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**WHISTLEBLOWER TUG-OF-WAR:
CORPORATE ATTEMPTS TO SECURE
INTERNAL REPORTING PROCEDURES IN THE
FACE OF EXTERNAL MONETARY INCENTIVES
PROVIDED BY THE DODD-FRANK ACT**

Shannon Kay Quigley*

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INTRODUCTION

Whistleblowing occurs when an employee attempts to “blow the whistle”¹ and expose a wrongdoing within a corporation or organization.² Whistleblowing may occur internally, when an employee contacts a manager or a supervisor, or externally, when an employee reports to a government agency or media representative.³ The public has deemed some whistleblowers the “voices of reason” who act to protect the public.⁴ Though a few whistleblowers succeed in identifying and stopping fraud, most employees with personal knowledge of corruption fail to report the information, and the fraud remains undiscovered.⁵ To promote whistleblowing to the government, several federal statutes incorporate “bounty” provisions, or monetary incentives, for whistleblowers to report valuable information.⁶ Many employees compare the monetary incentives to the risk of retaliation by co-workers and employers who brand the whistleblower a *snitch*, an *informer*, or worse, a *traitor*. In order to protect whistleblowers from such reprisals, statutes often contain retaliation provisions that forbid employers

1. An employee “blows the whistle” by alerting the corporation or the government of the potential wrongdoing. Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 548 (2004).

2. *Id.*

3. *Id.*

4. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1052 (2004).

5. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1117 (2006).

6. Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1143-44 (1999). Four federal bounty programs exist: the SEC, the IRS, the U.S. Customs Service, and the False Claims Act. *See id.* at 1144.

from firing employees for whistleblowing.⁷

In a promise to “clean up” the financial services industry and the prevalent fraud, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010.⁸ The Dodd-Frank Act provides monetary incentives for whistleblowers who report fraudulent corporate practices to the government.⁹ Yet eight years prior, Congress enacted the Sarbanes-Oxley Act to decrease fraudulent activities by requiring corporations to construct internal reporting mechanisms.¹⁰ Congress designed these mechanisms to encourage employees to report fraud and promote corporate self-regulation.¹¹ Corporations are still required to maintain the internal reporting mechanisms and compliance programs required by the Sarbanes-Oxley Act, even though the monetary incentives provided by the Dodd-Frank Act undermine the purpose of such programs.¹² For example, a public accountant for a major corporation may discover information that implicates a manager in an act of fraud. On one hand, the accountant may report to the company and risk retaliation. On the other hand, the accountant could report to the government for a substantial reward and receive protection for their whistleblowing activities.

As of 2010, the Securities and Exchange Commission (SEC) has not granted a whistleblower award under the Dodd-Frank Act.¹³ However, the recent \$96 million dollar award to Cheryl Eckard under a similar whistleblower provision, the False Claims Act, exasperated corporate

7. Cherry, *supra* note 4, at 1049.

8. Kevin Griffith, *Whistleblowing Galore Under the Dodd-Frank Act*, BANKING & FINANCE LAW REPORT (Aug. 24, 2010), <http://www.bankingandfinancelawreport.com/2010/08/articles/bank-regulation/whistleblowing-galore-under-the-doddfrank-act/>.

9. *Id.*

10. Moberly, *supra* note 5.

11. *Id.*; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745 (2002) (codified at 18 U.S.C. § 1514A (2010)).

12. Moberly, *supra* note 5; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745 (2002) (codified at 18 U.S.C. § 1514A (2010)).

13. SEC, ANN. REP. ON WHISTLEBLOWER PROGRAM 6 (Oct. 2010), available at http://www.sec.gov/news/studies/2010/whistleblower_report_to_congress.pdf [hereinafter SEC REPORT]. No whistleblower awards have been paid from the \$451 million dollars in the Fund created to finance the SEC's whistleblower award program. *Id.*

concern of the potential impact created by external whistleblowing awards.¹⁴ Eckard, a manager at GlaxoSmithKline (GSK),¹⁵ informed the government of her employer's compliance violations.¹⁶ Prior to informing the government, Eckard reported the violations to GSK for a period of ten months, and continued to do so even after GSK fired her; only when internal complaints failed did Ms. Eckard turn to the government.¹⁷ Eckard may not have been motivated by monetary incentives to report the fraudulent activity to the government. However, other employees in a similar situation may bypass internal reporting procedures, and corporations may lose the chance to remedy compliance violations prior to government involvement.¹⁸ In light of the publicity created by Eckard's award and the enactment of the Dodd-Frank Act, corporations may benefit from creating a more effective compliance program that will prevail over the financial incentives enticing employees to disregard internal programs.¹⁹

In response to this difficult challenge, many employers attempt to educate their employees about legal regulations or

14. Richard Levick, *A Whole New Ballgame: Dodd-Frank's Whistleblower Provisions*, LEVICK (Nov. 2, 2010) http://www.levick.com/index.php?id=910&type=articles&item_id=230&action=show_item.

15. GlaxoSmithKline is a pharmaceutical company. Ashby Jones, *The Story Behind the \$96M Whistleblowing Recovery*, WALL ST. J. LAW BLOG (Oct. 28, 2010, 10:03 AM), <http://blogs.wsj.com/law/2010/10/28/the-story-behind-the-96m-whistleblowing-recovery/>.

16. *Id.* Eckard discovered several problems at a GSK plant located in Cidra, Puerto Rico. Kristine B., *Whistleblower Lawsuit Pays Off Big for Former GSK Employee*, LAWYERSANDSETTLEMENTS.COM THE BLOG (Nov. 22, 2010), <http://www.lawyersandsettlements.com/blog/whistleblower-lawsuit-pays-off-big-for-former-gsk-employee-05772.html>. Eckard suggested that GSK notify the FDA about product problems in the plant, such as drugs of different types being mixed into the same bottle and medications contaminated with bacteria. *Id.*; *Glaxo Whistle-Blower Lawsuit: Bad Medicine*, CBSNEWS (Jan. 7, 2011, 12:36 PM), <http://www.cbsnews.com/stories/2010/12/29/60minutes/main7195247.shtml>. After Eckard filed a qui tam claim against GSK, GSK agreed to pay \$750 million to settle charges of placing adulterated drugs onto the market and \$600 million to settle claims under the False Claims Act. *Id.*; Michael Connor, *GSK to Pay \$750 Million Fine: Whistleblower to Get \$96 Million*, BUSINESS ETHICS (Oct. 26, 2010), <http://business-ethics.com/2010/10/26/1740-glaxosmithkline-to-pay-750-million-fine-whistleblower-to-get-96-million/>.

17. Gene Rickman, *Quality Assurance Manager Rewarded for Whistleblowing*, TOPNEWS (Oct. 28, 2010, 7:59 AM), <http://topnews.co.uk/215477-quality-assurance-manager-rewarded-whistleblowing>.

18. *See infra* Part II.

19. *See infra* Part IV.

ethical standards within the company.²⁰ A company's compliance and ethics program informs employees of the corporation's "code(s) of conduct, policies, and procedures designed to achieve compliance with applicable legal regulations and internal ethical standards."²¹ This compliance program must effectively deter and detect violations with the use of risk assessments, auditing, and appropriate discipline.²² Employees, more than corporate monitors, have a better understanding of the "inner workings" of the corporation and may know about fraudulent activities within the corporation.²³ Usually corporate officials assign mid-level managers to handle the *dirty work* involved in fraud.²⁴ In fact, a paper trail leading to the corporate official may not exist, and without the help of the insider, the mid-level managers will be the "scapegoats," while the higher-ranked initiator remains undiscovered and unpunished.²⁵ As whistleblowers have disclosed roughly one-third of fraudulent crimes against businesses, encouraging employees to become internal whistleblowers is an essential step towards preventing fraud.²⁶ However, these compliance programs may not be able to compete with the substantial monetary incentives provided by the Dodd-Frank Act.

This Comment will explore the possible effects of the Dodd-Frank Act on corporate compliance programs established after the Sarbanes-Oxley Act. Part I will provide an introduction to the history of whistleblower provisions, ultimately focusing on the internal reporting requirements of the Sarbanes-Oxley Act and the later implementation of corporate compliance programs.²⁷ Part II will explore the problems the Dodd-Frank Act may create for corporate compliance programs.²⁸ An analysis of whether the Dodd-Frank Act may successfully entice employees to blow the

20. Corporate Compliance Committee, *Corporate Compliance Survey*, 60 BUS. LAW. 1759, 1759 (2005) [hereinafter *Corporate Compliance Survey*].

