WHY SHOULDN'T WE PROTECT INTERNAL WHISTLEBLOWERS? EXPLORING JUSTIFICATIONS FOR THE *ASADI* DECISION

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What kind of whistleblowing should the Dodd-Frank Act protect? In Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit held that Dodd-Frank's antiretaliation provisions extend only to whistleblowers who report information externally, an interpretation of the statute that leaves "internal whistleblowers" unprotected. At first glance, such a ruling, by minimizing protection for whistleblowers, appears likely to result in negative consequences. This Note argues, however, that the Fifth Circuit put forward a rule that not only rests upon a legitimate interpretation of the Dodd-Frank Act but that also may have positive real world consequences. Such consequences, this Note argues, include better channeling of information to the SEC, incentivizing a stronger "tone at the top" within corporations, and minimizing opportunities for corporations to mask wrongdoing.*

 J.D., 2015, New York University School of Law; B.A., 2012, Grove City College. Special thanks to the Mahans, Ellen Brasel, and my family, especially my parents and Rachel Walker, for their constant support and encouragement over the years. Thanks also to Charlie Low, Kevin Benish, and Robert Gianchetti for their tireless and excellent work as editors.

INTRODUCTION

Should a whistleblower who reports wrongdoing to others within her company receive protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")?[1] In *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit examined the text of Dodd-Frank and firmly decided *no*.[2] Although the Fifth Circuit was the first federal court of appeals to address this issue,[3] its decision did not settle the matter. In making its decision, the Fifth Circuit diverged from case law outside the circuit[4] and the Securities and Exchange Commission's ("SEC") interpretation of the Act.[5] While some district courts outside the Fifth Circuit have followed *Asadi*,[6] other courts—most notably the Second Circuit—and scholars have continued to champion a different interpretation of Dodd-Frank, one that extends strong protections to "internal whistleblowers."[7]

In justifying its *Asadi* decision, the Fifth Circuit focused primarily on the statutory language of Dodd-Frank.[8] The court held that the statutory text of Dodd-Frank is unambiguous: The Act does not protect internal whistleblowers from retaliation.[9] Some critics of *Asadi* have focused on this textual element of the court's reasoning, arguing

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[1] *See* 15 U.S.C. § 78u-6 (2012) (outlining the whistleblower protections under the Dodd-Frank Act).

[2] 720 F.3d 620, 621 (5th Cir. 2013).

[3] Nicholas Woodfield, *Why the 5th Cir. Was Wrong in* Asadi v. GE Energy, LAW360 (Feb. 14, 2014, 4:09 PM), http://www.law360.com/articles/509472/why-the-5th-circ-was-wrong-in-asadi-v-ge-energy.

[4] *See, e.g.*, Murray v. UBS Sec., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *6 (S.D.N.Y. May 21, 2013) (interpreting Dodd-Frank to provide protection for internal whistleblowing); Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) (same); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 993–94 (M.D. Tenn. 2012) (same); Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011) (same).

[5] *See* 17 C.F.R. § 240.21F-2(b)(1) (2014) (interpreting Dodd-Frank to provide protection for internal whistleblowing).

[6] *E.g.*, Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 408 (S.D.N.Y. 2014), *rev'd and remanded*, No. 14-4626, 2015 WL 5254916 (2d Cir. Sept. 10, 2015); Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 645 (E.D. Wis. 2014).

[7] *See infra* Part I.C (detailing court decisions and academic opinions standing in opposition to *Asadi*).

[8] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 622 (5th Cir. 2013).

[9] *Id.* at 629.

that the Fifth Circuit erred by rejecting the policy that best promoted corporate honesty (therefore, truly fulfilling the overarching purpose of Dodd-Frank).[10]

This Note argues that the Fifth Circuit's decision in *Asadi* not only rests upon a strong interpretation of Dodd-Frank, but also sets out a rule that is justified on policy grounds. By incentivizing whistleblowers to directly approach the SEC, the *Asadi* court created a rule more likely to encourage corporations to improve their internal environments, resulting in an ethical "tone at the top" and a more honest corporate culture. Even if some corporations do not improve their "tone at the top," other benefits such as a heightened ability for the government to collect penalties and fewer opportunities to mask corporate wrongdoing still justify an *Asadi*-style rule.

Part I of this Note examines the *Asadi* decision, the central questions raised by the case, the incentives created by the Fifth Circuit's decision, and the criticisms which have followed the case. Part II offers responses to critics of *Asadi* and presents arguments demonstrating how the Fifth Circuit's decision could ultimately lead to positive results.

I
WHEN IS A WHISTLEBLOWER A "WHISTLEBLOWER"? THE RELATIONSHIP BETWEEN DODD-FRANK AND INTERNAL WHISTLEBLOWING UNDER *ASADI*

A. Khaled Asadi and the Internal Whistleblower Under Dodd-Frank

In response to the 2008 financial crisis,[11] Congress passed the Dodd-Frank Act.[12] The largest financial regulatory reform bill enacted since the Great Depression, Dodd-Frank contained a myriad of provisions, programs, and elements designed to combat corporate malfeasance.[13] The areas touched by Dodd-Frank ranged from ATM fees to the regulation of hedge funds.[14] Corporate whistleblowing was

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[10] *See infra* Part I.C (detailing court decisions and academic opinions standing in opposition to the Fifth Circuit's decision).

[11] *See* Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 446 (2012) (noting "Congress reacted" to the 2008 financial crisis by "enacting the Dodd-Frank Act in an effort to establish a more stringent corporate governance policy").

[12] Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. Law No. 111-203, 124 Stat. 1376 (2010).

[13] Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL ST. J., July 16, 2010, at A1.

[14] *Id.*

one major area targeted by Dodd-Frank.[15] Building on whistleblower protections created by the 2002 Sarbanes-Oxley Act ("SOX"), Dodd-Frank sought to further encourage whistleblowing by creating a special SEC "Office of the Whistleblower" (which included a chief, deputy chief, and five attorneys) and laying out provisions for whistleblower rewards.[16] Dodd-Frank also implemented stronger protections against whistleblower retaliation than those found in SOX.[17] While Dodd-Frank addressed many issues surrounding whistleblowing, it left at least one important issue unsettled: When does an employee who reports wrongdoing actually count as a whistleblower?

Khaled Asadi soon discovered the importance of this question. Asadi had been serving as GE Energy's ("GE") Iraq Country Executive for four years when, in 2010, he was informed by Iraqi officials that his company had hired an employee in violation of the Foreign Corrupt Practices Act.[18] The officials alleged that, to help a lucrative joint venture between the Iraqi government and GE move forward, GE improperly hired a woman associated with an Iraqi official.[19] Instead of approaching the SEC with his information, Asadi reported the wrongdoing to his supervisor and his company ombudsperson.[20] Shortly after reporting the wrongdoing, Asadi received an unprecedented (and unexpected) negative performance review from his supervisor, followed by a request from GE that he take a voluntary demotion.[21] Shortly after refusing to take this demotion, Asadi was fired.[22]

Asadi brought his case to court alleging his termination was illegal retaliation for whistleblowing.[23] Asadi lost in the district court; he then appealed to the Fifth Circuit.[24] Asadi's case before the Fifth Circuit concerned whether he was protected by Dodd-Frank's restrictions against retaliation for whistleblowing, even though he had only

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15 *See* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 52 (2012) (describing how Dodd-Frank impacted whistleblowing).

