
SECURITIES REGULATION — WHISTLEBLOWER PROTECTION — SECOND CIRCUIT HOLDS THAT ANTIRETALIATION PROVISION OF DODD-FRANK ACT DOES NOT APPLY EXTRATERRITORIALLY. — *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014).

Passed in the wake of the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ includes an antiretaliation provision intended to protect employees who report violations of antifraud and securities laws from being fired or sanctioned by their employers.² Since the Act's passage, courts have faced, *inter alia*, two issues of statutory interpretation central to the scope of the antiretaliation provision: first, the degree to which it applies extraterritorially to foreign employers and their conduct abroad,³ and second, whether it protects employees who report violations internally to their employers and not externally to the Securities and Exchange Commission (SEC).⁴ Recently, in *Liu Meng-Lin v. Siemens AG*,⁵ the Second Circuit resolved the first of these interpretive questions and declined to address the second. Affirming the dismissal of a suit brought by an overseas employee against a foreign employer, the Second Circuit held that “the antiretaliation provision does not apply extraterritorially.”⁶ The court's resolution of the Act's geographic scope was an unsurprising application of the presumption against extraterritoriality⁷ elaborated in recent Supreme Court decisions.⁸ But by deciding the case on that issue alone,⁹ the court left open the other salient question: whether Dodd-Frank covers employees as “whistleblowers” if they report violations only internally. As a matter of statutory interpretation, future courts should defer to the SEC's interpretation that the ambiguous provision protects both internal and external reporting.¹⁰

Taiwanese citizen and resident Liu Meng-Lin was hired in 2008 as a healthcare compliance officer for Siemens China, a subsidiary of the

¹ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

² See 15 U.S.C. § 78u-6(h) (2012).

³ See, e.g., *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 328–29 (S.D.N.Y. 2013).

⁴ See, e.g., *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

⁵ 763 F.3d 175 (2d Cir. 2014).

⁶ *Id.* at 177. The court also rejected the contention that the employer's listing on the New York Stock Exchange rendered the application of Dodd-Frank domestic. *Id.* at 179–80.

⁷ *Id.* at 180.

⁸ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010).

⁹ See *Liu*, 763 F.3d at 183.

¹⁰ See Brief of the Securities and Exchange Commission, *Amicus Curiae in Support of the Appellant* at 4, *Liu*, 763 F.3d 175 (No. 13-4385-cv), 2014 WL 663875 [hereinafter SEC Brief].

German corporation Siemens AG.¹¹ Beginning in October 2009, Liu used Siemens's internal procedures to report what he suspected were inadequate bribery prevention measures under the Foreign Corrupt Practices Act of 1977¹² (FCPA).¹³ Liu believed that the company was inflating its bids when selling medical devices to Chinese and North Korean hospitals and paying kickbacks to officials who accepted those bids.¹⁴ Siemens was unreceptive to Liu's concerns; as he continued to press his supervisors, the company restricted his responsibilities and eventually fired him.¹⁵ Soon after his termination, Liu alerted the SEC to the possible FCPA violations and sued Siemens in the Southern District of New York, alleging that Siemens had violated Dodd-Frank's antiretaliation provision by firing him in response to his internal reporting.¹⁶

The district court dismissed Liu's suit on two alternative grounds.¹⁷ First, Judge Pauley cited the "presumption against extraterritoriality"¹⁸ expounded by the Supreme Court in *Morrison v. National Australia Bank Ltd.*¹⁹ and reasoned that, given this presumption, the antiretaliation provision's "silence" on foreign applicability meant that it must be confined to domestic concerns.²⁰ Second, the court held that, regardless of its extraterritoriality, Liu's reporting of alleged FCPA violations did not fall within any of the forms of whistleblower activity protected by Dodd-Frank.²¹ His behavior was not — as Liu

¹¹ *Liu*, 763 F.3d at 177; *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 326 (S.D.N.Y. 2013).

