Case No. 16-2740

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS E. DEYKES,

Plaintiff/Appellant,

v.

COOPER-STANDARD AUTOMOTIVE INC.
and MATTHEW W. HARDT,

Defendants/Appellees.

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS/APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

Linda E. Kelley
Patrick N. Forrest
Leland P. Frost
MANUFACTURER'S CENTER FOR LEGAL ACTION
733 10th Street, N.W.
Suite 700
Washington, D.C. 20001

Counsel for National Association of Manufacturers

Ronald E. Meisburg

Susan F. Wiltsie
Scott H. Kimpel
Andrea R. Calem
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037-1701
202.955.1500
202.778.2201 - FACSIMILE
rmeisburg@hunton.com
swiltsie@hunton.com
skimpel@hunton.com
acalem@hunton.com

Counsel for Amicus Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, the undersigned counsel certifies that the National Association of Manufacturers ("NAM") is a nonprofit trade association representing small and large manufacturers in a wide range of industrial sectors and in all 50 states. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. It has neither a parent corporation nor any other form of corporate affiliate that is a party or amicus to this appeal, nor is it associated with a publicly owned corporation or affiliate with a substantial financial interest in the outcome of this litigation by reason of insurance, a franchise agreement, or an indemnity agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Dodd-Frank – the Dodd-Frank Wall Street Reform and Consumer Protection Act

DOL – the United States Department of Labor

EEOC – the United States Equal Employment Opportunity Commission

ERISA – the Employee Retirement Income Security Act

FCA – the False Claims Act

NAM – the National Association of Manufacturers

OSHA – the United States Occupational Safety and Health Administration

Rule 21F – 17 C.F.R. §§ 240.21F, *et seq*.

Rule 21F-2 – 17 C.F.R. §240.21F-2(b)(1)(ii)

SEC or Commission – the Securities and Exchange Commission

SOX – the Sarbanes-Oxley Act of 2002

STATEMENT OF IDENTITY, INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community, and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM regularly participates as amicus curiae in cases of particular importance to the manufacturing industry. This litigation raises issues of direct concern to the NAM and its members, many of which are publicly-traded companies and subject to the jurisdiction of the Securities and Exchange Commission ("SEC" or "the Commission"). Both in that capacity, and as employers of twelve million American workers, the NAM and its members have an active interest in the development of the law on whistleblower rights.

In particular, the NAM and its members support laws and regulations that incentivize employees to promptly report any perceived wrongdoing or illegal activity. They also desire a regulatory scheme in which an agency plays a gatekeeping function prior to litigation, which incentives good faith complaints grounded in factual and legal support. Finally, the NAM wishes to avoid litigation, particularly duplicative litigation.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), creates a private right of action in federal court for employees who believe they have experienced retaliation. The SEC interprets Dodd-Frank's definition of "whistleblower" to include employees who have made internal complaints of wrongdoing, but have not brought evidence of any wrongdoing to the attention of the Commission, to use that private right of action to sue employers in federal court. 17 C.F.R. § 240.21F-2(b)(1)(ii) ("Rule 21F-2"). A split of opinion has developed in the United States Courts of Appeal about this issue, which now is before this Court. Any interpretation of Rule 21F and the Dodd-Frank Act definition of "whistleblower" by this Court therefore will have far-reaching implications for public companies, including the many public employers that are members of the NAM.

All parties have consented to the filing of this *amicus* brief.

RULE 29(c)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* the NAM states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the *amicus*, its members, or its counsel – contributed money to fund preparing or submitting this brief. In compliance with Fed. R. App. P. 29(a)(3), the NAM has filed a motion seeking leave to file this amicus brief.

SUMMARY OF ARGUMENT

Amicus curiae the NAM supports the conclusion of the District Court in this case that the statutory definition of "whistleblower" in Dodd-Frank, set forth at 15 U.S.C. § 78u-6(a)(6), must be applied across all provisions of Dodd-Frank, including that law's anti-retaliation provisions. That conclusion aligns logically with the structure of Dodd-Frank's whistleblower reward scheme, and is consistent with this Court's approach to statutory construction. It also is consistent with the policy choices Congress made when it added Dodd-Frank to the SEC's anti-fraud toolkit.