16 *Id.*

17 *See id.* at 14–17 (citing the ways in which Dodd-Frank improved upon Sarbanes-Oxley). It should be noted that both Dodd-Frank and Sarbanes-Oxley act to prevent termination within a legal environment where, by default, most employees can be fired "at-will." *See infra* Part II.A (discussing the interaction between Dodd-Frank and SOX).

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

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599, at *2 (S.D. Tex. June 28, 2012), *aff'd*, Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).

24 720 F.3d at 621.

blown the whistle internally (and had not approached the SEC itself).[25]

The Dodd-Frank whistleblower protection that Asadi relied upon was the private cause of action provided for in the statute.[26] This private cause of action covers individuals who whistleblow either (a) directly to the SEC while "initiating, testifying in, or assisting in any investigation or judicial or administrative action of" the SEC, or who (b) make disclosures that are "required or protected under the Sarbanes-Oxley Act of 2002."[27] If, after individuals have disclosed information concerning wrongdoing, employers "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment," the statute allows courts to hold such employers liable.[28] The statute also permits wronged employees to bring their cases directly to a district court and, if successful in court, to recover two times back pay.[29]

Even Asadi conceded that he did not count as a whistleblower under the plain meaning of Dodd-Frank's text.[30] In the definition section of the statute, "whistleblower" is defined as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[31] The definition refers only to individuals who directly approach the SEC. Because Asadi did not directly approach the SEC, it appeared as if this definition did not cover him.

However, Asadi asserted that he was implicitly covered by § 78u-6(h)(1)(A) as an internal whistleblower, since that section of Dodd-Frank extended whistleblower protections.[32] To make this argument, Asadi pointed to the third "protected category" of whistleblowers listed under § 78u-6(h)(1)(A),[33] which provides protection for disclosures "required or protected under the Sarbanes-Oxley Act of

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[25] *See id.* at 623. Asadi's case before the district court turned, in contrast, on questions of extraterritoriality. *Asadi*, 2012 WL 2522599, at *4. The Fifth Circuit did not consider this legal issue (nor will this Note).

[26] 15 U.S.C. § 78u-6(h)(1)(A) (2012).

[27] *Id.*

[28] *Id.*

[29] *Id.* §§ 78u-6(h)(1)(B)–(C).

[30] 720 F.3d at 624 ("Asadi concedes that he is not a 'whistle-blower' as that term is defined in section 78u-6(a)(6) because he did not provide any information to the SEC.").

[31] § 78u-6(a)(6).

[32] 720 F.3d at 624.

[33] This section is referred to in the *Asadi* opinion as the "whistleblower-protection provision," *id.* at 628, and will hereinafter also be referred to as the "whistleblower-protection section."

2002."[34] Because internal whistleblowers were protected under Sarbanes-Oxley, Asadi reasoned that they were also protected under the third category of whistleblowers laid out in § 78u-6(h)(1)(A) of Dodd-Frank.[35]

Asadi relied on several outside sources of authority to support his argument that internal whistleblowers were protected by Dodd-Frank. One source Asadi looked to was the official SEC interpretation of the statute.[36] While the SEC interpretation states that awards should only be extended to individuals who "provide the Commission with information,"[37] it clarifies that antiretaliatory provisions extend to broader groups, including internal whistleblowers.[38] The *Asadi* court, in analyzing the regulations, noted that the SEC defined "whistleblower" broadly, labeling any individual engaged in activity protected under 15 U.S.C. § 78u-6(h)(1)(A) a whistleblower.[39] Under the SEC regulations, Asadi would, therefore, have been protected by the antiretaliatory provisions contained in Dodd-Frank.

Asadi also relied on several district court cases, including[40] *Egan v. TradingScreen, Inc.*,[41] *Nollner v. Southern Baptist Convention, Inc.*,[42] and *Kramer v. Trans-Lux Corp.*,[43] which supported his preferred interpretation of Dodd-Frank.[44] In *Egan*, the district court justified extending antiretaliation protection to an internal whistleblower based not just on considerations of the statutory text but also on broader considerations. The court began by writing that a "literal reading" of Dodd-Frank's whistleblower definition would dictate protecting only whistleblowers who reported wrongdoing directly to the

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[34] *Id.* at 626.

[35] *Id.*

[36] *Id.* at 629.

[37] 17 C.F.R. § 240.21F-2(a)(1) (2014).

[38] *Id.* § 2(b)(1); *see also Asadi*, 720 F.3d at 629 (interpreting § 2(b)(1) as defining "whistleblower" broadly).

[39] 720 F.3d at 629.

[40] Brief of Khaled Asadi, Plaintiff-Appellant at 25, Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013) (No. 12-20522), 2012 WL 5294783, at *25.

[41] No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

[42] 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

[43] No. 3:11cv1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012).

[44] *See id.* at *4–5 (following the SEC's interpretation that Dodd-Frank's definition of "whistleblower" includes some internal whistleblowers); *Nollner*, 852 F. Supp. 2d at 993–95 & n.9 (stating that the antiretaliation provisions require the violation of securities law, but implicitly indicating that a whistleblower could receive antiretaliation protection without having reported to the SEC); *Egan*, 2011 WL 1672066, at *4–5 (holding that "[t]he contradictory provisions of the Dodd-Frank Act are best harmonized by reading [its] protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to [the statute's] definition of a whistleblower as one who reports to the SEC").

SEC.[45] However, the court held that this literal interpretation could not be justified because such a strict reading would "effectively invalidate" the whistleblower protection section of Dodd-Frank.[46] Deferring to the overall structure intended by Dodd-Frank, the *Egan* court ultimately rejected a rigid interpretation of the text, choosing instead to maximize protection of whistleblowers.[47]

While *Nollner* did not definitively determine whether internal whistleblowing is protected by Dodd-Frank, it approvingly cited *Egan* on the point of Dodd-Frank's ambiguity and discussed the issue in dicta.[48] *Nollner* was interpreted by the *Asadi* court as endorsing *Egan*'s analysis and being case law that was "in [Asadi's] corner."[49] After examining the statutory language of Dodd-Frank and finding it ambiguous, the court in *Kramer* deferred to the SEC's interpretation protecting internal whistleblowers.[50] These three decisions bolstered Asadi's case for antiretaliation protection.[51]

B. The Fifth Circuit's Examination of the Dodd-Frank Text

Despite Asadi's arguments, appeal to the SEC's interpretation, and support from cases in other circuits, the Fifth Circuit held that Dodd-Frank did not extend antiretaliation protection to internal whistleblowers.[52] According to the Fifth Circuit, the text of the statute was meant to extend to external whistleblowers only, a point the court emphasized with a repeated reference to the "unambiguous" text. In order to reach its conclusions, the court relied very heavily on the statutory definition section of Dodd-Frank, highlighting Asadi's initial admission that this definitional language was clear.[53] The Fifth Circuit argued that this definitional section strongly demonstrated congressional intent *not* to extend whistleblower protection to internal whistleblowers.[54] Focusing on Congress's use of the statutorily defined word "whistleblower" within the whistleblower-protection section, the court reasoned that Congress could easily have used a more neutral

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45 *Egan*, 2011 WL 1672066, at *4.

46 *Id.*

47 *See id.* at *5 (harmonizing the statutory definition of "whistleblower" and the whistleblower-protection section by reading the protection section as a narrow exception to the statutory definition's requirement of reporting to the SEC).