¹² Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S. Code). The FCPA prohibits domestic and U.S. exchange-listed companies (like Siemens) and their employees from, among other things, "knowingly fail[ing] to implement a system of internal accounting controls" aimed at preventing corruption. 15 U.S.C. § 78m(b)(5) (2012). Prior to *Liu*, Siemens had paid a record-breaking \$800 million in sanctions after admitting to FCPA violations. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> [<http://perma.cc/2M23-4ESK>]. Siemens was required to implement more stringent antibribery procedures as part of its plea agreement, and Liu alleged that he alerted management that those procedures were not being properly followed. See *Liu*, 978 F. Supp. 2d at 326.

¹³ *Liu*, 978 F. Supp. 2d at 326.

¹⁴ *Id.*

¹⁵ *Id.* at 326–27.

¹⁶ *Liu*, 763 F.3d at 177.

¹⁷ See *Liu*, 978 F. Supp. 2d at 329–30.

¹⁸ *Id.* at 328.

¹⁹ 130 S. Ct. 2869 (2010); see *id.* at 2877 ("When a statute gives no clear indication of an extraterritorial application, it has none."). This presumption was reaffirmed in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (applying the presumption to the Alien Tort Statute).

²⁰ *Liu*, 978 F. Supp. 2d at 328.

²¹ *Id.* at 331–32. Dodd-Frank protects whistleblowers from being fired or otherwise sanctioned for (i) "providing information to the Commission" related to other parts of the provision; (ii) "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the

alleged²² — “required or protected under the Sarbanes-Oxley Act of 2002”²³ (SOX), nor under “any other law, rule, or regulation subject to the jurisdiction of the [SEC].”²⁴ Finally, Judge Pauley noted a judicial split over whether Liu could be considered a “whistleblower” at all under Dodd-Frank even if his reporting *were* covered by SOX²⁵: the antiretaliation provision defines “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws *to the [SEC]*.”²⁶ But because SOX *does* require or protect some internal disclosures,²⁷ the activities protected under Dodd-Frank are seemingly more expansive than the whistleblower definition. Judge Pauley, however, chose not to resolve this apparent conflict because he had already found two grounds for his decision.²⁸

The Second Circuit affirmed the dismissal.²⁹ Writing for a unanimous panel, Judge Lynch³⁰ wholly agreed with the district court’s conclusion that the antiretaliation provision did not apply extraterritorially,³¹ the court saw “absolutely nothing in the text of the provision . . . or in the legislative history of the Dodd-Frank Act” that could overcome the *Morrison* presumption.³² Judge Lynch rejected Liu’s argument that Dodd-Frank “contain[ed] very broad language that includes all employees,” which, according to Liu, showed congressional intent to cover international concerns.³³ Judge Lynch instead found the relevant text to be “precisely the sort of ‘generic’ language that the Supreme Court has expressly stated is insufficient to overcome the pre-

Commission based upon or related to such information”; and — crucially for *Liu* — (iii) “making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.” 15 U.S.C. § 78u-6(h)(1)(A)(i)–(iii) (2012).

²² *Liu*, 978 F. Supp. 2d at 330.

²³ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

²⁴ 15 U.S.C. § 78u-6(h)(1)(A)(iii); see *Liu*, 978 F. Supp. 2d at 330 (holding that because SOX protects only those making disclosures related to “fraud against shareholders,” *id.* (quoting 18 U.S.C. § 1514A(a)(1) (2012) (internal quotation marks omitted)), Liu’s FCPA-related disclosures were not protected by SOX, and thus did not trigger Dodd-Frank). The court also held that SOX’s protections did not apply extraterritorially and thus did not cover Liu’s disclosures regardless of whether they related to the FCPA. See *Liu*, 978 F. Supp. 2d at 330.

²⁵ See *Liu*, 978 F. Supp. 2d at 331–32.

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

²⁷ See 18 U.S.C. § 1514A(a) (prohibiting employers from firing or otherwise “discriminat[ing] against an employee” for reporting a suspected securities law violation to “a person with supervisory authority over the employee”).