ARGUMENT

I. INTRODUCTION

Dodd-Frank, enacted in 2010 in the wake of the Great Recession, is a multi-faceted law which seeks to inject more safety and accountability into the nation's banking and financial systems. Section 922 of Dodd-Frank, codified at 15 U.S.C. § 78u-6(a), creates a whistleblower reward program designed to enhance the SEC's ability to discover and remedy violations of the securities laws. Under this program, any person who reports a violation of the securities laws, whose report results in an enforcement action in which the SEC collects more than $1 million in fines, can be awarded a bounty of between 10 and 30% of the fines collected. Since the inception of this program, the SEC has awarded more than $111 million in bounties to whistleblowers, with the largest award exceeding more than $30 million.[1]

The Dodd-Frank whistleblower scheme includes an anti-retaliation provision, which creates a private right of action for employees who believe they have experienced retaliation for being a "whistleblower" within the meaning of the statute. The statute of limitations for such an action is at most ten years (although no more than three years after the date when facts material to the right of action are known or should reasonably have been known, or six years after the event giving rise to the claim). 15 U.S.C. § 78u-6(h)(1)(B). Remedies for retaliation include reinstatement, two times the amount of back pay owed to the individual, interest on the back pay award, and compensation for litigation costs and attorneys' fees. 15 U.S.C. § 78u-6(h)(1)(C).[2]

---

[1] U.S. Securities and Exchange Commission, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program, p. 1.

[2] Dodd-Frank's whistleblower reward system is modeled on the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, which rewards whistleblowers for exposing fraud against the government. Dodd-Frank is the more flexible of the two statutes, in that it does not have an exhaustion requirement; it does not require whistleblowers to first file sealed lawsuits and ask the government to intervene; and, it provides a lengthy limitations period.

The issue in this case touches on the provisions of the Sarbanes Oxley Act of 2002, Pub. Law 107-204, 116 Stat. 745 (2002) ("SOX"), which was enacted in the wake of the Enron corporate scandal and similar events. SOX mandated changes to corporate governance and accounting practices, and it also includes an anti-retaliation provision. SOX overlaps with Dodd-Frank in that it protects employees who report alleged violations of mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a). Such reports can be made to law enforcement agencies, to Congress, or to someone with supervisory authority over the employee. 18 U.S.C. § 1514A(a).

However, SOX does not permit a reporting employee to proceed directly to federal court; rather, it assigns the administration of this whistleblower program to the Occupational Health and Safety Administration ("OSHA"), within Department of Labor ("DOL") (as do the majority of contemporary federal whistleblower laws), and requires employees to file complaints for alleged SOX retaliation with the Secretary of Labor within 180 days of the date the alleged retaliatory action occurred, or the date the employee became aware of such action. As with discrimination charges filed with the EEOC, OSHA then investigates the complaint and determines if there is reasonable cause to conclude it has merit. Either party may challenge that finding and request a hearing before an administrative law judge, which then can be appealed to the agency's Administrative Review Board. 29 C.F.R. 1980 *et seq*. Alternatively, if the agency does not issue a final decision within 180 days of the filing of the complaint, the employee may bring an action in federal district court, where he or she is entitled to a jury trial. 18 U.S.C. § 1514A(b)(1), (b)(2)(E). SOX plaintiffs are entitled to be "made whole," and have been awarded reinstatement, back pay, "make whole" compensation such as restoration of seniority, sick leave and vacation leave, compensatory damages for emotional distress and loss of reputation, and attorney's fees and costs. 18 U.S.C. § 1514A(c).

SOX includes a requirement that corporate audit committees establish (or maintain, if pre-existing) effective internal procedures by which employees can report concerns regarding questionable accounting or auditing matters. 18 U.S.C. §§ 301, 406; 15 U.S.C. §§ 78f(m)(4). Such reports can be made anonymously. *Id.* Thus, many publicly-traded companies have put into place such internal monitoring and reporting systems, and non-publicly traded companies have used SOX's corporate governance criteria as the benchmark for internal controls and a hotline or complaint system. The NAM's member organizations have invested heavily in these controls and in internal reporting systems such as hotlines.