48 *Nollner*, 852 F. Supp. 2d at 994 n.9.

49 Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 624–25 & n.6 (5th Cir. 2013).

50 Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU), 2012 WL 4444820, at *4–5 (D. Conn. Sept. 25, 2012).

51 *Asadi*, 720 F.3d at 624–25 & n.6.

52 *Id.* at 630.

53 *Id.* at 624–27.

54 *Id.* at 626–27.

term like "employee" or "individual."[55] Instead, the chosen language demonstrated that Congress only intended to protect whistleblowing in purposefully narrow circumstances.[56]

What of the apparent ambiguity between this definitional section of Dodd-Frank and the third protected category of whistleblowers found within § 78u-6(h)(1)(A)? The Fifth Circuit found that the "statutory text describing these three categories of protected activity" was, when juxtaposed with the definitional section, "also unambiguous."[57] The Fifth Circuit rejected Asadi's argument that there was tension between this third category and the statutory definition of whistleblower, pointing out that a plain reading of the text did *not* "effectively invalidate" the third part of Dodd-Frank's whistleblower-protection section.[58] The Fifth Circuit wrote that this third section was intended to make certain that external whistleblowers were still protected in particular circumstances.[59] According to the Fifth Circuit, the third section protected employees who blew the whistle both internally *and* to the SEC.[60] Without such a section, the *Asadi* court contended such simultaneous whistleblowers might be left unprotected.[61] Instead of creating ambiguity, the Fifth Circuit found that the third category listed in Dodd-Frank merely made certain that *all* potential whistleblowers who approached the SEC were protected by Dodd-Frank.[62]

In the text of the *Asadi* opinion, the Fifth Circuit did not discuss the issue of *Chevron* deference in great detail.[63] Some later courts—including the Second Circuit—have, instead of adopting a wholesale criticism of *Asadi*'s consequences, argued more narrowly that Dodd-

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[55] *Id.* at 626.

[56] *See id.* at 627 (noting that Congress explicitly used the term "whistleblower" in the protection provisions, maintaining that the statute provides a single, unambiguous definition of "whistleblower," and therefore finding the protection provisions are limited "to apply only to individuals who qualify as 'whistleblowers' under the statutory definition of that term").

[57] *Id.* at 625.

[58] *See id.* at 624–25 & n.6 (discussing and rejecting *Egan*, which held that a literal reading of the whistleblower definition would "effectively invalidate" the third category protection).

[59] *Id.* at 625–27.

[60] *Id.* at 627.

[61] *Id.*

[62] *Id.* at 628.

[63] *See id.* at 630 (citing *Chevron* and concluding Congress directly addressed the question at issue). One of the major principles set forth in the Supreme Court's *Chevron* decision is that courts should typically defer to the statutory interpretation of administrative agencies. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

Frank is itself ambiguous and thus the SEC's interpretation is entitled to *Chevron* deference.[64] The Fifth Circuit's response to the possibility of *Chevron* deference, however, was that "[b]ecause Congress [had] directly addressed the precise question at issue . . . the SEC's expansive interpretation of the term 'whistleblower'" must be rejected.[65] *Chevron* deference is only justified when actual textual ambiguity exists.[66] Because Congress clearly defined "whistleblower," interpretations that run counter to the unambiguous text are not worthy of deference.

The *Asadi* court's decision left Mr. Asadi—and all internal whistleblowers under the circuit's jurisdiction—unprotected. To read the Fifth Circuit's opinion, this decision was an easy one. Concerns about ambiguity, the SEC's interpretations, and real world consequences were simply not strong enough to outweigh the plain meaning of the text. Because Congress did not act to extend the antiretaliation provisions of Dodd-Frank to internal whistleblowers, such whistleblowers could not be protected.

C. Examining the Criticized Incentives of the Fifth Circuit's Decision

The Fifth Circuit, by focusing so closely on Dodd-Frank's text, may appear, at first, to have missed the real world regulatory forest for the textual trees. The Fifth Circuit was the first circuit to write an opinion on this aspect of Dodd-Frank and, indeed, was the first court to extensively analyze the issue.[67] Nevertheless, the Fifth Circuit by no

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[64] *See, e.g.*, Berman v. Neo@Ogilvy LLC, No. 14-4626, 2015 WL 5254916, at *9 (2d Cir. Sept. 10, 2015) (granting *Chevron* deference to the SEC's interpretation of Dodd-Frank's whistleblower protections); Rosenblum v. Thomson Reuters (Markets) LLC, 984 F. Supp. 2d 141, 146–48 (S.D.N.Y. 2013) (same); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (same); Murray v. UBS Sec., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *4–7 (S.D.N.Y. May 21, 2013) (same). The *Kramer* case, which was noted by the *Asadi* court, makes a similar *Chevron*-style argument, deferring to the SEC based on ambiguity in the text. Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012).

[65] 720 F.3d at 630.

[66] *See id.* (citing *Chevron*). Other courts have followed a similar reasoning. *See, e.g.*, Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 408 (S.D.N.Y. 2014) (relying on *Asadi* to explicitly argue that because the statutory text of Dodd-Frank is clear, *Chevron* deference is inappropriate); Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *7 (M.D. Fla. May 12, 2014) (same); Banko v. Apple Inc., 20 F. Supp. 3d 749, 756–57 (N.D. Cal. 2013) (same); Wagner v. Bank of Am. Corp., No. 12-cv-00381-RBJ, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013), *aff'd*, 571 F. App'x 698 (10th Cir. 2014) (citing *Asadi* as support for the plain language view in understanding the definition of "whistleblower").

[67] While Asadi did rely on some district court cases to develop his argument, *see supra* notes 40–44, each case devoted only a few paragraphs to addressing the ambiguity in the Dodd-Frank text. *Kramer*, 2012 WL 4444820, at *4–5; Nollner v. S. Baptist Convention,

means settled the matter, and the Second Circuit's recent decision in *Berman* has created a definite circuit split.[68] Some have attempted to rebut the Fifth Circuit's textual analysis.[69] Other critics have focused on real world consequences, and a few advocates of a rule running counter to *Asadi* have said, sometimes implicitly[70] and sometimes explicitly,[71] that the only way the Fifth Circuit reached its conclusion regarding Dodd-Frank's text was by purposefully ignoring the real world implications of its holding.

In *Asadi*, the Fifth Circuit did rely almost exclusively on the text of Dodd-Frank. At the start of the opinion, the court noted that its analysis "begins and ends with the text."[72] Because the court concluded that the text was so clear, it believed that basing its decision on any other grounds would be inappropriate.

Certainly, committed textualists might argue that the Fifth Circuit was justified in relying on the text alone. The Fifth Circuit noted that, because the statute was "unambiguously" written, "[t]he statute, therefore, clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank."[73] Implicit in this statement is the idea that examining

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Inc., 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012); Egan v. TradingScreen Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *4–5 (S.D.N.Y. May 4, 2011).

[68] *Berman*, 2015 WL 5254916, at *9. *See also* Ed Beeson, *SEC Whistleblowers Finally Ripe for High Court Review*, LAW360 (Sept. 10, 2015, 9:36 PM), http://www.law360.com/articles/701503 ("Given not only this split but also the various fractures within district courts on the topic . . . [the Supreme Court] eventually will have to weigh in, attorneys from both the defense and plaintiffs bar agree.").