21. *Id.*

22. *Id.*

23. See Moberly, *supra* note 5, at 1116.

24. See Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L. REV. 357, 374 (2003).

25. *Id.* at 374-75.

26. Moberly, *supra* note 5.

27. See *infra* Part I.

28. See *infra* Part II.

whistle externally will follow in Part III.²⁹ It will include an examination of the significance and complexity of the Dodd-Frank Act incentives and the retaliation protections provided to whistleblowers.³⁰ Further, Part III will consider the results of other whistleblower statutes and the potential success of the Dodd-Frank Act.³¹ Lastly, Part IV will suggest modifications to compliance programs that will encourage internal whistleblowing in response to the Dodd-Frank Act.³²

I. BACKGROUND

As far back as the Civil War era, the federal government enacted statutes—such as the False Claims Act (FCA), the Internal Revenue Service (IRS) Informant's Claims Program, and the Insider Trading and Securities Enforcement Act of 1988 (Insider Trading Act)—to increase whistleblowing through monetary incentives and retaliation protections for reporting valuable information to government agencies.³³ Congress limited each whistleblowing statute to a specific purpose: in 1863, the FCA deterred government military suppliers from presenting false claims to the government;³⁴ in 1867, the IRS Informant's Claims Program provided guaranteed incentives for whistleblowers who alerted the IRS of compliance violations;³⁵ in 1988, the Insider Trading Act empowered the SEC to award a bounty when civil penalties were recovered from an insider-trader.³⁶ While external

29. See *infra* Part III.

30. See *infra* Part III.A–B.

31. See *infra* Part III.C–D.

32. See *infra* Part IV.

33. See False Claims Act, 31 U.S.C. § 3730 (2011); INTERNAL REVENUE SERVICE, EXECUTIVE SUMMARY, 1 & n.1 (2008), available at http://www.irs.gov/pub/whistleblower/whistleblower_annual_report.pdf; SEC, Office of the Inspector Gen., Office of Audits, *Assessment of SEC Bounty Program: Executive Summary*, 1 (2010) [hereinafter *SEC Executive Summary*], available at <http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf>; Robin Page West, *Qui Tam Litigation*, 28 LITIG. 21, 21 (2001).

34. West, *supra* note 33.

35. Fiscal Year 2010 Report to the Congress on the use of Section 7623, 1 (2010), available at <http://www.irs.gov/pub/irs-utl/whistleblowerfy09rtc.pdf>. The act was modified in 2006 to require the IRS to award whistleblowers who provided information that “substantially contribute[d] to the collection of tax, penalties, interest, and other amounts when the amounts in dispute are more than \$2 million.” *Id.*

36. *SEC Executive Summary*, *supra* note 33. The Insider Trading and Securities Fraud Enforcement Act of 1988 added Section 21A(e) to the

whistleblower awards are not a novel concept in the United States, many corporations have begun to encourage internal reporting requirements.³⁷ Internal reporting allows the corporation to ascertain potential problems, report necessary violations to the government, and receive sentencing benefits for their disclosures.³⁸ However, these internal reporting programs may be in jeopardy, as the Dodd-Frank Act authorizes significant monetary awards persuading employees to report to the government.³⁹ This leaves the corporation with little opportunity to discover the problem, report the violation to the local authorities, and receive sentencing credits.⁴⁰

A. *The Sarbanes-Oxley Act*

In 2002, President George W. Bush signed the Public Company Accounting Reform and Investor Protection Act, also known as the Sarbanes-Oxley Act.⁴¹ This groundbreaking act incorporated whistleblower protections into the Securities Exchange Act of 1934⁴² and provided the first civil remedy for public company employees who blew the whistle about fraudulent activities—a protection traditionally limited to private sector employees reporting health and public safety violations.⁴³ The Sarbanes-Oxley Act broke through the “conceptual barrier” that previously limited the scope and impact of public policy to the private sector and

Securities Exchange Act of 1934, effectively authorizing the SEC to grant awards to whistleblowers who provided information on insider-trading. *Id.* Insider-trading “refers generally to buying or selling a security, in breach of fiduciary duty or other relationship of trust or confidence, while in possession of material, nonpublic information about the security. *Id.* at 1 n.1.

37. *See infra* Part I.B.

38. *See infra* Part I.A.

39. *See infra* Part II.

40. *Id.*

41. ORRICK, HERRINGTON & SUTCLIFFE LLP, EMPLOYMENT LAW YEARBOOK 2008, at 876 (Timothy J. Long ed., Practising Law Inst. 2008) [hereinafter EMPLOYMENT LAW YEARBOOK].

42. *See id.*; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745 (codified as amended at 15 U.S.C. 1514A (2010)). The Act was enacted on July 30, 2002 in an attempt to restore confidence in corporate financial wrongdoings after several highly publicized cases. EMPLOYMENT LAW YEARBOOK, *supra* note 41, at 876–77 (citing 148 CONG. REC. S6439–40, 107th Cong. (2002)).

43. Daniel P. Westman, *The Significance of the Sarbanes-Oxley Whistleblower Provisions*, 21 LAB. LAW. 141, 142 (2005).

expanded protections to a contemporary public concern: fraud.⁴⁴ Additionally, the Act significantly altered internal reporting mechanisms by improving the legitimacy of internal disclosures through implemented procedures and providing sentencing benefits for embracing an effective reporting program.⁴⁵

In order to ensure that corporate executives report to the board of directors and maintain “open and effective channels of information,”⁴⁶ the Sarbanes-Oxley Act demands that corporations: “(1) establish internal controls and procedures; (2) certify their completeness and quality; (3) file an internal controls report; and (4) have external auditors attest to the adequacy of internal control systems.”⁴⁷ The Act also requires that each corporate audit committee retain all complaints and ensure anonymous submission.⁴⁸ These requirements make certain that management will not dismiss anonymous complaints⁴⁹ and that the audit committee documents and verifies the effectiveness of internal procedures.⁵⁰

If the corporation fails to implement internal procedures required by the Sarbanes-Oxley Act, the national securities exchanges⁵¹ and the national securities associations⁵² will

44. *Id.*

45. Moberly, *supra* note 5, at 1139.

46. Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 840 (2009) [hereinafter *Whistleblowing Attorneys*].

47. John F. Kros & Scott S. Nadler, *The Impact of Sarbanes-Oxley on Off-Balance Sheet Supply Chain Activities*, BNET.COM (2010), http://findarticles.com/p/articles/mi_qa3705/is_201001/ai_n53508823/pg_1/?tag=content;coll.

48. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301 (codified at 15 U.S.C. § 78j-1(m)(4)(B) (2010)).

49. Westman, *supra* note 43, at 149.

50. Kros & Nadler, *supra* note 47.

51. A national securities exchange is a securities exchange that has registered with the SEC. There are fifteen securities exchanges currently registered with the SEC: NYSE Amex L.L.C., BATS Exchange, Inc., BATS Y-Exchange, Inc., NASDAQ OMX BX, Inc., C2 Options Exchange, Inc., Chicago Board Options Exchange Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange, L.L.C., The Nasdaq Stock Market L.L.C., National Stock Exchange, Inc., New York Stock Exchange L.L.C., NYSE Arca, Inc., and NASDAQ OMX PHLX, Inc. SEC, *Exchanges*, SEC. & EXCH. COMM'N, <http://www.sec.gov/divisions/marketreg/mrexchanges.shtml> (last modified July 26, 2011).

52. National security associations represent private security companies and are designed to monitor any state and federal legislation or regulations that may affect the quality and effectiveness of private security services. See National Association of Security Companies, *About Nasco*,

refuse to list the securities of the corporation.⁵³ Further, several amendments to the United States Organizational Sentencing Guidelines—which govern the imposition of sentences by Federal Judges on organizational defendants—encourages ethical conduct and conformity, by reducing federal criminal penalties for violations if the corporation took reasonable steps to ensure an effective, publicized compliance program.⁵⁴ The board of directors must acquaint itself with the compliance program. The Act entrusted the board with the responsibility of examining annual reports from a high-level employee, such as a compliance director, who is responsible for the compliance and ethics program.⁵⁵ While critics claim that expanding internal whistleblower programs created an incentive for corporations to hide information from the public to protect the company's reputation and avoid negative publicity, the Sarbanes-Oxley Act sanctions corporate monitors if they refuse to disclose violations to the SEC.⁵⁶

Congress intended to intensify safeguards for employees, shareholders, and consumers by forcing corporations to establish a valid corporate compliance program with successful internal reporting procedures.⁵⁷ Through the requirements of the Sarbanes-Oxley Act, a compliance program should encourage the free flow of information throughout the corporation, without the fear of retaliation

B. Internal Reporting Procedures of Compliance Programs

Prior to the Sarbanes-Oxley Act, many corporate compliance programs required reports to ascend through the

<http://www.nasco.org/about-nasco>.