SOX does not define "whistleblower." *See* 15 U.S.C. § 7201 (Definitions). Rather, 18 U.S.C. §1514A(a), entitled "Whistleblower Protection for Employees of

Publicly Traded Companies," prohibits discrimination against employees who engage in certain conduct: (1) providing information, or assisting in an investigation, regarding any violation of the securities laws or any provision of federal law relating to fraud against shareholders, which investigation can be conducted by a federal regulatory or law enforcement agency, any member or committee of Congress, or a person with supervisory authority over the employee; or (2) filing, testifying, participating in or otherwise assisting in a proceeding relating to any such violation of the securities laws.

In contrast, in Dodd-Frank, Congress chose to define "whistleblower:" "The term 'whistleblower' means 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 ore regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). The definition is written in mandatory language: "In this section the following definitions *shall* apply[.]" 15 U.S.C. §78u-6(a) (emphasis added).

Separately, Congress described the conduct that is protected whistleblower activity: (i) providing information to the Commission; (ii) participating in any investigation, judicial or administrative action of the Commission related to such information; and (iii) making disclosures "that are required or protected" under SOX, any part of the Exchange Act, section 1513(e) of Title 18 (prohibiting retaliation against those who provide information to law enforcement officers), and any other law, rule, or regulation subject to the jurisdiction of the Commission. 15 U.S.C. § 78u-6(h)(1)(A).

The reference to SOX in subsection iii of § 78u-6(h)(1)(A) signifies that Congress was aware of the overlap – and the differences – between SOX and Dodd-Frank. Congress could have chosen to amend SOX, 18 U.S.C. §1514A(a), or could have defined the scope of Dodd-Frank whistleblower protection by reference to certain conduct, as it did in SOX. Instead, it chose to create a very specific definition of "whistleblower," and separately to describe conduct that is protected from retaliation, in a manner distinctly different than SOX.

The Commission takes the view that there is "significant tension" between Dodd-Frank's definition of "whistleblower" and the description of protected conduct in the anti-retaliation provision (SEC Amicus Brief, Doc. 23 at 19-20). Rather than attempt to harmonize these two provisions, it stepped into this perceived breach by adopting Rule 21F-2, which in essence amends the statutory definition of "whistleblower" to add anyone who engages in the conduct described in § 78u-6(h)(1)(A)(iii). The Commission purports to take this liberty based on its view that Dodd-Frank is ambiguous, and that its rulemaking authority therefore allows it to "clarify" the statutory language. (SEC Amicus Brief, Doc. 23 at 15.)[3] The validity of this rule, and the interpretation of §78u-6(h)(1)(A), is now before this court, after Plaintiff/Appellant Douglas E. Deykes filed a Dodd-Frank retaliation claim based on his internal reporting of alleged violations of the Foreign Corrupt Practices Act.

II. THE DISTRICT COURT CORRECTLY HELD THAT DODD-FRANK'S STATUTORY LANGUAGE IS UNAMBIGUOUS.

A. Well-Established Principles of Statutory Construction Support the District Court's Decision.

This Court has held, *Chevron*[4] "all too often is taken to mean simply that administrative agencies win in any dispute involving a question of statutory construction. Plainly, this is incorrect … An agency's interpretation is not entitled to *Chevron* deference. . . if the apparent statutory ambiguity can be resolved using traditional tools of statutory construction." *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1059 (6th Cir. 2014) (internal citations and quotation marks omitted). That is the case here. And, as Appellees point out (Appellee's Brief, Doc. 29, pp. 12, 22) construing a statute should never be a search for ambiguity in

---

[3] The Commission's expanded definition of "whistleblower" is consistent with its view of itself as an advocate for whistleblowers. (Speech of SEC Chair Mary Jo White, presented at the Ray Garrett, Jr. Corporate and Securities Law Institute at Northwestern University School of Law in April 2015, available on SEC's website at http://www.sec.gov.news/speech/chair-white-remarks-at-garrett-institute.html ("We at the SEC increasingly see ourselves as the whistleblower's advocate.")

[4] *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

furtherance of an enforcement goal. Rather, *only* if the statute is inescapably ambiguous should a court look to other authority to shed light on the statute's meaning. *Brilliance Audio, Inc. v. Haights Cross Communs., Inc.*, 474 F.3d 365, 371-72 (6th Cir. 2007).