[69] *See, e.g.*, *Berman*, 2015 WL 5254916, at *1 (noting that the central issue in determining whistleblower protections was that of "statutory interpretation" and rejecting the Fifth Circuit's analysis of the statutory text); *Rosenblum*, 984 F. Supp. 2d at 146–48 (rejecting the Fifth Circuit's analysis of the statutory text); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 747 (2014) ("The decision in *Asadi* is flawed because it fails to acknowledge that the language of the statute is ambiguous on its face . . . .").

[70] *See, e.g.*, Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014) ("No term or phrase in the [Dodd-Frank] statute is actually ambiguous. Instead, courts perceiving ambiguity appear flummoxed by the simple fact that the protections in the statute extend to activity beyond the activity that qualifies an employee for protection.").

[71] *See, e.g.*, Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014), *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014) (refusing to justify a rule running counter to *Asadi* based on a *Chevron* analysis in favor of criticizing *Asadi* on broader grounds); Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act,* 113 MICH. L. REV. 121, 137, 148–49 (2014) (deriding the Fifth Circuit's decision "[b]ased [p]urely on the [t]ext" and urging the Supreme Court to adopt a rule protecting internal whistleblowers that is "more consistent with Dodd-Frank's remedial purpose").

[72] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 622 (5th Cir. 2013).

[73] *Id.* at 630.

the consequences of an alternative rule improperly substitutes the judgment of the judiciary in place of Congress. Regardless of the appropriateness of only relying on the text, the fact remains that the judicial defenders of *Asadi* pay scant attention to the real world consequences of their particular interpretation of Dodd-Frank's antiretaliation provisions.

The incentives created by *Asadi* are clear—reporting to the SEC is encouraged and internal reporting is discouraged.[74] By extending protection to individuals who approach the SEC but *not* to individuals who report internally, the Fifth Circuit has created a situation where the decision to report internally is now a more difficult one.[75]

The decision to internally come forward with information of wrongdoing is already a risky one for employees. In some situations where an employee is reporting wrongdoing, the reporter both spurs the company to act and arms the company "with information that may result in the company taking an aggressive posture against the employee," which often ends with retaliation against the internal whistleblower.[76] By removing some protections for internal reporting, the Fifth Circuit's holding places employees in a position where they are either more likely to keep their information to themselves or to take their information directly to the SEC.[77]

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[74] *See, e.g.*, Mystica M. Alexander, *Defining the Whistleblower Under Dodd-Frank: Who Decides?*, 5 CALIF. L. REV. CIR. 278, 284 (2014) (noting that a rule running counter to the SEC's interpretation might "discourage" whistleblowers); Thomas S. Markey, *"Whistleblower" Redefined: Implications of the Recent Interpretative Split on the Dodd-Frank Whistleblower Anti-Retaliation Provision*, 33 REV. BANKING & FIN. L. 441, 449 (2014) ("[T]he Fifth Circuit's interpretation may discourage employees from reporting internally . . . ."); Pacella, *supra* note 69, at 750 ("[I]nternal whistleblowers are currently left without the assurance that they may take advantage of the robust protections from retaliation that have become available under Dodd-Frank when they make internal reports."); Nicole H. Sprinzen, Asadi v. GE Energy (USA) L.L.C.*: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 193 (2014) ("[I]t is common sense that employees would be much less likely to raise concerns about possible legal violations internally when the employees do not believe that they will have employment protection if they raise these concerns.").

[75] *See supra* note 74 (compiling sources demonstrating the negative effect of the *Asadi* rule on internal whistleblowers).

[76] Sprinzen, *supra* note 74, at 193.

[77] Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 73 (2013) (arguing that the Fifth Circuit's decision "appears to create an incentive to bypass internal compliance mechanisms altogether, or to inform the SEC"); Caroline E. Keen, *Clarifying What Is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 234 (2015) ("If internal reports and disclosures are not protected, employees may skip internal reports and go directly to the SEC for a potential monetary award and for the protection of the Dodd-Frank anti-retaliation provisions."); Pacella, *supra* note 69,

Critics of the *Asadi* decision argue that the Fifth Circuit's interpretation will result in a number of negative consequences. Some criticisms of the *Asadi* rule focus on employees left unacceptably vulnerable by the Fifth Circuit's ruling. Neither nefarious wrongdoers nor passive observers, internal whistleblowers seek to do the right thing and speak up when they see something wrong. These are the very types of employees the law should seek to protect. The *Bussing* court found the *Asadi* rule to be wrong, in part on such grounds, noting that an *Asadi*-style rule was unjust because it "fails to protect those who are most vulnerable to retaliation."[78] Similarly, another author has observed that the Fifth Circuit's decision violates one of the primary purposes of Dodd-Frank by removing the "safety net" meant to "catch [whistleblowers] if they are terminated for attempting to do the right thing and protect the public."[79]

Other criticisms of the *Asadi* rule focus on the fact that, by de-incentivizing particular paths for whistleblowers to take, the Fifth Circuit lessens the amount of information about wrongdoing available internally. A rule providing "strong protections for internal reporting" (and running counter to *Asadi*) is a better way to encourage corporate employees "with specialized knowledge or expertise," who might be uncomfortable approaching the SEC, to identify violations.[80] Further, "the Fifth Circuit's interpretation may discourage employees from reporting internally."[81] Perhaps a bit too optimistic a point of view is that protections for internal whistleblowing will not only help information flow within companies but will also increase the *quality* of information that the SEC receives.[82] Internal reporting, the *Bussing* court argues, will function to "vet [potential] tips to the SEC," therefore ensuring "that the SEC receives fewer and higher quality reports from whistleblowers."[83]

This critique focusing on information is tied to what is perhaps the strongest argument against *Asadi*—that a de-emphasis on internal whistleblowing programs will not only harm whistleblowers and law

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at 750 (noting whistleblowers, discouraged by the *Asadi* decision, "are likely to be prompted to report directly to the SEC").

78 Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014).

79 Calvin Kennedy, Note, *Who, What, When, Where and Why: An Examination of* Asadi v. G.E. Energy *and the Dodd-Frank Anti-Retaliation Provision*, 75 U. PITT. L. REV. 235, 252–53 (2013).

80 Leifer, *supra* note 71, at 148.

81 Markey, *supra* note 74, at 449.

82 *Bussing*, 20 F. Supp. 3d at 733.

83 *Id.*

enforcement, but will also harm companies themselves.[84] When it comes to wrongdoing, companies almost always prefer internal investigations to external investigations.[85] Compared to internal investigations, external investigations are more costly, more time consuming, less effective (as they cannot catch information as early), and more embarrassing to the company being caught.[86] This particular concern, that an *Asadi*-style rule encourages a practice that is worse for corporations, seems to animate some of the existing criticism of the Fifth Circuit's ruling.[87] Critics argue that the *Asadi* court—by protecting those who whistleblow externally while ignoring internal whistleblowers—encourages these less desirable external investigations. Ironically, despite the fact that they are protected by an *Asadi*-style rule, businesses themselves are generally against such a rule.[88] Even GE, before it was called into court to justify its own retaliatory actions, joined a number of companies in lobbying the SEC to extend protections to internal whistleblowers.[89]

The *Asadi* decision is not criticized simply out of a concern for the coffers of corporate America; it is also attacked on the grounds that strong compliance programs are arguably necessary for the common good. Internal compliance is "invaluable" not only because of its short-term ability to catch internal fraud, but also because of its long-term "potential to transform negative corporate mentalities."[90] Robust, effective corporate compliance programs yield a "variety of

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[84] *See, e.g.*, Alexander, *supra* note 74, at 285 (observing that the Fifth Circuit's decision "reflects on the extent to which employees can be expected to adhere to and support a corporation's internal compliance system"); Jeff Vogt, Note, *Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank*, 67 OKLA. L. REV. 353, 378–79 (2015) (concluding that "the Fifth Circuit's decision threatens to undermine all internal corporate compliance programs").