²⁸ *Liu*, 978 F. Supp. 2d at 332.

²⁹ *Liu*, 763 F.3d at 183.

³⁰ Judge Lynch was joined by Judges Raggi and Lohier.

³¹ See *Liu*, 763 F.3d at 178–83.

³² *Id.* at 180.

³³ *Id.* (quoting Brief for Plaintiff-Appellant at 11, *Liu*, 763 F.3d 175 (No. 13-4385-cv), 2014 WL 198079) (internal quotation marks omitted).

sumption.”³⁴ The court highlighted a contrast between the anti-retaliation provision and other Dodd-Frank provisions that expressly provide for extraterritorial application,³⁵ which supported a “logical inference . . . that the antiretaliation provision, enjoying no such explicit grant of extraterritorial application, has none.”³⁶ And despite Siemens’s listing of American Depositary Receipts on the New York Stock Exchange,³⁷ no facts surrounding Liu’s allegations — the Chinese company, its corrupt payments to foreign officials, or its firing of Liu abroad — gave rise to a domestic application of the statute.³⁸

Because the case could be dismissed on the extraterritoriality ground alone, Judge Lynch declined to reach the additional issues discussed by the lower court, including whether Liu’s internal reporting “qualified him as a ‘whistleblower’ under the Dodd-Frank Act.”³⁹ The court thus did not address the SEC’s amicus brief,⁴⁰ in which the Commission sought deference for its interpretation that the term “whistleblower” encompassed employees who reported possible violations internally.⁴¹

As the first appellate decision to address the extraterritorial application of the antiretaliation provision, *Liu* took a significant step toward defining the scope of Dodd-Frank’s whistleblower protections. And as a matter of statutory interpretation, the court’s decision on the statute’s extraterritorial application was correct, even if it may have created some inconsistency within the Act’s protections. But while the Second Circuit was not required to rule on the issue⁴² of

³⁴ *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013)).

³⁵ *See, e.g.*, 15 U.S.C. § 78aa(b) (2012) (giving U.S. district courts jurisdiction over securities antifraud cases involving “conduct occurring outside the United States that has a foreseeable substantial effect within the United States”). The court found, however, that the cited provision, which pertained solely to antifraud suits brought by the government, was unrelated to the scope of Dodd-Frank’s whistleblower protection. *Liu*, 763 F.3d at 180–81.

³⁶ *Liu*, 763 F.3d at 181.

³⁷ *See id.* at 180 (“[T]he listing of securities alone is the sort of ‘fleeting’ connection that ‘cannot overcome the presumption against extraterritoriality.’” (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2689, 2882 (2010))).

³⁸ *See id.* at 177, 179.

³⁹ *Id.* at 183. The court also declined to decide whether Liu’s disclosures were required or protected under SOX. *Id.*

⁴⁰ *See id.*

⁴¹ SEC Brief, *supra* note 10, at 1. The Commission sought deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which instructs a reviewing court to defer to an agency’s reasonable interpretation of ambiguities in statutes it administers, *see id.* at 842–43.

⁴² Although it was certainly possible for the Second Circuit to resolve the internal whistleblower question — in 2013, for example, the Fifth Circuit ruled that Dodd-Frank covered only those who reported to the SEC even though this issue was not directly presented on appeal, *see Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621, 623 (5th Cir. 2013) — this comment does not take a position on whether the Second Circuit should have reached the “whistleblower” definition issue as a matter of judicial policy. Indeed, the question of whether courts should rule on

whether Liu was a “whistleblower” under Dodd-Frank because he reported within Siemens, the court’s silence on this matter leaves open a significant question of statutory interpretation at the heart of Dodd-Frank. Future courts facing this question should recognize that the antiretaliation provision is ambiguous, and they should grant deference to the SEC’s interpretation of the provision as protecting internal whistleblowers.