1. Presumption That Statute Means What it Says

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Vander Boegh*, *quoting Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146 (1992). No disagreement can exist that Congress had SOX in mind when it was in the process of enacting Dodd-Frank. Congress could have chosen not to define "whistleblower" in Dodd-Frank, and instead only adopt the conduct-based characterization of whistleblower conduct, as it did in SOX. Alternatively, Congress could have amended Section 1514A to expand the characterization of whistleblower activity. Instead, it made a deliberate choice to use a different process and defined "whistleblower" as those who bring information to the Commission.

It also must be assumed that Congress was well aware of the fact that SOX and Dodd-Frank create two different complaint-reporting infrastructures, each with its own limitations period and remedies. SOX requires employees who make internal reports of wrongdoing to bring retaliation complaints to the DOL within 180 days of the retaliatory activity (or discovery thereof), and permits the DOL to review the merits of those complaints before any additional action is taken; only if the agency delays more than 180 days in its investigation may an employee proceed to federal court. If the DOL finds the complaint to be meritorious, it will prosecute the anti-retaliation action on behalf of the employee. In contrast, Dodd-Frank creates a much longer limitations period (usually 3 or 6 years, and up to 10 years). Congress could explicitly have combined these remedial schemes had it wished to do so, but it left in place the DOL's role in SOX enforcement and the shorter limitations period of that statute.

The statutory language in these two statutes is unambiguous and, moreover, no legislative history even suggests that Congress had a different outcome in mind. Accordingly, the presumption that Congress meant what it said must stand.

2. Importance of Statutory Definition

The fact that Congress chose to define "whistleblower" is significant to the analysis here. A statutory definition such as this one "generally controls," unless it would lead to an absurd result, or one which is inconsistent with legislative intent. *Tennessee Protection & Advocacy, Inc. v. Wells*, 371 F.3d 342, 349-50 (6th Cir. 2004). And, as previously noted, Congress made this definition mandatory. (*See* Appellees' Brief, Doc. 29, p. 15.) Absent this statutory definition, the Commission and the courts might have more leeway in defining "whistleblower." *See, Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23(1992) (absent statutory definition, or use of a term in statute with accumulated settled meaning under common law, words in statute can be construed from perspective of layman). In light of Congress' explicit instructions, however, the statutory definition applies. Congress gave no indication that it intended the definition of "whistleblower" to be any different for purposes of both Dodd-Frank's monetary reward provisions and its anti-retaliation provisions.

3. Reading Statutes and Statutory Provisions *In Pari Materia*

Where two or more statutes deal with the same subject, "they are to read *in pari materia* and harmonized, if possible." *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 927 (6th Cir. 2000) (harmonizing Antidumping Act of 1916 with subsequent antidumping legislation such as Title VII of the Tariff Act of 1930, and denying injunctive relief under former because of potential effect on latter). SOX and Dodd-Frank fulfill two different functions for securities law whistleblowers. Consistent with SOX's emphasis on corporate governance, it provides retaliation protection to employees who make internal reports about securities fraud, as well as reports to law enforcement agencies generally. Its remedial scheme is administered by the DOL, of whose resources employees must avail themselves before accessing a federal court.

In contrast, Dodd-Frank's whistleblower provisions are crafted to incentivize whistleblowers to assist the Commission with its enforcement efforts.[5] To this end, the Commission chose not to make internal reporting a prerequisite to recovery of a monetary award, rejecting the concerns of many in industry that giving employees a direct path to whistleblower recovery would deter participation in internal compliance programs. (*See* SEC Amicus Brief, Doc. 23, pp. 10-13 and fn. 13, discussing balancing of enforcement needs and desire not to weaken corporate compliance programs.) The focus on the Commission's enforcement agenda that is at the core of Dodd-Frank is logically consistent with that statute's whistleblower provisions, which protect from retaliation only those who further *the agency's* agenda by providing it with information. Courts must read these two complementary statutes *in pari materia* – harmoniously. To do so entails a recognition that Congress could not have intended to supplant SOX's reporting and remedial scheme by creating a private right of action, with a longer statute of limitations, for those who do not report to the Commission.