[85] *See, e.g.*, Gregory A. Brower & Brett W. Johnson, *When Enough Is Not Enough: Two Court Rulings Complicate Corporate Compliance Efforts*, 28 LEGAL BACKGROUNDER 1, 3 (2013), http://www.wlf.org/upload/legalstudies/legalbackgrounder/10-11-13BrowerJohnson_LB.pdf (describing corporate reactions to *Asadi* and the general corporate preference for internal whistleblowing).

[86] *Id.; see also Bussing*, 20 F. Supp. 3d at 733 (noting efficiency benefits that result when wrongdoing is detected early by companies instead of by regulators).

[87] Brower & Johnson, *supra* note 85, at 3. Pacella makes this argument strongly, noting that because of the critical "role that internal whistleblowers play in the fraud detection process," internal whistleblowers "should be subject to the highest protection against retaliation possible." Pacella, *supra* note 69, at 760. A rule like *Asadi* creates a situation where "the viability of such [fraud detection] programs is likely to be compromised," an outcome that is "significantly disadvantageous for companies." *Id.* at 757.

[88] Brower & Johnson, *supra* note 85, at 3.

[89] *Id.*

[90] Pacella, *supra* note 69, at 760.

benefits" to companies, regulators, and the general public.[91] In a market without robust compliance mechanisms, companies would "lose out on the benefits of fixing violations internally," regulators would be overwhelmed by the sheer volume of information coming forward, and the market would begin to dip as investors "lose confidence either in the financial sector . . . or in the regulatory system itself" as a result of "the SEC's inability effectively to punish and deter securities violations."[92] The SEC cannot do it all and compliance is essential to successful long-term law enforcement. Critics argue that by de-incentivizing internal whistleblowing, the Fifth Circuit's interpretation of Dodd-Frank thwarts corporate efforts to run successful compliance programs, therefore harming the entire legal enforcement scheme.[93]

II
BEYOND THE STATUTORY TEXT OF *ASADI*: JUSTIFYING THE CRITICIZED INCENTIVES OF THE FIFTH CIRCUIT'S DECISION

A. Examining the Asadi *Rule in Light of Sarbanes-Oxley and the Office of the Whistleblower*

Arguments against the Fifth Circuit's ruling can be confronted in a number of ways. When it comes to questions about the injustice or the "chilling effect" on information that might result from a failure to protect internal whistleblowers, it should be noted that, even under the *Asadi* rule, internal whistleblowers still have a safety net: the Sarbanes-Oxley antiretaliation provisions. Even if Dodd-Frank does not extend protection to internal whistleblowers, the more limited Sarbanes-Oxley provisions against retaliation will often still apply,

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[91] Leifer, *supra* note 71, at 148. Leifer finds that the "majority of incentives" from internal compliance programs come from enabling employees to "display[ ] loyalty to one's company and allowing for quick, efficient, and private resolutions of violations . . . ." *Id.* at 139.

[92] *Id.* at 149.

[93] *See* Alexander, *supra* note 74, at 284 ("All questions of authority aside, from a public policy perspective, the SEC's position is more in accordance with the overall objective of securities law enforcement, which is to encourage reporting."); DeMott, *supra* note 77, at 75 ("Overall, it is hard to resist the conclusion that, viewed in retrospect, these statutory protections against retaliation do not appear to be optimally crafted to strengthen internal compliance systems."); Brief of the Securities & Exchange Commission as Amicus Curiae in Support of the Appellant at 22–23, Liu Meng-Lin v. Siemens AG, No. 13 Civ. 317, 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013), *appeal docketed*, No. 13-4385 (2d Cir. Nov. 14, 2013) (arguing that an *Asadi*-style rule will negatively impact corporate compliance).

protecting the victim of retaliation under a completely different regime.[94] The righteous employee might still have some recourse.

Indeed, the interaction between SOX protections and Dodd-Frank is one of the few areas in which courts defending an *Asadi*-style rule have ventured outside of the statutory text. The *Asadi* court itself concluded its opinion by noting that "if we were to accept Asadi's construction of the whistleblower protection provision, the SOX anti-retaliation provision, and most importantly, its administrative scheme, for practical purposes, would be rendered moot."[95] An *Asadi*-style interpretation of the Dodd-Frank Act "does not leave people who inform their employers of possible securities violations without a remedy if their employer retaliates against them."[96] Litigation under Dodd-Frank is not about the raw question of antiretaliation provisions, but is rather about far narrower questions of whether internal whistleblowers can bypass the more stringent conditions of a SOX-approved suit.[97] A rule contrary to *Asadi* "would essentially replicate and render moot the SOX whistleblower protections already in place."[98] The bottom line is that SOX provides whistleblowers with options outside of Dodd-Frank.[99]

Critics of *Asadi* might respond that the SOX antiretaliation provisions are not quite as duplicative as the district courts in *Berman* and *Verfuerth* characterize them to be. Individuals who bring antiretaliation actions under SOX must file 180 days after a violation occurs (compare this with Dodd-Frank's six-month to ten-year limitation), must file their complaint with the Secretary of Labor first (and receive approval), and can only receive back pay for damages (compare again with Dodd-Frank, which doubles back pay).[100] Certainly, while the differences between SOX and Dodd-Frank might appear to be a matter of a few extra procedural hoops and an extra damages carrot, each of these additional hurdles represents restrictions that

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94 18 U.S.C. § 1514A (2012) (providing protection "against retaliation in fraud cases").

95 Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 629 (5th Cir. 2013).

96 Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 409 (S.D.N.Y. 2014).

97 *Id.* ("[W]hat plaintiff asks for here is not access to legal protection from retaliation for disclosing information to his employers—Sarbanes-Oxley already provides that. Rather, he asks for the right to file a private lawsuit without the need to first contact a government agency.").

98 Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014).

99 Banko v. Apple Inc., 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013).

100 *Quarterly Updates*, 30 CORP. COUNS. Q. 1, 42 (Jan. 2014); *see also* Naseem Faqihi, *Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation*, 82 FORDHAM L. REV. 3341, 3362, 3380–81 (2014) ("Although lawyers may still bring an anti-retaliation claim under SOX, they will need to consider shorter statutory periods and restrictions on where the claim can be brought.").

might cut *some* internal whistleblowers who have been retaliated against out of the loop.

Similarly, decreased monetary awards under SOX beget decreased incentives to risk retaliation resulting from internally reporting wrongdoing.[101] With large monetary rewards making external whistleblowing an even more attractive option,[102] lessened monetary restitution might only make the prospect of keeping information internal less desirable.

Certainly, the existence of SOX does not completely counteract any and all potential negative consequences that might result from an *Asadi*-style rule. The existence of SOX does illustrate, however, that the questions raised by the incentives of *Asadi* are not stark, all-or-nothing decisions; rather, they are choices of degrees. In deciding to more closely follow the text of Dodd-Frank and adopt an *Asadi*-style rule, a court does not choose to abandon internal whistleblowers entirely. The choice is simply to lessen available protections. Similarly, the choice is not to chill all internal reports of wrongdoing by removing every protection available. The issue is merely how strong the incentives should be. Critics who raise the prospect of employees left without any safety net whatsoever ignore the continued existence of other antiretaliation regimes.