53. *Whistleblowing Attorneys*, *supra* note 46, at 840–41, citing Sarbanes-Oxley Act, § 301 (codified as amended at 15 U.S.C. 78j-1(m)(A) (2010)).

54. *Id.* at 840–41 (citing 18 U.S.C. § 8B2.1(a) (2010)). Under the United States Organizational Sentencing Guidelines criminal sanctions imposed on organizations differ from sentences imposed on individuals. 18 U.S.C. Appx prec. § 8A1.1 The sentencing guidelines provided for organizations imposes sanctions on the organization to provide “just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” *Id.*

55. Moberly, *supra* note 5, at 1149–50.

56. *Id.* at 1151.

57. Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 3–4 (2005).

corporate management hierarchy.⁵⁸ While some corporations had ethics hotlines, employees often refused to challenge the managers engaged in fraud because there were few or no protections from retaliation.⁵⁹ Further, if an employee did blow the whistle, he may have been reporting the misconduct to a non-responsive, biased, or corrupt manager.⁶⁰ “Ineffective and unsupported disclosure channels failed to encourage employees to become whistleblowers and, if employees did blow the whistle, their disclosures rarely reached parties willing and able to address them.”⁶¹

Following the enactment of the Sarbanes-Oxley Act, corporations implemented or re-modeled their internal reporting mechanisms and compliance programs.⁶² A productive, successful internal reporting mechanism encourages participation through several essential factors: effective communication with employees about the importance of internal procedures, anonymous reporting, and reduction of the disadvantages of whistleblowing.⁶³ An effective program will persuade dedicated, loyal employees to report internally.⁶⁴ To protect internal reporting, some corporations hire private parties that specialize in constructing anonymous hotlines for whistleblowers concerned about their anonymity.⁶⁵ These third parties, such as EthicsPoint or International Ombudsman Association, provide hotlines, web-based reporting, and case management services.⁶⁶ For example, KPMG, an international corporation offering audit, tax and advisory services, hired EthicsPoint to ensure confidentiality and anonymity within its compliance

58. *Whistleblowing Attorneys*, *supra* note 46, at 840–41.

59. Cherry, *supra* note 4.

60. Moberly, *supra* note 5, at 1135.

61. *Id.* at 1138.

62. Kros & Nadler, *supra* note 47.

63. Moberly, *supra* note 5, at 1142–43; Telephone Interview with Tim Mazur, Chief Operating Officer, Ethics & Compliance Officer Association (Nov. 11, 2010).

64. Moberly, *supra* note 5, at 1143.

65. Telephone Interview with Tim Mazur, *supra* note 63.

66. *About Us*, ETHICS POINT, <http://www.ethicspoint.com/about-us/default.aspx>, (last visited Dec. 27, 2010); JEFFREY M. KAPLAN & JOSEPH E. MURPHY, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES: PREVENTING CRIMINAL AND CIVIL LIABILITY, 14–47 (Thomson West rev. ed. 2007).

program.⁶⁷ When these third parties receive allegations of misconduct, they must report the violation to the corporate compliance officer, who in turn reports it to the SEC.⁶⁸

In order to ensure that the corporate compliance program operates effectively, a compliance officer should be a true, trusted, respected officer who is able to create procedural changes and perform investigations through unrestricted access to the Chief Executive Officer (CEO) and the board of directors.⁶⁹ Corporate ethics officers are designed to give employees an avenue to report wrongdoings without fear of retribution.⁷⁰ Many corporations combine ethics and compliance programs because a “compliance program that incorporates ethical concerns is, in fact, more likely to anticipate changes in the law and [effectively] prevent borderline violations of legal requirements.”⁷¹ Regardless of a corporation’s program design, the compliance officer is responsible for reporting compliance issues to the CEO.⁷² Some critics argue this procedural requirement permits the CEO to improperly influence the officer’s fact-finding and investigations.⁷³ Thus, when accepting the position, many compliance officers take an oath to uphold their responsibilities.⁷⁴ However, this procedure cannot ensure that compliance officers will not be influenced by the individuals who hired them.

Internal investigations are traditionally conducted when a violation is discovered or when the SEC informs the

67. *Answers to your questions about the Ethics and Compliance Hotline*, KPMG ETHICS AND COMPLIANCE HOTLINE, <https://secure.ethicspoint.com/domain/media/en/gui/11093/additional.html> (last visited Nov. 10, 2011).

68. *In re Monsanto Co.*, Securities Exchange Act Release No. 50978 (Jan. 6, 2005), available at <http://www.sec.gov/litigation/admin/34-50978.htm>.

69. KAPLAN & MURPHY, *supra* note 64, at 9–2 to 9–5. He must be “high-level” personnel within the organization such as, a director, an executive officer, a party with substantial ownership interest, or an individual with significant responsibility within the company. *Id.*

70. *Id.* at 9–17 to 9–18.

71. *Id.* Unfortunately approximately forty percent of compliance officers report directly to the board of directors, the CEO, or the company president. Dr. John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 DRAKE J. AGRIC. L. 305, 310 (2000). Thus, the board of directors or CEO’s influence may cause the compliance officer to reveal the employee’s name and subject him to possible retaliation. See *infra* Part IV.C.

72. KAPLAN & MURPHY, *supra* note 66, at 9–44 to 9–46.

73. *Id.* at 14–37.

74. Telephone Interview with Tim Mazur, *supra* note 63.

corporation that the corporation is the subject of a federal investigation.⁷⁵ Typical violations that invoke government scrutiny include “misrepresent[ing] or [omitting] important information about securities; manipulating the market prices of securities; stealing customers’ funds or securities; violating broker-dealers’ responsibility to treat customers fairly; insider trading; . . . and selling unregistered securities.”⁷⁶ If the misconduct is minor, the corporation will likely use in-house counsel who are more familiar with the company; however, in complex issues, the company should use outside counsel.⁷⁷ “Serious conflicts of interest” arise when a firm engaged in a violation also participates in the resulting investigation.⁷⁸ The “Best Practice” guide, suggested by the Conference Board’s Commission on Public Trust and Private Enterprise, concluded that “special counsel retained to conduct independent investigations with likelihood to implicate company executives . . . should not be an individual or a firm that the company regularly uses as outside counsel or that derives a material amount of revenues from the company.”⁷⁹

While the prices for internal investigations can be exorbitant, they outweigh the cost of failing to investigate because the corporation will not receive a sentencing break and may incur more damages by the ongoing fraud.⁸⁰ If the corporation discovers that misconduct did not transpire, disclosure to the SEC is unnecessary; however, when a violation occurs, the corporation must report it to the SEC⁸¹ if the violation involves “information, whether it is positive or negative, that might be relevant to an investor’s decision to

75. KAPLAN & MURPHY, *supra* note 65, at 15–4.

76. *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/about/whatwedo.shtml> (last modified Oct. 24, 2011) [hereinafter *Investor’s Advocate*].

77. KAPLAN & MURPHY, *supra* note 66, at 15–13.

78. *In re Enron Corp. Sec., Derivative & ERISA Litig. v. Enron Corp.*, 235 F. Supp. 2d 549, 668 n.103 (S.D. Tex. 2002).

79. THE CONFERENCE BOARD, COMMISSION ON PUBLIC TRUST AND PRIVATE ENTERPRISE, 33 (2003), available at http://www.conference-board.org/pdf_free/SR-03-04.pdf. Lawyers and law firms are best at conducting investigations, as they are thorough and objective. *Id.* at 32.