This principle applies equally to Dodd-Frank itself: the whistleblower reward provisions and the anti-retaliation provisions of that statute must be read

[5] The Commission noted in its Adopting Release for the final Dodd-Frank rules that, "while internal compliance programs are valuable, they are not substitutes for strong law enforcement." *See,* http://www.sec.gov.rules/final/2011/34-64545.pdf, p. 104.

harmoniously, giving effect to all provisions, in the context of the larger framework created by SOX and Dodd-Frank.

4. Repetition Does Not Create Surplusage

The Commission argues that the District Court's interpretation of the statute renders superfluous the words "to the Commission," in clauses (i) and (ii) of Section 78u-6(h)(1)(A) [the description of protected whistleblower activity]. (SEC Amicus Brief, Doc. 23, at 27.) However, of greater importance is the presumption that Congress knew what it was doing, and that rules of construction should be used to find an unambiguous reading of the statute. The presumption against surplusage is not a tool for creating ambiguity. *TMW Enters. v. Fed. Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010). "'Where there are two ways to read the text' – and the one that avoids surplusage makes the text ambiguous – 'applying the rule against surplusage is, absent other indications, inappropriate.'" *Id.* (internal citations omitted). Further, surplusage legitimately may be viewed as an attempt to provide emphasis. *Id.*

Here, §78u-6(h)(1)(A)(iii) *can* be read consistently with the statute's whistleblower definition: it is a catchall provision which refers to disclosures "required or protected" by SOX or other statutes that ultimately find their way *to the Commission* – whether brought there by the reporting employee, or forwarded there by another agency.

This reading is more reasonable than presupposing, as did the Second Circuit in *Berman v. Neo@Ogilvy, LLC,* 801 F.3d 145 (2d Cir. 2015), that Congress simply forgot to reconcile conflicting provisions in the heat of the moment, and is entirely more consistent with traditional canons of statutory construction; specifically, the presumption that statutes mean what they say, and should be read *in pari materia.*

5. This Court Routinely Applies All These Principles of Construction

Sixth Circuit jurisprudence routinely applies these principles of statutory construction, and reflects an overriding concern with avoiding a finding of ambiguity in a statute whenever possible. For instance, in *Sexton v. Panel Processing, Inc.,* 754 F.3d 332 (2014), this Court examined an anti-retaliation provision in ERISA, and held that the protections for employees who give information or testify in inquiries and proceedings did not extend to internal complaints, such as one made by the plaintiff in an email to his supervisor.[6] As here, the employee (supported by the Secretary of Labor) argued that the public policies underlying this anti-retaliation provision militated in favor of a broad construction of the statutory language, and the agency requested *Chevron*

[6] The relevant provision stated, "It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [the Act]." 29 U.S.C. § 1140.

deference for that interpretation. However, this Court held that the plain words of the statute were unambiguous and controlled the result. *Id.* at 339-42.

Similarly, in *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005), before the Court was an interpretation of the "public disclosure bar" in the FCA, which (in part) defines a whistleblower as someone who is the "original source" of the information given to the government – that is, someone with direct and independent knowledge of the information, who has voluntarily provided the information directly to the government before filing an action under the FCA. The plaintiff in *Walburn* first filed a tort/civil rights action against Lockheed as a result of his alleged exposure to gases, and later filed a putative *qui tam* claim under the FCA. The issue before the Court was whether the earlier-filed tort action meant that the plaintiff had not met the requirement that he voluntarily give information *to the government* prior to making a public disclosure of the information on which the *qui tam* claims rested. While the tort action was a public disclosure, it had not been made to the government.

The plaintiff argued that his tort case rested on different allegations than his FCA case, thus he had properly notified only the government prior to filing the latter case. This Court disagreed, construing the statutory definition of "original source" narrowly, and held that the *qui tam* action was barred.

