Fortunately for internal whistleblowers, Congress granted the SEC with a necessary and powerful exemptive authority so that the SEC can have wide discretion to exempt *any* individuals or groups of individuals from *any* statutory requirement under Dodd-Frank in the wake of a dynamic and unpredictable financial market. This "virtually unlimited"¹⁹⁹ authority is bound only by the requirement that it is exercised in a manner consistent with public interest. Given that expanded protections for internal whistleblowers would benefit whistleblowers, companies, investors, and the SEC, a rule exempting internal whistleblowers from the "to the Commission" requirement for Dodd-Frank protection should receive deference. This power is important to recognize because it provides the SEC with a way to carry out the purposes of Dodd-Frank and provide internal whistleblowers with the expanded protections they deserve, even if the anti-retaliation provision clearly requires external reporting. It allows the SEC to do so while still respecting congressional intent because Congress had explicitly granted the SEC the power to exempt whistleblowers from external reporting.

¹⁹⁸ See *supra* notes 183–90 and accompanying text.

¹⁹⁹ See *supra* note 73 and accompanying text.

Even so, courts and the SEC seemed to have forgotten that this power exists. Therefore, this Comment reminds agencies and courts going forward how the forgotten power of general exemptive authority can play a considerably significant role in allowing courts to defer to agencies that relax clear statutory requirements, when a blanket application of those statutory requirements would lead to widely impractical results.

LESLEY CHEN*

* Online Editor, *Emory Law Journal*, Volume 67; Emory University School of Law, J.D., 2018; Washington University in St. Louis, B.A., 2014. I would like to thank my faculty advisor, Professor Jonathan Nash, for his guidance throughout the writing process. I am also thankful for *Emory Law Journal* members Caryn Wang, Jeffrey Schacknow, Lucy Gauthier, and Janiel Myers, for their helpful feedback and edits in preparing this Comment for publication. Finally, I would like to thank my family members Xiao Jing Feng, Lin Chen, and Kimberly Chen for all their love and support.