80. KAPLAN & MURPHY, *supra* note 66, at 15–11.

81. *Id.* at 15–32.

buy, sell, or hold the security.”⁸² If the corporation fails to report material information, the SEC will bring a civil enforcement action against the corporation.⁸³ Regulations also require corporations to disclose any crucial legal or administrative proceedings and other items that may have a reasonable impact on the corporation’s productivity.⁸⁴ Although the law demands these disclosures, the sentencing guidelines also function to motivate corporations to divulge information by reducing their sanction.⁸⁵

“Ethics and compliance rank highly among the characteristics needed in today’s corporations, and a proper system for internal whistleblowing is vital to those causes.”⁸⁶ Internal compliance programs allow corporations to address concerns internally and receive sentencing credit for self-reporting any legal violations.⁸⁷ In order for the Sarbanes-Oxley Act to be successful in decreasing the public’s concern for corporate fraud, corporations need to successfully implement and enforce internal reporting procedures that can identify misconduct. In turn, corporations benefit from the implementation of such programs; they identify wrongdoings, decrease negative media, and take advantage of sentencing breaks when a violation does occur.

C. *The Dodd-Frank Act*

In 2010, Congress enacted the Dodd-Frank Act to increase the accountability of the financial system, to ensure financial stability, and to decrease bailouts to protect American taxpayers and consumers.⁸⁸ The Act made several

82. *Investor’s Advocate*, *supra* note 76.

83. *Id.*

84. Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 809 (2004) (citing 17 C.F.R §§ 229.10, 229.303(a)(3)(ii) (2006)).

85. Moberly, *supra* note 5, at 1139.

86. Penny Crosman, *Dodd-Frank Whistleblower Provisions Could Hamper Banks’ Compliance Efforts*, NACD Claims, BANK SYSS. & TECH. (Dec. 21, 2010), <http://www.banktech.com/blogs/228800977> (discussing the Dodd-Frank Act’s impact on encouraging employees to bypass banks’ compliance departments and inform the SEC of fraudulent activity); *see* 18 U.S.C. § 8B2.1 (2011).

87. Adele Nicholas, *Whistleblower Provisions of the Dodd-Frank Act Pressure Employers to Improve Compliance*, INSIDE COUNSEL (Oct. 2010), <http://www.insidecounsel.com/Issues/2010/October-2010/Pages/Whistleblower-provisions-of-the-DoddFrank-Act-pressure-employers-to-improve-compliance.aspx>.

88. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection

amendments to the Securities Exchange Act of 1934, which originally established the SEC and provided regulations for financial markets.⁸⁹ In order to increase the SEC's regulatory capacity, the Dodd-Frank Act provides significant monetary incentives and retaliation protections for employees who report fraudulent activities to the government.⁹⁰ As the Dodd-Frank Act focuses purely on the SEC, the Act applies to whistleblowers who provide "information relating to a violation of the securities law,"⁹¹ or who initiate, testify, or assist in an SEC investigation or judicial action.⁹² If successful, the Dodd-Frank Act incentive and retaliation provisions will have a unique and potentially detrimental effect on the compliance programs created in conformity with the Sarbanes-Oxley Act. As the SEC has not yet granted a Dodd-Frank Act whistleblower award, the possible effects of the act are unknown.⁹³

II. THE DODD-FRANK ACT COMPETES WITH INTERNAL COMPLIANCE PROGRAMS

The SEC specifically states "[t]he [SEC] Commission does not intend for its rules to undermine effective company processes for receiving reports on potential violations . . . ,"⁹⁴ including compliance programs created after the Sarbanes-Oxley Act. The Dodd-Frank Act adversely encourages whistleblowers to report to the government, instead of the corporation, by increasing monetary incentives and strengthening the protections provided to employees.⁹⁵

Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

89. *Id.*; Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934). The Securities Exchange Act imposes reporting requirements on corporations who are listed in the national securities exchanges, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), to implement a philosophy of full disclosure and an honest market. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

90. Griffith, *supra* note 8.

91. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. §78u-6(a)(6) (2010)).

92. *Id.* (codified as amended at 15 U.S.C. §78u-6(h)(1)(A) (2010)).

93. SEC REPORT, *supra* note 13.

94. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-63237, 75 Fed. Reg. 70,488, 70,496 (Nov. 17, 2010) (to be codified at 17 C.F.R. pt. 240, 249) [hereinafter SEC Proposed Rules].

95. Douglas Y. Park, *Whistleblower Provisions of Dodd-Frank Worry Companies*, DYP ADVISORS (NOV. 16, 2010), <http://www.dypadvisors.com/2010/11/16/whistleblowing-provisions-dodd-frank-worry-companies/>; *see also*

This decreases the effectiveness of compliance programs by reducing the number of employees willing to utilize internal reporting mechanisms.⁹⁶

The Chief Ethics and Compliance Officer at Allstate Insurance Co. argued that the Dodd-Frank Act incentives directly conflict with the internal programs implemented with the Sarbanes-Oxley law, as employees will “flee” to the federal government instead of reporting misconduct to the corporation.⁹⁷ Similarly, David Hirschmann, of the U.S. Chamber of Commerce, declared that the Dodd-Frank Act will essentially “eviscerate” corporate compliance programs.⁹⁸ Kenneth Grady, general counsel at Wolverine World Wide, Inc., claimed that employees are no longer contemplating the option of internal whistleblowing, and asked “which do you think is going to win—an internal whistleblower program that relies on truth or one that offers a huge financial bounty?”⁹⁹ McDonald’s, Delta Air Lines, and GSK, as well as many other companies, criticize the Dodd-Frank Act for damaging their internal compliance programs.¹⁰⁰ Prior to the enactment of the SEC’s rules under the Dodd-Frank Act, SEC Commissioner Troy Paredes admitted that the proposed rules “might not do enough to preserve the important role that corporate compliance programs serve. It would be unfortunate if, as a result of the Dodd-Frank whistleblower program, effective corporate compliance programs were thwarted.”¹⁰¹ After the enactment of the SEC’s rules, Commissioner Paredes noted that the SEC could have created more stringent rules to ensure that employees would use

Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(b)(1), 78u-6(h)(1)(A) (2010)).

96. Park, *supra* note 95.

97. Ashby Jones & Joann S. Lublin, *Critics Blow the Whistle on Law*, WALL ST. J., Nov. 1, 2010, at B1.

98. David Hirshmann, U.S. CHAMBER OF COMMERCE, Nov. 3, 2010, available at <http://www.uschamber.com/press/releases/2010/november/us-chamber-urges-sec-consider-potential-consequences-whistleblower-boun>.

99. Jones & Lublin, *supra* note 97, at B11.

100. Tim Human, *Whistleblower Rule Sets Alarm Bells Ringing*, BUSINESS INSIDER (January 26, 2011), <http://www.businessinsider.com/whistleblower-rule-sets-alarm-bells-ringing-2011-1>.

101. Troy A. Paredes, Comm’r of Sec. & Exch. Comm’n, Statement at Open Meeting to Propose Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Nov. 3, 2010), available at <http://www.sec.gov/news/speech/2010/spch110310tap-whistleblowers.htm> (last modified Nov. 3, 2010).

internal reporting requirements.¹⁰² SEC Commissioner Kathleen Casey stated that the SEC has “underestimated the negative impact on internal compliance programs.”¹⁰³

Though it encourages external whistleblowing, the Dodd-Frank Act does not specifically prohibit an employee from internal whistleblowing; in fact, the SEC will not disqualify internal whistleblowers from receiving awards, so long as they report to the SEC within ninety days of the violation.¹⁰⁴ Additionally, an SEC rule allows the Commission to consider a whistleblower’s internal reporting attempts when determining the amount of the award.¹⁰⁵ Corporate lawyers argue that the SEC should do more than support internal whistleblowing, by requiring employees to report internally before the SEC will investigate.¹⁰⁶ Merely considering a

102. SEC OFFICE OF THE WHISTLEBLOWER, http://www.sec.gov/about/offices/owb/owb-faq.shtml#P27_7623 [hereinafter OFFICE OF THE WHISTLEBLOWER] (statement of Commissioner Troy Paredes). Commissioner Paredes suggested two SEC rules that, if enacted, would have promoted internal reporting mechanisms without discouraging whistleblowing to the SEC: (1) require employees report the same information provided to the SEC to their employer, and (2) change the language of the SEC rules to *require* that the SEC consider the employees internal reporting choices (instead of the current language which allows the SEC to simply *consider* the employee’s decisions). *Id.*

103. *Id.* (statement of Commissioner Kathleen Casey). Commissioner Casey was concerned that the new whistleblower incentives were significant enough to encourage employees to “bypass” internal reporting requirements. *Id.*

104. Kelly Eggers, *New Whistleblower Rules: Are Your Workers Government-Sponsored Moles*, WALL ST. J. BLOG (Nov. 4, 2010, 6:55 PM), <http://blogs.wsj.com/deals/2010/11/04/new-whistleblower-rules-are-your-workers-government-sponsored-moles/?KEYWORDS=whistleblowing>. See also SEC Proposed Rules, *supra* note 94.