First, although there are normative arguments that the *Liu* court’s ruling against the antiretaliation provision’s extraterritoriality undermines the coherence and effectiveness of Dodd-Frank,⁴³ the decision was a doctrinally straightforward application of *Morrison*’s clear and undeniably sweeping articulation of the presumption against extraterritoriality.⁴⁴ After all, since *Morrison*, the Court has used the presumption to limit the Alien Tort Statute⁴⁵ (ATS), which was arguably crafted principally to address international conduct.⁴⁶ Compared to the ATS, the geographically neutral Dodd-Frank can hardly be said to contain the requisite “explicit statutory evidence that Congress meant for the antiretaliation provision to apply extraterritorially.”⁴⁷

Notwithstanding the extraterritoriality issue, the Second Circuit chose to leave unresolved the question whether Dodd-Frank covered Liu as a “whistleblower” even though he reported the alleged FCPA violations to his employer rather than to the SEC.⁴⁸ Believing that Dodd-Frank is ambiguous as to the scope of its protection, the SEC adopted a clarifying rule stating that Dodd-Frank covers internal reporting that is “required or protected” by SOX and the other laws

nonessential grounds is highly controversial, especially among the Supreme Court Justices. See generally Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (discussing the “pervasive” practice of “decisional minimalism,” whereby “judges decide no more than they have to decide,” *id.* at 6).

⁴³ See, e.g., Mike Koehler, *The Odd Dynamic Persists*, FCPA PROFESSOR (Oct. 22, 2013), <http://www.fcpaprofessor.com/the-odd-dynamic-persists> [<http://perma.cc/6LDV-EMWW>] (noting the bizarre result ensuing from the lower court decision: “the DOJ and/or SEC could bring an FCPA action . . . against Siemens regardless of whether the payment scheme had a U.S. nexus, . . . but Liu can not qualify for protection under the Anti-Retaliation Provision for blowing the whistle on the allegations”).

⁴⁴ See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1032 (2011) (describing *Morrison* as “reinvigorat[ing] energetically and in broad language” the presumption against extraterritoriality).

⁴⁵ 28 U.S.C. § 1350 (2012).

⁴⁶ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1672 (2013) (Breyer, J., concurring in the judgment) (arguing that, in contrast to the securities law at issue in *Morrison*, the ATS “was enacted with ‘foreign matters’ in mind” and “refers explicitly” to international concerns).

⁴⁷ *Liu*, 763 F.3d at 183. Additionally, the one other court that has ruled on the extraterritoriality of the provision reached the same conclusion. See *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at *4–5 (S.D. Tex. June 28, 2012), *aff’d*, 720 F.3d 620 (5th Cir. 2013).

⁴⁸ See *Liu*, 763 F.3d at 183. The lower court discussed this issue but did not rule on it. See *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 331–32 (S.D.N.Y. 2013).

enumerated in Dodd-Frank.⁴⁹ In the numerous cases brought by whistleblowers both before and after that rule's adoption, the majority of courts have endorsed the SEC's interpretation, either by holding the provision to be ambiguous and granting the SEC deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,⁵⁰ or by holding that Dodd-Frank unambiguously protects internal whistleblowers.⁵¹ But in *Asadi v. G.E. Energy (USA), L.L.C.*,⁵² the Fifth Circuit — the only appellate court with a decision on point — held the opposite, concluding that the Act unambiguously prevents a reading of “whistleblower” that includes internal reporting.⁵³

A future Second Circuit panel — not to mention other courts — will almost certainly face the issue of whether internal reporting is covered. It is vital that those courts recognize the ambiguity of the statute and do not follow the Fifth Circuit decision in *Asadi*. The statute is ambiguous first and foremost in its plain text. In holding that the statute unambiguously excludes internal reporting, the *Asadi* court cited the canon against surplusage to avoid reading the words “to the Commission” out of the definition of “whistleblower.”⁵⁴ But drawing on that same canon, a district court held that the SOX-related substantive provision could also be reasonably interpreted as a “narrow exception to [the] definition of a whistleblower as one who reports to the SEC,”⁵⁵ which would avoid “effectively invalidat[ing] Dodd-Frank’s] protection of whistleblower disclosures that do not require reporting to the SEC.”⁵⁶ In other words, while the canon could support reading the restrictive definition of “whistleblower” *in* to Dodd-Frank’s substantive protections (as was done in *Asadi*), the surplusage argument could also militate against reading substantive protections *out* of the statute.⁵⁷