And, in *Vander Boegh*, *supra*, the plaintiff alleged he was not hired because he engaged in protected whistleblower activity at a *prior* job. This Court affirmed the district court's decision that the plaintiff lacked standing under various whistleblower statutes because he was a job applicant – not an employee. As here, the plaintiff argued that the public policies underlying the applicable whistleblower provisions meant that "applicants" should be included in the definition of "employee."[7] This Court looked both at statutory definitions of "employees" under some of the statutes (which did not include "applicants"), and, in the absence of statutory definitions, applied the common-law meaning of "employee" under other statutes. It held that the statutory definitions were unambiguous, and the common-law definition – which incorporated a lay understanding of the word "employee" – did not include job applicants. Consequently, the plaintiff was barred from recovery despite the public policy considerations urged by the plaintiff. *See also, Brown v. City of Covington*, 805 F.2d 1266 (6th Cir. 1986) (despite appellants' argument that failure of Congress to include governmental entities within definition of "person" in pre-1975 version of Securities Exchange Act of 1934 was merely a "stylistic oversight," as well as argument that "noble policy goals"

[7] The statutes at issue were the Energy Reorganization Act, 42 U.S.C. § 5851, the False Claims Act, 31 U.S.C. § 3730(h)(1), and the retaliation provisions of four federal environmental statutes: the Safe Water Drinking Act, 42 U.S.C. § 300j-9(i), the Clean Water Act, 33 U.S.C. § 1367, the Toxic Substances Control Act, 15 U.S.C. § 2622, and the Solid Waste Disposal Act, 42 U.S.C. § 6971.

underlying securities laws favored broad reading of statute, court could not rewrite otherwise clear section of statute); *Wright et al. v. Comm'r of Internal Revenue*, 809 F.3d 877 (6th Cir. 2016) (plain language of tax code allowed petitioners to take losses on put-call options, even though Tax Court ruled to the contrary on the basis of sound tax policy; if this outcome is to be prevented, Congress must amend tax code).

These logical and reasonable principles of statutory interpretation should govern the disposition of this case. Congress should be presumed to have meant what it said in Dodd-Frank. If Congress meant something else, it – and not the Commission - must amend the law.

B. <u>**Sound Policy Considerations Support Affirmance of the District Court's Decision.**</u>

More than thirty federal statutes contain anti-retaliation provisions,[8] and every state and the District of Columbia also have some form of whistleblower law.[9] Statutory whistleblower programs must be designed in a manner that balances competing policy concerns, including deterrence of fraud or waste, encouragement of timely, high-quality reports from whistleblowers, and discouragement of exclusively profit-seeking or vindictive behavior.

---

[8] *Sexton v. Panel Processing, Inc.*, 745 F.3d 332, 336 (6th Cir. 2014), *citing* Jon O. Shimabukuro et al., Cong. Research Serv., R43045, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (2013).

[9] Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of Whistleblower Protection*, 38 Am. Bus. L.J. 99, App. A (2000).

To further these goals, the members of the NAM (who collectively employ 12 million men and women) support whistleblower programs that allow employers to quickly resolve meritorious claims of unlawful conduct that are brought to their attention. Internal reporting programs fulfill this function and, failing that, prompt agency involvement serves this function as well.

With respect to internal reporting, a report by The Network entitled "2015 Corporate Governance and Compliance Hotline Benchmarking Report"[10] analyzed 684,278 internal complaints made to corporate hotlines throughout the five-year period from 2010 to 2014. It found that the hotline reporting rate across all industries was 10.3 reports per 1,000 employees in 2014, almost a 6% increase over the prior year. *Id.* at 4, 9-11. For those reports where case outcome was provided, 81% of all incidents reported warranted an investigation, with 48% of those investigations resulting in corrective action taken. *Id.* at 24-25. Of the participants, seventy-four per cent (74%) did not notify management of an issue before making a report (*id.* at 22-23), suggesting that employees prefer the anonymity of a hotline. Personnel management incidents were the leading incident category across all industries, followed by corruption and fraud, and employment law violations. *Id.* at 13.

[10] Online at https://www/bdo.co.za/getattachment/de0dddeb-7b1c-4e6c-b755.../attachment.aspx?