105. See SEC Proposed Rules, *supra* note 94, at 32–33. The SEC claims that it will consider whether the employee participated in internal compliance programs or attempted to hinder such programs when determining the amount of the award. OFFICE OF THE WHISTLEBLOWER, *supra* note 102. Commissioner Troy Paredes also stated that the SEC *may* consider an employees use of an internal reporting requirement when determining the award; the SEC rules do not *require* the SEC to consider such internal reporting. *Id.* (statement by Commissioner Troy Paredes).

106. Jessica Holzer & Ashby Jones, *SEC Proposed Rules for Bounties*, WALL ST. J., B4, (Nov. 4, 2010) (statement by Steven Pearlman, a corporate defense lawyer at Seyfarth Shaw L.L.P.). See Jones & Lublin, *supra* note 97, at B11 (statement made by Kenneth Daly, the President of the National Association of Directors). Tim Mazur also suggests that the SEC should require employees to first use internal procedures; however, in order to safeguard employees from retaliation, he proposes that the SEC provide an exception for employees who can prove that a reasonable person would not have felt comfortable reporting through internal procedures. Telephone Interview with Tim Mazur, *supra* note 63.

whistleblower's attempt to report internally is not sufficient to sustain compliance programs, as it leaves the corporation with no power to enforce internal reporting.¹⁰⁷

If the Dodd-Frank Act successfully entices employees to report externally, the Act will force corporations to finance compliance programs required by the Sarbanes-Oxley Act with no ability to compete with the significant financial incentives offered by the Dodd-Frank Act.¹⁰⁸ The sentencing benefits provided to self-reporting corporations with effective compliance programs are insignificant, as corporations will lack the ability to attain the requisite information about the violation from the employee.¹⁰⁹ As the employee weighs the benefits and disadvantages of reporting externally, an employer faced with a potential violation may report to the government prematurely in an attempt to gain sentencing benefits.¹¹⁰ If the corporation has not completed a thorough investigation, the employer is inviting the government to examine the company even when a securities law violation did not occur.¹¹¹

In order to remove unexpected, extraneous government involvement and compete with external monetary awards, corporations must create an internal compliance program that is more enticing than the uncertainty and complexity of receiving an award through the Dodd-Frank Act.¹¹² Yet this presents the proverbial *tug-of-war*, where the federal government and corporations compete for the employee's loyalty in their disclosures. To succeed and receive sentencing benefits, compliance programs must persuade employees to report internally, maintaining the corporation's ability to conduct a thorough investigation and to self-report any discovered violations.¹¹³

107. Telephone Interview with Tim Mazur, *supra* note 63.

108. See Park, *supra* note 95.

109. See Moberly, *supra* note 5, at 1134 ("Under the [Organizational Sentencing Guidelines], penalties for corporations convicted of crimes could be reduced by up to ninety-five percent if the corporation previously implemented [] a program" aimed at preventing and detecting violations of law).

110. See Nicholas, *supra* note 87.

111. *Id.*

112. *Id.*

113. Lisa Kuca & Christopher A. Myers, *Corporate Compliance & Ethics Programs: A New Generation U.S. Sentencing Commission Tightens the Requirements for Effective Programs*, 19 COMM. ON CORP. COUNS. 22 (2005).

III. AN ANALYSIS OF THE DODD-FRANK ACT

Corporations will only face an employee “tug-of-war” if the Dodd-Frank Act is successful at enticing employees to report to the SEC. If the possibility of a monetary award is too remote or the retaliation provisions are too narrow, an employee may feel more comfortable with an easy, self-explanatory corporate compliance program. However, if the Dodd-Frank Act successfully provides awards, the chain reaction could escalate the number of employees comfortable with whistleblowing to the SEC. In tough economic times, when employees fear losing their jobs, the effect of retaliation provisions is also essential to understanding an employee’s willingness to betray the corporation and subject it to government involvement. Finally, an evaluation of the success of past federal statutes¹¹⁴ and the potential success of the Dodd-Frank Act is necessary to understanding the potential impact on compliance programs.¹¹⁵

A. Whistleblower Incentives

A few statutes have recognized bounty provisions¹¹⁶ for whistleblowers.¹¹⁷ The Dodd-Frank Act is structurally similar to some of these provisions, but there are some major innovations that will affect the application and success of whistleblower awards.¹¹⁸ Several factors are necessary to determine the potential of the Act based on the extent of the awards provided to potential whistleblower: (1) the scope of the statute, (2) the conditions necessary to qualify for a whistleblower award, (3) the certainty and the source of receiving an award, (4) the amount of the award and discretion of the agency, and (5) the anonymity of the whistleblower.¹¹⁹

114. *See infra* Part III.C.

115. *See infra* Part III.D.

116. Bounty provisions are monetary incentives paid by the federal government to individuals who provide tips relating to the government’s regulatory or law enforcement efforts. Ferziger & Currell, *supra* note 6, at 1141.

117. *Id.* at 1144.

118. *Id.* at 1145–46.

119. *See id.* at 1145. These five factors were created from an analysis of bounty programs in the Securities Exchange Commission, the IRS, the U.S. Customs Service, and the False Claims Act. *Id.* at 1144–45. For this Comment, two factors, the certainty of the bounty and the source of the bounty have been

1. *Scope of the Statute*

The Dodd-Frank Act applies to whistleblowers who provide “information relating to a violation of the securities law,”¹²⁰ or who initiate, testify, or assist in an investigation or judicial action.¹²¹ Some professionals believe the impact of the Dodd-Frank Act will be minimal because whistleblower provisions are only triggered when a publicly-traded company is involved.¹²² In comparison, the successful FCA originally allowed anyone, including government employees, to bring *qui tam* actions—actions brought by the employee in the interest of the public—for false claims committed by an individual or a company.¹²³ The Dodd-Frank Act does not include a similar *qui tam* provision and limits the type of individuals who qualify for an award, as the SEC will not award whistleblowers who obtain information while a “member, officer or employee of—(i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a self-regulatory organization; (iv) the Public Company Accounting Oversight Board; or (v) a law enforcement organization.”¹²⁴

combined into one factor. *See id.* at 1145.

120. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, § 922(a) (2010) (codified as amended at 15 U.S.C. § 78u-6(a)(6) (2010)).

121. *Id.* (codified as amended at 15 U.S.C. § 78u-6(h)(1)(A) (2010)).

122. Kevin LaCroix, *Developments Worth Watching on the Anti-Corruption Front*, THE D&O DIARY (July 22, 2010), <http://www.dandodiary.com/2010/07/articles/foreign-corrupt-practices-act/developments-worth-watching-on-the-anticorruption-front/>. Typically only public company employees will have the knowledge to engage in whistleblowing. *Id.*

123. False Claims Act, 31 U.S.C. § 3730(c) (2011). “*Qui tam*” is a Latin term for those “who pursues this action on our Lord or King’s behalf as well as his own” and allows citizens to sue on behalf of the government. West, *supra* note 33. The FCA originally allowed anyone, including government employees to bring *qui tam* actions, actions brought only by the plaintiff in the interest of the public. 31 U.S.C. § 3730(a). This created duplicate actions when both the government brought criminal claims and the government employee brought *qui tam* civil claims against the defendant. *See* West, *supra* note 33. It was later amended to allow a *qui tam* plaintiff to remain a party to the action and receive an award even if the government intervened. *Id.* When the government was involved in the action, only .4% of the claims were dismissed; however, 80% of the claims filed as *qui tam* actions, in which the government declined to intervene, were dismissed. Press Release, U.S. Dep’t of Justice Office of Pub. Affairs, Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986, Release No. 09-1253 (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html> [hereinafter FCA Claims].

124. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-

Since employees with a duty to report violations to their agency will not receive whistleblower awards, the Dodd-Frank Act deters federal employees from using their official capacity for personal gain.¹²⁵ The Dodd-Frank Act also denies awards to individuals convicted of a crime related to the violation, but it does not specifically reject awards for individuals simply involved with the violation.¹²⁶

The statutory language as to who qualifies for an award is straightforward.¹²⁷ The whistleblower must have information relating to a securities law violation and may not be an employee of specific securities agencies or law enforcement agencies.¹²⁸ Therefore, the act does not significantly limit employees of publicly-traded companies from receiving an award if they have sufficient information to report to the SEC regarding a securities law violation.

2. *Sufficient Information*

In order to recover an award under the Dodd-Frank Act the whistleblower must provide original information to the SEC.¹²⁹ This provision is more restrictive than the FCA, which does not require the whistleblower to provide original information—it only requires the whistleblower to be the

6(c)(2)(A) (2010)).

125. Ferziger & Currell, *supra* note 6, at 1147.

126. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(b)(2)(B) (2010)). In comparison, the Tax Relief Act decreases an award if the whistleblower initiated or planned actions that led to the violation or underpayment, while the FCA and the Tax Relief Act require that an award be denied to any whistleblower charged with a crime in connection with the violation. False Claims Act, 31 U.S.C. § 3730(d)(3) (2011); Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, (2006) (codified as amended at 26 USC § 7623(b)(1) (2006)). The Insider Trading Act does not contain a provision denying payment to anyone involved or convicted in relation to the violation. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 3(A)(2), 102 Stat. 4677 (1988) (codified at 15 U.S.C. § 78u-1 (2011)).

127. See Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(a)(6), 78u-6(c)(2)(A), 78u-6(b)(2)(B) (2010)).

128. *Id.*

129. *Id.* (codified as amended at 15 U.S.C. § 78u-6(b)(1)(2010)). The SEC rules state that “[o]riginal information” is information derived from your independent knowledge (facts known to you that are not derived from publicly available sources) or independent analysis (evaluation of information that may be publicly available but which reveals information that is not generally known) that is not already known by us.” OFFICE OF THE WHISTLEBLOWER, *supra* note 102.

original source of information.¹³⁰ In comparison, the Dodd-Frank Act proscribes that the information be “derived from the independent knowledge or analysis . . . not known to the Commission . . . and is not exclusively derived from . . . [a] hearing, audit, or investigation, or from the news media.”¹³¹ Further, the original information requirement induces the corporation to self-report violations before the employee, because the whistleblower’s information would no longer be “original” within the meaning of the Dodd-Frank Act.¹³² However, when pressed to report first, the company will have to distinguish information that is worth reporting from that of mere speculation in a short time period, and risk the threat of unnecessary government involvement should the report be unsubstantiated. Since the employee must provide critical original information to the government before the corporation informs the government, the act deters employees from alerting the corporation through internal compliance programs.

3. *The Certainty of Receiving an Award*

The Dodd-Frank Act creates uncertainty by limiting awards to successful prosecution and basing the payment on uncertain factors.¹³³ The SEC must prosecute the violator and limit the whistleblower award to a percentage of the monetary sanctions “collected” from the particular action.¹³⁴ Unlike other similar statutes that derive the whistleblower award from monetary penalties paid by the violator, the Dodd-Frank Act established the Securities and Exchange Commission Investor Protection Fund in the Treasury of the United States.¹³⁵ This Fund pays the whistleblower award out of the money collected by the Commission in judicial actions—even if unrelated to the matter on which the award

130. False Claims Act, 31 U.S.C. § 3730(e)(4)(B). The FCA would allow an individual with information from a third party, to qualify as the “original source” when they disclose such information to the government. *Id.*

131. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(a)(3) (2010)). This presumptively would not allow for third-party knowledge, even if the whistleblower was the original source of the information. *Id.*

132. LaCroix, *supra* note 122.

133. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(b)(1) (2010)).

134. *Id.*

135. *Id.* (codified as amended at 15 U.S.C. § 78u-6(g) (2010)).

is based—and income recovered from the investment of the Fund.¹³⁶ If the amount of the Fund is insufficient to cover the entire whistleblower award, “there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanctions collected by the Commission in the covered judicial or administrative action on which the award is based.”¹³⁷

Therefore, the statutory language implies that the SEC must collect the monetary sanction prior to completing the unsatisfied remainder of the award. Even if the whistleblower obtained part of the award from the Fund, the remainder of the award is contingent on the SEC’s ability to recover money from the violator. While the statutory language may concern a potential external whistleblower as to the certainty of the award, the fund currently has \$451 million,¹³⁸ thus, it is unlikely that whistleblowers will be concerned that the SEC will not collect the sanction from violator before awarding the whistleblower.¹³⁹

4. *Determining the Amount of the Award*

In determining the amount of an award, it is essential to provide the proper balance between encouraging whistleblowers to reveal the truth and not giving them an incentive to falsify a report of fraud.¹⁴⁰ Exorbitant awards entice whistleblowers to provide information but may also create false whistleblowers; however, inconsequential awards will not provide the incentive necessary to encourage whistleblowers to overcome their fear of retaliation.¹⁴¹ “An informer would have little incentive to give original information, upon occasions at considerable personal risk, to officers of the United States if his compensation rested in the absolute discretion . . . [or] in the whim of an [SEC] executive officer.”¹⁴² The Act limits the discretion of the SEC to determine the amount of the award to 10%–30% of the

136. *Id.*

137. *Id.* (codified as amended at 15 U.S.C. § 78u-6(g)(3)(B) (2010)).

138. SEC REPORT, *supra* note 13.

139. The whistleblower will receive the award directly from the fund until the \$451 million is depleted. *See id.* at 5.

140. Ferziger & Currell, *supra* note 6, at 1151–52.

141. *Id.*

142. *Wilson v. United States*, 135 F.2d 1005, 1009 (3d Cir. 1943).

monetary judgment.¹⁴³ The Act also limits the SEC to specific criteria for determining the exact percentage of the award: the significance of the information to the judicial action, the degree of assistance, the interest of the Commission in deterring violations, and other relevant factors established by the Commission in rules or regulations.¹⁴⁴ Limiting the SEC's discretion ensures that the award will be sufficient to motivate employees to reveal the truth, but not significant enough to encourage fabricated claims.

5. Whistleblowers Remaining Anonymous

Prior to blowing the whistle, the whistleblower will consider whether he can remain anonymous and protect his relationship with his employer and fellow employees.¹⁴⁵ If a whistleblower's testimony is vital to the success of the action, the Sixth Amendment of the U.S. Constitution protects the defendant's right to obtain witnesses in his favor and permits the defendant to discover the whistleblower's name.¹⁴⁶ Generally, a judge may only keep the whistleblower anonymous when his testimony is not relevant to the prosecution.¹⁴⁷

Regardless of the defendant's Sixth Amendment right, many statutes provide whistleblowers with some legal guarantees of anonymity.¹⁴⁸ The Dodd-Frank Act provides

143. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, § 922(a) (2010) (codified as amended at 15 U.S.C. § 78u-6(b)(1) (2010)). In comparison, the FCA and the Tax Relief Act allow for a monetary judgment of 15–30% of the award, while the Insider Trading Act limits the award to 10%. False Claims Act §3730(d)(1) (2011); Insider Trading Act, § 21A(e) (codified as amended at 15 U.S.C. § 78u-1(e) (2011)). The Tax Relief Act also provides a 10% cap for “less substantial contributions” for information resulting in a hearing. 26 U.S.C. § 7623(b)(2)(2006)).

144. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(c)(1)(B)(i) (2010)). The Dodd-Frank Act requires that the Commission disregard the balance of the Fund in considering the amount of the award. *Id.* The SEC rules claim that they will provide an award if the whistleblower's information leads to a new investigation, the re-opening of a previously closed investigation, and the information leads to a successful enforcement action. OFFICE OF THE WHISTLEBLOWER, *supra* note 102.