⁴⁹ See Whistleblower Status and Retaliation Protection, 17 C.F.R. § 240.21F-2(b) (2014). Congress directed the SEC to issue rules implementing the antiretaliation provision because Dodd-Frank amended the Securities Exchange Act. See SEC Brief, *supra* note 10, at 2–3.

⁵⁰ 467 U.S. 837 (1984); see *Liu*, 978 F. Supp. 2d at 332 (“Two courts have found this rule deserves deference under *Chevron* . . .” (citing *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *4–7 (S.D.N.Y. May 21, 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012))).

⁵¹ See *id.* at 331 (citing six district court cases).

⁵² 720 F.3d 620 (5th Cir. 2013).

⁵³ See *id.* at 623.

⁵⁴ *Id.* at 628.

⁵⁵ *Murray*, 2013 WL 2190084, at *5 (quoting *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011)) (internal quotation mark omitted).

⁵⁶ *Id.* (quoting *Egan*, 2011 WL 1672066, at *4) (internal quotation mark omitted).

⁵⁷ See *id.* The *Asadi* court found that the discrepancy did not create ambiguity because it read the definition and the substantive provision as answering fundamentally different questions: “(1) who is protected; and (2) what actions by protected individuals constitute protected activity.” *Asadi*, 720 F.3d at 625. That reading of the statute did not invalidate Dodd-Frank’s protection of SOX-related disclosures; rather, it understood the SOX-related provision as covering employees

Reading “whistleblower” as unambiguously restricted to external whistleblowing also eschews the Supreme Court’s practice, elucidated in *FDA v. Brown & Williamson Tobacco Corp.*,⁵⁸ of examining the statute not only in isolation but also in the context of the regulatory scheme as a whole when assessing whether a statutory provision is ambiguous.⁵⁹ With a current securities-regulation framework that encourages internal reporting,⁶⁰ reading Dodd-Frank as an unambiguous deviation from that trend seems extreme, absent a clearer signal.

Moreover, the argument that Dodd-Frank unambiguously requires reporting to the Commission would be more convincing if Congress had a compelling reason to restrict protections in that way.⁶¹ Rather, the normative strength of the SEC’s interpretation supports an inference that Congress did not unambiguously intend to bar it.⁶² Dodd-Frank’s protections are more favorable to whistleblowers than SOX’s protections,⁶³ and thus even when the statutes do overlap, reading Dodd-Frank to require external reporting would have the dubious effect of encouraging employees to go over the heads of their employ-

when they reported to the SEC (unbeknownst to their employers) and within the company, and were then fired. *Id.* at 627–28. That is, there could be employees not fired *because of* their external reporting, but who nevertheless *were* protected whistleblowers because they reported “to the Commission.” *But see* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 732 (D. Neb.) (describing several “problems” with the *Asadi* interpretation, including that it “creates a peculiar standard . . . in which liability for retaliation only attaches if certain preconditions — of which [employers] are unaware — are satisfied”), *motion to certify appeal granted*, No. 8:12-CV-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

⁵⁸ 529 U.S. 120 (2000).

⁵⁹ *See, e.g., id.* at 132–33 (“Ambiguity is a creature not of definitional possibilities but of statutory context.” (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)) (internal quotation marks omitted)).

⁶⁰ *See* SEC Brief, *supra* note 10, at 6 (“Congress for nearly two decades has enacted a series of amendments to the securities laws to encourage, and in some instances to require, internal reporting of potential misconduct.”).