Similarly, critics concerned that incentivizing external whistleblowing will lead to *too much* information flow, and that this increase in information will overwhelm and reduce the efficacy of the SEC[103] may underestimate the SEC's capacity to deal with an increase in information. Prior to the passage of Dodd-Frank, arguments that the SEC would become incapacitated by a sizeable increase in whistleblowers might have held more weight. The Dodd-Frank reforms, however, contained specific provisions meant to improve the SEC's ability to handle an increase in whistleblowers reporting directly to the SEC.[104] In the years following Dodd-Frank's passage,

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[101] *Quarterly Updates*, *supra* note 100, at 42 ("A successful Dodd-Frank whistleblower can get money damages equal to twice back pay, but the Sarbanes-Oxley Act provides only for back pay (without doubling) for retaliation.").

[102] *See generally* Stephen M. Kohn, *The SEC's Final Whistleblower Rules & Their Impact on Internal Compliance*, 15 WALL STREET LAWYER 1 (2011) (discussing the impact of whistleblower bounties on whistleblower decisions to report information externally).

[103] *See* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014) (discussing how internal compliance might "vet" potential tips to the SEC); Leifer, *supra* note 71, at 149 (discussing the prospect of an "overwhelmed" SEC).

[104] *See* Sarah L. Reid & Serena B. David, *The Evolution of the SEC Whistleblower: From Sarbanes-Oxley to Dodd-Frank*, 129 BANKING L.J. 907, 912 (2012) ("In order to handle the inevitable influx of whistleblower tips resulting from Dodd-Frank, Section 924(d) of the act directs the SEC to establish a separate office under its auspices to administer and to enforce the Dodd-Frank whistleblower provisions.").

the SEC Office of the Whistleblower did indeed observe a sharp increase in reports of wrongdoing.[105] Rather than being overwhelmed, the SEC has shown its capacity to harness this increase in tips, bringing successful enforcement actions and issuing an increasing number of bounties to tipsters.[106] While the effects of Dodd-Frank are still being assessed, those who predict that a sharp increase in reports will automatically translate into worse enforcement fail to account either for the nature of the Dodd-Frank provisions or the SEC's potential for increased efficiency.[107]

B. Examining the Positive Policy Consequences Resulting from an Asadi*-style Decision*

As discussed above, an *Asadi*-style rule has the potential to result in short-term drawbacks, including undesirable outcomes for some employees who do blow the whistle internally, less protected channels in which information regarding wrongdoing can flow, and, finally, challenges for internal compliance.[108] So what might some proactive justifications be for limiting incentives for internal whistleblowing? I would argue that there are some real world *advantages* that might result from an *Asadi*-style rule. These advantages include more opportunities for the SEC to collect fines for wrongdoing, increased incentives for companies to foster positive attitudes towards internal compliance, and stronger assurances that information of wrongdoing will be placed in the hands of individuals most likely to act on such information.

This Note certainly does not intend to justify a rule ensuring that whistleblowing goes through external channels only. Such a world would likely be undesirable for a number of reasons. Although the SEC has handled a sharp increase in external whistleblowing tips admirably,[109] the SEC would likely also suffer if *everyone* with suspi-

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[105] U.S. SEC. & EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 20, https://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

[106] *Id.* at 10–12, 20; *see also* Stephanie Russell-Kraft, *3 Years in, SEC Whistleblower Office Earns Name for Itself*, LAW360 (August 22, 2014, 7:23 PM), http://www.law360.com/articles/569232/3-years-in-sec-whistleblower-office-earns-name-for-itself (describing the SEC's utilization of its increased investigative capacity).

[107] *See* Leifer, *supra* note 71, at 149 (speculating as to whether the SEC will be overwhelmed by an influx of complaints without acknowledging the increase in office capacity and successful handling of tips); *Bussing*, 20 F. Supp. 3d at 733 (same).

[108] *See supra* Part I.C (detailing court decisions and academic opinions standing in opposition to the Fifth Circuit's decision).

[109] *See supra* notes 104–06 and accompanying text.

cion of wrongdoing approached the agency directly.[110] Internal whistleblowing is not in risk of being extinguished by an *Asadi*-style rule, as Sarbanes-Oxley offers *some* protection for internal whistleblowers. What is more, the mindset of most employees is *already* biased towards keeping information internal (instead of reporting it externally).[111] This Note does not intend to establish definitively that positive consequences will result from the *Asadi* decision. This Note seeks, however, to take on the central question raised by critics of *Asadi*, which asks: Can encouraging external whistleblowing over internal whistleblowing *ever* be a valid policy choice? I would argue, for the reasons below, that in some instances it can be.

1. Higher Collection of Fines

One slight—but still significant—advantage to a rule that incentivizes more individuals to take their information directly to the SEC is the fact that the SEC will have an increased ability to collect fines from companies accused of wrongdoing. If the SEC is given high-quality information indicating that wrongdoing has taken place, it has the ability to collect very high penalties. Steinway notes that "[f]rom 2000-2013, the mean payment by corporate defendants in SEC issuer reporting and disclosure cases was $57.9 million. Although that figure includes several outliers, the median payment was still $9 million."[112] While some of that money has gone back to whistleblowers under the Dodd-Frank bounty program,[113] much of the money collected from external whistleblowing is used for the public good. Most goes directly into the U.S. Treasury General Fund, but some is also used to compensate swindled investors and protect against future fraud.[114] This is not possible when whistleblowers fail to share information with regulators or third-parties[115] as "[i]nternal whistleblowing protects organi-

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110 *Cf. supra* note 103 and accompanying text (discussing the consequences which might result if the SEC were actually overwhelmed).

111 *See* Geoffrey Christopher Rapp, *Four Signal Moments in Whistleblower Law: 1983-2013*, 30 HOFSTRA LAB. & EMP. L.J. 389, 398–99 (2013) ("[T]here is no indication that, even after Dodd-Frank, employees will utterly abandon internal whistleblowing programs. Most employees report fraud as part of a desire to protect their employer and they will likely choose internal routes for that reason, even if it runs against their financial self-interest.").

112 Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," but What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE L.J. 209, 210 (2014).

113 *Id.*

114 *Id.* at 210, 212–22.

115 *See* Andrew C. Call et al., *The Impact of Whistleblowers on Financial Misrepresentation Enforcement Actions*, VALUEWALK.COM (Mar. 4, 2015, 9:30 PM), http://

zational interests at the expense of the public treasury."[116] However, this is not dispositive. The possibility exists that "organizational loyalty, morale and efficiency" resulting from internal whistleblowing might outweigh the benefits from a simple increase in public monies.[117]

2. *More Organic Whistleblower Protections and Greater Ex Ante Prevention of Wrongdoing*

A rule providing incentives for individuals to report externally might, in the long-term, also positively impact businesses themselves. An *Asadi*-style rule could incentivize businesses to create an internal culture better suited to upholding the law. Given the host of disadvantages of public, as opposed to private, disclosure of wrongdoing,[118] most businesses would probably prefer a rule encouraging employees to resolve unsavory issues internally.