145. Ferziger & Currell, *supra* note 6, at 1157.

146. *Id.*

147. *Id.*

148. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(2) (2010)); Insider Trading Act, § 21A(e) (codified as amended at 15 U.S.C. § 78u1(e) (2011)). The FCA does not have a provision for anonymity because the

some assurances of confidentiality, as the Commission generally will not disclose any information regarding the whistleblower, including information provided by the whistleblower that could reveal the whistleblower's identity.¹⁴⁹ However, the Act limits this protection by requiring the Commission to provide critical information about the whistleblower to the defendant during a public proceeding.¹⁵⁰ Additionally, relevant information provided by the whistleblower will be disclosed to a limited group of organizations, even though they are required to keep the information confidential, in order to protect investors and accomplish the purpose of the Dodd-Frank Act.¹⁵¹ Finally, the whistleblower's identity is not truly anonymous because the whistleblower will have to disclose his identity in order to receive payment.¹⁵² Therefore, employees contemplating whistleblowing under the Dodd-Frank Act will weigh surrendering their anonymity against the probability of receiving a reward.¹⁵³

B. An Analysis of the Dodd-Frank Act Retaliation Provisions

Employees who are aware of valuable information will not volunteer their knowledge, either internally or externally, when they fear retaliation.¹⁵⁴ Many statutes include provisions prohibiting an employer from retaliating against an employee who engages in lawful behavior, such as whistleblowing.¹⁵⁵ The Sarbanes-Oxley Act addressed

whistleblower is an identified party to the case. False Claims Act § 3730. In comparison, the Tax Relief Act protects the whistleblower's identity even after the conclusion of the trial. Ferziger & Currell, *supra* note 6, at 1157.

149. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(2)(A) (2010)).

150. See Ferziger & Currell, *supra* note 6, at 1157. What information qualifies as "critical information" is determined by a judge. See *id.*

151. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(2)(D) (2010)). The Commission can make any information available to: "(I) the Attorney General of the United States; (II) an appropriate regulatory authority; (III) a self-regulatory organization; (IV) a State attorney general in connection with any criminal investigation; (V) any appropriate State regulatory authority; (VI) the Public Company Accounting Oversight Board; (VII) a foreign securities authority; and (VIII) a foreign law enforcement authority. *Id.*

152. *Id.* (codified as amended at 15 U.S.C. § 78u-6(d)(2)(B) (2010)).

153. Ferziger & Currell, *supra* note 6, at 1158.

154. Vaughn, *supra* note 57, at 2.

155. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a) (codified as

inadequate whistleblower protections by regulating corporate conduct and providing federal protections for whistleblowers.¹⁵⁶ The Dodd-Frank Act also applied a similar provision to protect whistleblowers from retaliation.¹⁵⁷ Employees contemplating internal or external whistleblowing must consider these protections.

1. *Elements of a Retaliation Claim*

Under the Dodd-Frank Act an employer cannot “discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the conditions of employment because of any lawful acts done by the whistleblower.”¹⁵⁸ The whistleblower must have engaged in lawful, protected conduct, by participating in an SEC action, providing information to the Commission, or disclosing information under the Sarbanes-Oxley Act or the Securities Exchange Act of 1934.¹⁵⁹ Prior to the Dodd-Frank Act, the Sarbanes-Oxley Act protected employees with a reasonable belief that a violation occurred.¹⁶⁰ However, the Dodd-Frank Act does not include a similar qualifier and expands retaliation protections to any SEC whistleblower—regardless of whether or not the employee actually believed a violation occurred.¹⁶¹

To prove that a retaliation action occurred, the plaintiff must establish the elements of a prima facie case: (1) the plaintiff was or is an employee of the employer, (2) the employee engaged in whistleblowing activity protected by statutory law, (3) the employer had knowledge of the employee’s protected whistleblowing activity, (4) the employee was terminated or subjected to an adverse

amended at 18 U.S.C. 1514A(a) (2010)); False Claims Act, 31 U.S.C. § 3730(h)(1) (2011).

156. Vaughn, *supra* note 57, at 2–3.

157. Dodd Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h) (2010)); Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(a) (2010)).

158. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(A) (2010)).

159. *Id.* It also protects disclosures under any other SEC law, rule or regulation. *Id.*

160. Connie N. Bertram & Lesley A. Pate, *Sarbanes-Oxley: A New Whistle Stop for Whistleblowers*, 21 LAB. LAW. 19, 23–24 (2005).

161. See Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(A) (2010)).

employment action, and (5) there was a causal connection between the employee's whistleblowing activity and the subsequent employment action.¹⁶² The whistleblower must also have suffered an adverse employment action as a punishment for his lawful conduct.¹⁶³ Adverse employment actions include: firing, failing to hire, demoting, denying overtime, disciplinary action, denying benefits, intimidation, threats, decreased pay, reduced hours, and reassignment to a position without possible promotion.¹⁶⁴ The employee must show that his lawful activity was a "contributing factor" to the adverse employment action.¹⁶⁵ The employer, on the other hand, may prove by clear and convincing evidence, that it would have taken the same employment action without regard to the employee's lawful conduct.¹⁶⁶ Courts will also consider the employee's performance at the corporation, prior to the retaliation suit, as evidence of the employer's legitimate justification for the adverse employment action.¹⁶⁷ If the employer treated the employee appropriately after receiving knowledge of the employees claim, the court may refuse to infer "retaliatory animus" and deny the employee's retaliation claim.¹⁶⁸

2. *Filing a Retaliation Claim*

Under the Sarbanes-Oxley Act, the employee must file a complaint with the Department of Labor, Occupational Safety and Health Administration (OSHA).¹⁶⁹ If the Secretary of Labor does not issue a decision within 180 days, the employee can bring an action in federal district court.¹⁷⁰ The Dodd-Frank Act eliminates the procedural difficulty involved in waiting for the Secretary of Labor to issue a decision by allowing employees to directly file their complaint with the

162. Cavico, *supra* note 1, at 609.

163. U.S. Dep't of Labor, *Office of the Whistleblower Protection Program*, WHISTLEBLOWERS.GOV, <http://www.whistleblowers.gov/index.html>, (last modified Nov. 10, 2011).

164. *Id.*

165. Bertram & Pate, *supra* note 160, at 27.

166. Dodd-Frank Act, § 1057(c)(3)(B).

167. EMPLOYMENT LAW YEARBOOK, *supra* note 41, at 831.

168. *Id.* at 835.

169. Bertram & Pate, *supra* note 160, at 32.

170. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a) (codified as amended at 18 U.S.C. § 1514A(b)(1)(B) (2010)).

appropriate district court.¹⁷¹

There are also differences between the Sarbanes-Oxley statute of limitations and the Dodd-Frank Act.¹⁷² The Sarbanes-Oxley Act requires a retaliation claim be filed within 180 days of the violation,¹⁷³ while the Dodd-Frank Act provides a unique statute of limitation scheme.¹⁷⁴ A claim cannot be filed more than six years after the violation, or more than three years after the “date when facts material to the right of action are known or reasonably should have been known by the employee.”¹⁷⁵ Even though the employee cannot bring any claim ten years after the date of the violation, this statute of limitations provides the employee with an opportunity to wait longer than provided by the Sarbanes-Oxley Act to report a retaliation claim.¹⁷⁶

Most importantly, the Dodd-Frank Act allows whistleblowers the opportunity to try retaliation claims before a jury.¹⁷⁷ Congress may have initially intended Sarbanes-Oxley retaliation claims to be held before a jury, but some courts determined that the nature of equitable claims under Sarbanes-Oxley did not entitle plaintiffs to a jury trial.¹⁷⁸ Since the amendments made by the Dodd-Frank Act, more employees will likely elect to have their case tried in a federal court to obtain higher compensatory damages.¹⁷⁹

171. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(i) (2010)).

172. Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(b)(2)(D) (2010)); Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2010)).

173. Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(b)(2)(D) (2010)); The Dodd-Frank Act modifies the Sarbanes Oxley Act to include a statute of limitation of 180 days. Dodd-Frank Act, § 922(c)(1)(A)(i) (codified as amended in 18 U.S.C. § 1514(b)(2) (2010)).

174. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2010)).

175. *Id.*

176. *See id.* (codified as amended at § 15 U.S.C. 78u-6(h)(1)(1)(B)(iii)(II) (2010)). *See* Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(b)(2)(D) (2010)).

177. Dodd-Frank Act, § 922(a) (codified as amended at 18 U.S.C. § 1514(b)(2)(E) (2010)); R. Scott Oswald & Jason Zuckerman, *Whistleblower Provisions of the Dodd-Frank Act*, EMPLOYMENT LAW GROUP (July 20, 2010), <http://www.employmentlawgroup.com/Articles/ROswald/DoddFrankWhistleblowerProvisions.html>.