⁶¹ Neither the *Asadi* court, nor the employer in that case, *see* Brief of Appellee at 23–31, *Asadi*, 720 F.3d 620 (No. 12-20522), 2012 WL 6127002, nor the employer in *Liu* submitted a reason that Congress would have wanted to protect external whistleblowers exclusively. While “[g]eneral policy concerns do not overcome the unambiguous meaning of a statute’s text,” *Comm. to Stop Airport Expansion v. FAA*, 320 F.3d 285, 290 (2d Cir. 2003), even Justice Scalia’s text-focused opinions striking down agency actions often suggest plausible policy reasons that Congress may have supported the interpretation he espouses, *see, e.g., MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230–31 (1994) (discussing ostensible benefits of the tariff requirement in the Communications Act in holding that the term “modify” in the Act’s tariff provision barred the FCC from eliminating tariffs).

⁶² Beyond serving as a possible means to examine statutory meaning or ambiguity, the normative strength of an interpretation that covers internal reporting also supports the *reasonableness* of that interpretation — a necessary finding if the SEC is to obtain *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁶³ It is worth noting that the *Asadi* court found easily explicable the discrepancy between SOX and Dodd-Frank: the former sufficiently protected internal whistleblowing, so the latter ratcheted up protection for the independent concern of external whistleblowing. *See Asadi*, 720 F.3d at 628–29.

ers.⁶⁴ The SEC, recognizing its limited resources,⁶⁵ sees the scheme as ideally working in the opposite way: maintaining “strong incentives for employees to continue to utilize their employers’ internal compliance . . . processes.”⁶⁶ That vision finds support in scholars’ understanding of optimal incentives to encourage whistleblowing. One study of employees fired for reporting before the passage of SOX and Dodd-Frank found that, while external whistleblowing was more effective than internal reporting at “changing organizational practices,” external whistleblowers were more likely to be fired.⁶⁷ The authors reasoned that this increased risk would deter external whistleblowing, which “suggest[ed] that model legislation would encourage internal whistleblowing, and protect that route with equal stringency.”⁶⁸ Other analysts have come to similar conclusions.⁶⁹

The Second Circuit in *Liu* did not need to decide the definitional “whistleblower” question because it had a dispositive ground on which to dismiss the case: the antiretaliation provision did not protect entirely foreign conduct. Future courts that do face this question of internal whistleblower protection, however, should reject the Fifth Circuit precedent holding to the contrary and grant deference to the SEC’s interpretation of the ambiguous provision.

⁶⁴ Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC — Dodd-Frank Act*, 124 HARV. L. REV. 1829, 1833–35 (2011).

⁶⁵ See SEC Brief, *supra* note 10, at 5 (“When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.” (quoting Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act Release No. 44969, 2001 WL 1301408, at *1 (Oct. 23, 2001)) (internal quotation marks omitted)).

⁶⁶ Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,308 (June 13, 2011).

⁶⁷ Terry Morehead Dworkin & Melissa S. Baucus, *Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes*, 17 J. BUS. ETHICS 1281, 1281 (1998).

⁶⁸ *Id.* at 1297. Although this increased risk could theoretically be addressed by increasing protection only for external reporting, the authors also found empirically that offering a combination of internal and external protection was more effective than the latter alone. See *id.*

⁶⁹ See, e.g., Eleanor Bloxham, *How to Encourage the Right Kind of Whistleblowers*, FOR-TUNE (June 15, 2011, 4:15 PM), <http://fortune.com/2011/06/15/how-to-encourage-the-right-kind-of-whistleblowers>. And it intuitively seems best to provide a potential whistleblower with two viable reporting options because it helps adapt enforcement to the heterogeneity of firms and their corrupt behaviors. Some types of corruption — likely the most pervasive and systemic versions — are almost certainly better dealt with via external reporting, while person- or region-specific malfeasance may warrant the more discreet nature of internal reporting. In fact, the conduct at issue in *Liu* illustrates the possible advantages of the latter approach; being an internal compliance officer, Liu likely wished to follow the very internal channels he was tasked with implementing rather than report to an outside agency before the alleged practices had been thoroughly investigated.