On the other hand, whistleblower programs providing financial incentives spur disclosures to the government. When Congress amended the False Claims Act in 1986 to significantly increase potential awards, the number of false claims reports increased dramatically.[11] Likewise, as the SEC continues to publicize the large bounties obtained by whistleblowers under the Dodd-Frank program, the number of tips it receives has substantially increased (in FY 2016, it received over 4,200 tips, more than a 40% increase in tips since FY 2012).[12]

Considering this information, the NAM submits that the District Court's resolution of this case supports healthy public policies with which its members agree. Specifically, that: (1) internal reporting of noncompliance is encouraged;[13] (2) if internal reporting does not work, or is not realistic under the factual circumstances, employees are incentivized to bring concerns about noncompliance to the agency best able to evaluate such claims (in this case, the SEC); (3) the

---

[11] Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J. L.& Bus. 27 (Fall 2013) at 60-61. FCA-based reports of false claims increased after 1986 from an average of six per year to 450 in 1998, and almost two per day in 1999. As of September 2012, more than $35 billion in *qui tam* and non-*qui tam* settlements and judgments had been paid. These authors conclude, "[t]he explosion of FCA suits strongly supports the conclusion that the availability of monetary awards promotes whistleblowing."

[12] U.S. Securities and Exchange Commission, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program, p. 1.

[13] The SEC will provide a higher reward to employees who have initially made internal reports. (*See,* Exchange Act Rule 21F-6(a)(4), permitting Commission to adjust an award upward based on internal reporting prior to bringing information to Commission.)

agency investigation/resolution will permit the employer to promptly remedy any wrongdoing, avoiding an enforcement action, and resolving noncompliance quickly; and (4) the statutory scheme restricts duplicative litigation on the same/similar facts.

The NAM's position is that, while both SOX and Dodd-Frank seek to enforce the securities laws and protect whistleblowers, the core of Dodd-Frank focuses on incentivizing prompt resolution of non-compliance with securities laws, while under SOX, internal compliance procedures and whistleblower protection take center stage. The statutory schemes work in harmony, so that only one agency is primarily involved in investigating a particular case of underlying alleged non-compliance. Multi-agency involvement would waste resources through inefficiency and is highly unusual in statutory precedent.

Thus, for SOX, Congress chose the DOL, the agency with expertise in employee issues, to administer the whistleblower retaliation scheme. SOX whistleblower provisions were modeled on other whistleblower laws administered by the DOL, such as the airline whistleblower protection provision, 49 U.S.C. § 42121(b). The statutory definition of protected whistleblowing is broad, but it applies to employees. The DOL investigates the retaliation complaint, and must complete that adjudication within 180 days. Detailed discovery and hearing procedures are set forth in 29 C.F.R. Part 18. SOX also amended the obstruction of justice statute, 18 U.S.C. § 1513(3), to prohibit retaliation against employee whistleblowers. And, it treats any violation of SOX as a violation of the Securities Exchange Act of 1934, thus potentially subjecting a company accused of SOX retaliation to SEC-imposed penalties.

For Dodd-Frank, Congress chose the SEC – the agency with expertise in the underlying non-compliance – to be the "lead" agency. The NAM agrees with this focus for Dodd-Frank. By attaching whistleblower protection only to those employees who go to the SEC, Congress is protecting the employee *and* protecting the investing public in equal measure. It is not, as it arguably did under SOX, making employee protection paramount. When a complaint is brought to the SEC, the SEC's task is to work with employers to determine if there has been noncompliance, and if so, to address it quickly, both for the public good and so that publicly-traded corporations do not squander shareholder resources in needless litigation. While no employer welcomes a finding that it has engaged in noncompliance, if this has occurred the employer wants to know as soon as possible, and wants to be able to work with the agency to address that issue without an enforcement action.

It benefits the investing public (including the NAM's members) when a statutory scheme is set up so that the paramount issue is directed to the agency experienced in assessing the merits of such claims. Historically, Congress has preferred this type of arrangement – for instance, under Title VII, the EEOC has the expertise to evaluate claims of discrimination and retaliation, so that the courts are not clogged with claims that have not been pre-screened by subject matter experts. The SOX reporting and administrative scheme also serves precisely this function. It allows employers to present their side of a dispute to DOL professionals who are not part of an enforcement program, who will make an impartial finding as to whether there is cause to believe an employee was retaliated against for expressing a reasonable belief that the securities laws were violated.