Although *Asadi* incentivizes external whistleblowing, under some conditions, businesses could preempt such behavior by creating an environment in which employees view reporting internally as safe, effective, and preferable to reporting to the media or government agencies.[119] In response to Dodd-Frank's bounty provisions, some commentators have suggested that reforms to internal culture should be implemented to realign incentives.[120] For example, management

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www.valuewalk.com/2015/03/the-impact-of-whistleblowers-on-financial-misrepresentation-enforcement-actions/ (finding that "whistleblower involvement accounts for between 21.0% and 27.5% of the $79.49 billion in total penalties assessed").

[116] Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 335 (1992).

[117] *Id.* Callahan and Dworkin note that "[i]t is impossible to tell" whether the benefits of internal whistleblowing outweigh the losses from decreased penalties. *Id.*

[118] *See supra* notes 84–87 and accompanying text.

[119] *See* NANCY M. MODESITT ET AL., WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 11-9 (3d ed. 2015) (arguing that the goal of internal compliance programs is developing "a process that works and that employees trust").

[120] *See* Justin Blount & Spencer Markel, *The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1061 (2012) (finding Dodd-Frank's whistleblower protections may be able to incentivize companies "to more effectively implement and enforce their internal compliance programs and attempt to build more ethical cultures"); Toby J.F. Bishop & Mohammad Ahmed, *Deploying Countermeasures to the SEC's Dodd-Frank Whistleblower Awards*, 18 BUS. CRIMES BULL. 1 (2010) (presenting a number of steps "organizations might take to help mitigate the increased regulatory risk"); Bill Libit, *Elements of an Effective Whistleblower Hotline*, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg. (Oct. 25, 2014), http://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline/ (arguing that compliance programs benefit greatly from effective "internal whistleblower hotline[s]"); John F. Savarese & Jonathan M. Moses, *Hype and Reality in the Dodd-Frank Whistleblower Rules*, Harv. L. Sch. Forum on Corp. Governance

might provide assurances that employees will not be retaliated against for reporting wrongdoing.[121] Businesses might also demonstrate—through financial awards and an increase in resources devoted to compliance—how much they genuinely value information that identifies fraud or otherwise illegal behavior.[122]

Potential immediate benefits from private assurances of non-retaliation are clear. Instead of relying on a statute or agency regulation, companies would take on the initiative, and the cost, of providing non-retaliation guarantees themselves. Aware that after-the-fact assurances may not be enough to induce internal (as opposed to external) reporting, companies might even be further encouraged to counteract the incentives from *Asadi* by taking more aggressive measures to stop wrongdoing from occurring in the first place.[123] While this framework would not work in every circumstance, the issues of bribery and improper hiring in *Asadi* itself seem like the obvious types of wrongdoing that could have been identified earlier through a rigorous FCPA compliance system or a more thorough vetting process for new hires.[124] If businesses do respond to *Asadi*'s incentives by taking stronger ex ante measures to prevent wrongdoing, such measures will not only prevent undesirable external whistleblowing but will also ensure that socially destructive wrongdoing never occurs in the first instance.

The real advantage of an *Asadi*-style rule, however, is that it could serve as the impetus for businesses to demonstrate a commitment to upholding the law. In essence, an *Asadi*-style rule might cause

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& Fin. Reg. (July 8, 2011), http://corpgov.law.harvard.edu/2011/07/28/hype-and-reality-in-the-dodd-frank-whistleblower-rules/ (recommending that companies take "affirmative steps to reinforce and repeat the key message that all employees are encouraged to report any compliance concerns directly to the company").

121 *See, e.g.*, Maria von Tippelskirch, Anti-Retaliation Protection for Compliance Officers as Internal Whistleblowers Under the Dodd-Frank Act (Mar. 18, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406223. Von Tippelskirch has suggested contractual antiretaliation provisions, arguing that "corporations that want to ensure the effectiveness of their own compliance departments should offer individual anti-retaliation agreements to their compliance officers." *Id.* at 17.

122 *See, e.g.*, Shannon Kay Quigley, Comment, *Whistleblower Tug-of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 295–96 (2012) (proposing that companies simplify internal whistleblowing procedures by "ensuring confidentiality, rewarding loyalty, and providing an independent, uncorrupted compliance officer").

123 *Cf.* Libit, *supra* note 120 (arguing that hotlines help companies identify and stop unethical behavior before it becomes illegal).

124 Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 621 (5th Cir. 2013). The behavior at issue was at least serious enough to attract the attention—and concern—of multiple Iraqi officials. *Id.*

a shift in internal culture. In recent years, there has been an increased focus on the importance of an ethical "tone at the top" for corporate legal compliance. Although "tone at the top" is often viewed as central to successfully changing and maintaining a culture of compliance, pinning down a precise definition is difficult.[125] The phrase is understood generally as a corporation's perceived attitude and overall culture with regards to following the law. The Association of Certified Fraud Examiners, in its seminal work discussing the importance of "tone at the top," writes: "Tone at the top refers to the ethical atmosphere that is created in the workplace by the organization's leadership. Whatever tone management sets will have a trickle-down effect on employees of the company."[126] Establishing a positive "tone at the top" is vital for an organization seeking to avoid malfeasance. It involves the idea that, no matter how many auditors and compliance officials are on a company's payroll, the attitudes of its management are far more important when it comes to questions of whether the organization followed the law.[127]

Changing unique corporate structures is a challenging task,[128] especially when driven by government forces.[129] Organizational structures are complex, with most internal incentives tipping towards short-term financial gains. The Association of Certified Fraud Examiners discusses four necessary elements to create a positive "tone at the top": (1) "communicat[ing] what is expected of employees," (2) "lead[ing] by example," (3) "provid[ing] a safe mechanism for reporting violations," and (4) "reward[ing] integrity."[130]

By encouraging businesses to proactively assure employees that they will not be retaliated against, *Asadi* incentivizes businesses to create a positive "tone at the top." The existence of a formal internal compliance program by no means guarantees effectiveness.[131] Indeed,

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125 Cynthia A. Koller et al., *When Moral Reasoning and Ethics Training Fail: Reducing White Collar Crime Through the Control of Opportunities for Deviance*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 549, 570 (2014).

126 Assoc. of Certified Fraud Examiners, *Tone at the Top: How Management Can Prevent Fraud in the Workplace* 1, www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/tone-at-the-top-research.pdf.

127 *See* Koller et al., *supra* note 125, at 571 ("Think of Enron, WorldCom, Tyco, Bernard L. Madoff Investment Securities, and Galleon Group—all companies who appeared to be at the height of their game—until the walls came crashing down.").

128 *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1148 ("[I]t is difficult—if not impossible—for the government to mandate a culture of honesty.").

129 *See* Koller et al., *supra* note 125, at 575 ("[T]one at the top is indeed, easy to say, hard to do, and even harder to prove.").

130 Assoc. of Certified Fraud Examiners, *supra* note 126, at 11–12.

131 Blount & Markel, *supra* note 120, at 1043–44.

faced with the high cost and difficulty of creating rigorous compliance programs and providing legal ethics training, one might expect some businesses to rely on an employee's natural tendency to report internally, assuming *someone* will come forward if things get bad enough.[132]

Under the *Asadi* rule, however, employees that decide to report wrongdoing internally do so without Dodd-Frank's protections. In these situations, corporations bear the burden of assuaging their employees' fear of retaliation or termination. In order to report information internally, whistleblowers must assess whether their employer has a genuine commitment to following the law. Although compliance measures may be costly, when faced with the prospect of embarrassing and costly public disclosures, an employer's commitment to doing right and its commitment to its bottom line become more closely aligned. Employers who do not proactively encourage whistleblowing may suffer not only the consequences of unaddressed wrongdoing but also public embarrassment. Each of the factors identified by the Association of Certified Fraud Examiners as contributing to a positive "tone at the top"—especially communication of expectations, safe mechanisms for reporting, and rewards for integrity—may also be necessary to convince employees that, despite weak antiretaliation protections, whistleblowing to the SEC is unnecessary. Indeed, a number of scholars have argued that the "tone at the top" must be genuine in order to truly incentivize employees to report internally.[133] If corporations do not display an obvious cultural commitment to upholding the law, they face the risk—and the accompanying inefficiencies—of having employees report to the SEC. Far from putting businesses in an impossible position, however, *Asadi* could incentivize corporations to truly embrace a corporate culture that emphasizes following the law.

3. Preventing the Misuse of Information About Wrongdoing

But what about companies that—despite the realigned incentives—still believe it is in their best interest not to reform? What if companies do the math and decide it is cheaper to eschew ex ante measures, let internal compliance wither, and allow wrongdoing to run its course? What if—either due to rational calculation, internal arrogance, or general resistance to change—companies retain a cul-

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[132] *See* Rapp, *supra* note 111, at 398–99 (arguing that many individuals engage in whistleblowing out of a genuine desire to help management).

[133] *See, e.g.*, Blount & Markel, *supra* note 120, at 1058–60 (discussing the commitment required by managers to affect corporate culture); Libit, *supra* note 120 (noting the importance of "shared values" in creating a successful compliance program).

ture that remains hostile to compliance? In such circumstances, where the *Asadi* decision does *not* create new incentives, does the Fifth Circuit's decision lead to net negative outcomes for whistleblowers?

I would argue that, even if *Asadi* failed to realign corporate incentives, the decision still creates positive externalities. For example, *Asadi* might keep information of wrongdoing out of the hands of companies with a low commitment to following the law. Just because companies *can* do good things after discovering wrongdoing does not mean they will. Some companies may take actions quickly; others may be indifferent. The whistleblower who wants to make sure the right thing is done may never go to the government, unaware that she should approach law enforcement because she is content that she has done her duty by reporting internally.[134] While outside authorities can presumably be relied upon to respond to a whistleblower's concerns, management may not be so dependable.[135]

Management simply "may or may not respond" to information about illegal activity, choosing perhaps to "ignore the information."[136] In this situation, information which might have been in the hands of the SEC will instead go completely unused. Employees may not know whether management is actively investigating the matter and attempting to resolve the issue. In some cases, observant employees might choose to approach the SEC if they see no evidence that internal reporting has righted the wrong. Less observant or risk-averse employees might stay silent after reporting, content, perhaps, that they have done their duty, and those with more authority are handling the situation.

In some circumstances, internal information might be used for more nefarious purposes. Instead of ignoring information, some management might "attempt a cover up."[137] In such instances, internal information may be used by the company to more effectively evade responsibility for wrongdoing. A corrupt supervisor who receives a tip from a banker uncomfortable with insider trading in his division can use the tip to more effectively mask and destroy evidence of the illegal conduct. When companies are indifferent to or supportive of wrong-

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134 *See* Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 25 (2007) ("When an employee discloses wrongdoing to a supervisor, the employer is unlikely to disclose the wrongdoing to a government agency.").

135 Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1968 (1996).

136 *Id.*

137 *Id.*; *see also* Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1760 (2007) (noting that internal whistleblowing "may also allow for cover-ups").

doing, society is best served by ensuring that these organizations do not have access to information from internal whistleblowers.

Famous cases of corporate wrongdoing illustrate how internally reported information might be ignored or misused. For example, although SAC Capital claimed that it utilized an expensive and "cutting edge" compliance program,[138] in an indictment for insider trading, the DOJ argued that "the limited number of internal investigations by the SAC compliance department of insider trading were generally weak."[139] Similarly, Firestone ignored internal reports about deficiencies in its own tires on at least two occasions, which resulted in hundreds of deaths and serious injuries.[140] Reports about the danger of asbestos were ignored by that industry for decades.[141] In these instances, evidence of wrongdoing existed internally but, because companies were unconcerned or malicious, that information was put to poor use.

By decreasing protections to whistleblowers, the *Asadi* decision may be able to restrict the flow of information from whistleblowers to companies that would use such knowledge to hide their illegal or unethical conduct. Were potential whistleblowers covered by Dodd-Frank's strong protections, they may not put much thought into whether they should actually go to compliance, as opposed to the SEC. Lacking strong protections from Dodd-Frank and faced with a higher risk of termination, however, internal whistleblowers must more directly confront their company's commitment to upholding the law. When this commitment is strong, credible, and easily observed by employees, information reported internally is likely very valuable. Such an environment is precisely the type in which, even under the *Asadi* framework, employees will feel comfortable reporting information internally.[142] By contrast, it is not a huge leap to speculate that companies most likely to abuse information reported by internal

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138 *See* James B. Stewart, *Common Sense: At SAC, Rules Compliance With an 'Edge*,' N.Y. TIMES (July 26, 2013), http://www.nytimes.com/2013/07/27/business/at-sac-rules-compliance-with-an-edge.html (noting that SAC claims it spends "tens of millions of dollars" on its compliance program and utilizes "some of the most aggressive communications and trading surveillance in the hedge fund industry").

139 Sealed Indictment, United States v. S.A.C. Capital Advisors, L.P., at 25, No. 13 Crim. 543 (S.D.N.Y. Mar. 25, 2015).

140 Lilanthi Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, MARKKULA CTR. FOR APPLIED ETHICS (2003), http://www.scu.edu/ethics/publications/submitted/whistleblowing.html.

141 *Id.*

142 *See supra* Part II.B.2 (discussing how companies might respond to *Asadi* by taking proactive measures to encourage internal whistleblowers).

whistleblowers are also the most likely to engage in retaliation.[143] Employees—working daily within organizations—are probably in the best position to evaluate whether their employer's commitment to compliance is truly genuine.[144] An *Asadi* rule, which encourages employees who feel they cannot rely on the good faith of their employers to adequately investigate information of wrongdoing or report it to the proper authorities, seems to better incentivize the placement of information where it will be most effectively used.

Conclusion

When the Fifth Circuit refused to extend protections to internal whistleblowers like Asadi, it looked primarily to Dodd-Frank's text. The court's textual analysis, which facially appeared to provide rather weak whistleblower protections, has potentially broad and beneficial policy consequences. Incentives to report externally created by rules like that of *Asadi* might, in some instances, transform some corporate cultures into compliance-friendly environments and keep information out of the hands of the most malicious corporate actors. Viewed in this light, the Fifth Circuit's decision sticks rigidly to Dodd-Frank's text but has defensible real world consequences.

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143 *Cf.* Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 Wm. Mitchell L. Rev. 627, 691 (1999) ("[T]he organization is more likely to retaliate if the whistleblowing is external and retaliation is more likely where management discourages internal reporting of a wrongdoing.").

144 *See* Blount & Markel, *supra* note 120, at 1057 ("[E]mployees within an organization are uniquely positioned to gauge the ethical climate of the organization and determine whether reporting internally will be futile or result in affirmative action to remedy the problem.").