Employees who want the remedies afforded by Dodd-Frank should be required to take their concerns to the Commission in order to receive whistleblower protection. The opportunity to obtain one of Dodd-Frank's million-dollar bounties should carry a corresponding duty to assist the Commission in its enforcement efforts. This process also decreases the likelihood of frivolous or revenge based allegations. An employee going to the SEC with claims of non-compliance must have a factual and legal basis for that claim. After all, it is a crime under 18 U.S.C. §1001 to make a false or fraudulent statement to the federal government. In this fashion, Congress incentivized good actors - with factual support that a violation of law has occurred - to come forward early with evidence of wrongdoing, knowing they will be protected from retaliation. In the NAM's view, Dodd-Frank's monetary awards are logically (and legally) attached to a duty to report to the Commission.

In contrast, subsuming the SOX reporting system into the Dodd-Frank system, and allowing employees who have made internal complaints to jump immediately to the courts (with a minimum three-year statute of limitation), focuses the attention on employee protection and not on the underlying non-compliance. Congress could have written the law this way, as it did with SOX, but the NAM submits that it did not. Moreover, for the areas of cross-over between SOX and Dodd-Frank, employees already have comprehensive whistleblower protection. Providing another short-cut avenue to litigation would create duplicative litigation on the same or similar facts under both SOX and Dodd-Frank, burdening employers without advancing the public good.

Finally, the NAM does not believe that Congress intended to transform every audit and compliance professional employed by a public company into a *de facto* whistleblower. Here, Deykes was the Vice President of Internal Audit and Compliance. Analyzing, investigating, reporting and remediating potential legal and accounting violations was the very nature of his job. The policy objective of the Dodd-Frank whistleblower mechanism is to encourage knowledgeable parties to report potential wrongdoing to the SEC by offering the potential to collect a bounty, not to create a special class of employment protection for an employee who is discharging the day-to-day responsibilities of his or her job.

In sum, the Commission's Rule 21F-2 alters the securities compliance focus of Dodd-Frank and, in so doing, changes the incentive structure created by the SOX and Dodd-Frank enforcement schemes. The rule decreases the likelihood that employees will bring securities law non-compliance to the SEC, the agency with subject-matter expertise. Accordingly, employers will have less opportunity to resolve such issues promptly and without litigation. The public (including employers) also will be harmed by inefficient resolution of securities law noncompliance. And employers may be burdened with expensive and higher-stake defenses of claims that might have been avoided, and/or duplicative claims under both statutes.

III. CONCLUSION

For these reasons, *amicus curiae* the National Association of Manufacturers respectfully urges this Court to affirm the decision of the District Court in this case.

Dated: April 21, 2017

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: /s/ Ronald E. Meisburg

Ronald E. Meisburg

Susan F. Wiltsie*
Scott H. Kimpel*
Andrea R. Calem*
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
202.955.1500
202.778.2201 – FACSIMILE
rmeisburg@hunton.com
swiltsie@hunton.com
skimpel@hunton.com
acalem@hunton.com

Counsel for Amicus Curiae
**Not admitted in the 6th Circuit*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the limitations of Fed. R. App. P. 29(d) because it contains 6,703 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: April 21, 2017

/s/ Ronald E. Meisburg
Ronald E. Meisburg

Susan F. Wiltsie*
Scott H. Kimpel*
Andrea R. Calem*
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
202.955.1500
202.778.2201 – FACSIMILE
rmeisburg@hunton.com
swiltsie@hunton.com
skimpel@hunton.com
acalem@hunton.com

**Not admitted in the 6th Circuit*

.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, a true and correct copy of the foregoing Brief of Amicus Curiae National Association of Manufacturers was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit via the Court's CM/ECF system. Counsel for all parties and *amici curiae* are registered CM/ECF users and will be served by the appellate CM/ECF system.

By: /s/ Ronald E. Meisburg

Ronald E. Meisburg
Susan F. Wiltsie*
Scott H. Kimpel*
Andrea R. Calem*
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
202.955.1500
202.778.2201 – FACSIMILE
rmeisburg@hunton.com
swiltsie@hunton.com
skimpel@hunton.com
acalem@hunton.com

**Not admitted in the 6th Circuit*