178. Oswald & Zuckerman, *supra* note 177.

179. *Id.* (discussing that if plaintiffs do not remove their claim to federal court, their case will be tried by the Department of Labor Office of

3. Remedies Available

Given the uncertainty involved in filing a lawsuit, employees should consider the other available remedies prior to proceeding with a retaliation claim. The Dodd-Frank Act provides a persuasive remedy for whistleblowers suing for retaliation; successful plaintiffs will receive two times the amount of back pay owed to them.¹⁸⁰ The Dodd-Frank Act also offers reinstatement, with the same employment status, and compensation for litigation costs, witness fees, and reasonable attorney fees.¹⁸¹

Further, the Sarbanes-Oxley Act included a criminal penalty provision that imposed substantial fines or up to ten years in prison for retaliation against any whistleblower who reported the violation of a federal criminal statute.¹⁸² While the Dodd-Frank Act does not contain a similar provision, the Sarbanes-Oxley Act includes whistleblowers that report *any* federal statute violation.¹⁸³ Thus, the provision of the Sarbanes-Oxley Act may subject an employer who retaliates against a whistleblower protected by any federal statute, such as the Dodd-Frank Act, to criminal sanctions.¹⁸⁴

The Dodd-Frank Act does not bar plaintiffs from bringing an action against their employer for breach of contract even if they have sued for retaliation under whistleblower protection statutes.¹⁸⁵ The Sarbanes-Oxley Act specifies that retaliation provisions do not preempt remedies available under state laws or collective bargaining agreements.¹⁸⁶ Under the Dodd-Frank Act, “rights, privileges, or remedies” provided under

Administrative Law Judges).

180. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(iii)(II)(c)(ii) (2010)). The Sarbanes-Oxley only provides back pay with interest. Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(c)(2)(B) (2010)).

181. See Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(1)(C)(i) (2010)). However, the Dodd-Frank Act lacks the specific statutory language incorporated in the Sarbanes-Oxley Act that authorizes any remedy necessary to “make the employee whole.” *Id.*; Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(c)(1) (2010)).

182. Sarbanes-Oxley Act, § 1107(a) (codified as amended at 18 U.S.C. § 1513(e) (2010)).

183. See Westman, *supra* note 43, at 144..

184. *Id.*

185. See Storey v. Patient First Corp., 207 F. Supp. 2d 431 (E.D. Va. 2002).

186. Sarbanes-Oxley Act, § 806(a) (codified as amended at 18 U.S.C. 1514A(d) (2010))

state law or under a collective bargaining agreement will not be diminished by a retaliation claim.¹⁸⁷

Many collective bargaining agreements contain clauses requiring an employer to have “just cause” before discharging an employee, thus eliminating the employer’s ability to retaliate by firing the employee.¹⁸⁸ Personnel manuals and policies have also been interpreted to include “just cause” termination provisions.¹⁸⁹ These provisions ensure that there will be “fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.”¹⁹⁰ Since the provisions protect activities of “honest and ethical” behavior, they include a broader range of conduct with more safeguards than many federal whistleblower retaliation statutes.¹⁹¹

C. *Successful Application of Past Whistleblower Acts*

The Dodd-Frank Act is not revolutionary in providing whistleblower incentives, as other statutes such as the FCA, the Insider Trading Act, the Tax Relief Act, and other federal programs have provided comparable incentives.¹⁹² The economic and procedural details of each existing bounty program demonstrate the factors relevant to the specific program’s success or failure.¹⁹³ While there may be some minor structural differences between the Dodd-Frank Act and other statutes,¹⁹⁴ the success of past provisions can serve as an indicator of the potential effect of the Dodd-Frank Act.

Since the enactment of the FCA in 1986, the Attorney

187. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(3) (2010)).

188. Joy A. Maulitz, *Liability for Wrongful Termination and Discipline*, 4–60 CALIFORNIA EMPLOYMENT LAW § 60.05 (2011).

189. *Id.* at § 60.05(2)(c).

190. *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 17 Cal. 4th 93, 108 (Cal. 1998); *King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426, 438 (2007).

191. *Westman*, *supra* note 43, at 152.

192. *Ferziger & Currell*, *supra* note 6 at 1201–07. Other such federal programs include whistleblower incentives for information regarding odometer tampering under the National Highway Traffic Safety Administration, hazardous substance dumping under the Environmental Protection Agency, ocean dumping under the Coast Guard, the disturbance of marine mammals under the National Marine Fisheries Services, and the FBI. *Id.* at 1143–44 n.12. Customs Service laws also provide incentives for violations. *Id.* at 1144.

193. *Id.* at 1197.

194. *See supra* Part III.

General recovered approximately \$24 billion in sanctions that resulted after whistleblowers provided information leading to the discovery of false claims.¹⁹⁵ In 2009, the federal government recovered \$2.4 billion dollars from the FCA; nearly \$2 billion resulted from *qui tam* actions and \$255 million was awarded to *qui tam* plaintiffs.¹⁹⁶ While this is a great indicator of the potential success of a whistleblower statute, the Dodd-Frank Act is more structurally limited than the broad language of the FCA.¹⁹⁷

In the twenty years since the implementation of the Insider Trading Act, only a few whistleblower awards have been made and the SEC has not received “a large number of applications from individuals seeking a bounty.”¹⁹⁸ Until 2010, the SEC had only paid five claimants a total of \$159,537 for information leading to insider trading.¹⁹⁹ But in 2010, prior to the enforcement of the Dodd-Frank Act, the SEC awarded \$1 million to Glen and Karen Kaiser for information leading to insider trading and the “entry of injunctions and orders requiring the payment of civil

195. FCA Claims, *supra* note 123.

196. *Id.* *Qui tam* plaintiffs act as whistleblowers when they file a *qui tam* action on behalf of the government. *Id.*; see also Press Release, U.S. Dep’t of Justice Office of Pub. Affairs, United States Settles False Claims Act Allegations with Cochlear Americas for \$880,000, Release No. 10-673 (June 9, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-civ-673.html> (stating that although the statistics for 2010 are not completed, the United States recently settled a false claims action for \$880,000 after Ms. March brought a *qui tam* suit against Cochlear Americas for illegal remuneration to increase purchases of cochlear implant systems; the government intervened in 2007, pursued civil penalties and received an \$880,000 settlement; \$176,000 of which was awarded to Ms. March for her part as a whistleblower).

197. See *supra* Part III.A and Part III.C.

198. SEC Executive Summary, *supra* note 33, at 2.

199. *Id.* at 5. The following is a list of claimants, date of filings and their respective bounty award: Claimant 1 received \$3500 in 1989; Claimant 2 received an award of \$18,152 in 2001; Claimant 3 received \$29,079 in 2002; Claimant 4 received three payments totaling \$102,640 from 2005 to 2009 for information leading to three separate insider trading cases; Claimant 5 received \$6166 in 2007. *Id.* From 1990 to 2004 the SEC denied awards to seven other bounty applicants; three of which provided sufficient information but were denied because the statute did not authorize payment when information was provided prior to the statutes effective date. *Id.* at 5-6. From 2005 to 2010 the SEC received approximately thirty bounty applicants; however, the SEC did not award a single bounty because the SEC did not formally take action to approve or deny any of the claims and did not notify the bounty applicant accordingly. *Id.*

penalties totaling \$10 million.”²⁰⁰ An award of \$1 million is the largest award the SEC has ever given to whistleblowers under the Insider Trading Act.²⁰¹ Excluding the Kaiser award, the awards were relatively small and not immensely enticing; however, the awards were limited at the SEC’s discretion, and the scarce number of awards was attributed to deficiencies within the SEC’s whistleblower award process.²⁰²

From 2004 to 2008, the IRS paid over 1000 awards after recovering more than \$760 million, of which more than \$72 million was awarded to whistleblowers.²⁰³ These awards took place when the amount was based on the discretion of the IRS and could not exceed \$10 million.²⁰⁴ While the Tax Relief Act of 2006 added section 7623(b), requiring an award of 15%–30% of the monetary judgment, the current success of the new amendment is not yet known.²⁰⁵

D. Potential Success of the Dodd-Frank Act

According to some analysts, “if the whistleblower provisions Congress previously provided in other areas are an accurate indication, the Dodd-Frank Act will dramatically increase the likelihood that suspected violators of securities laws will face costly enforcement actions.”²⁰⁶ Considering the result of the vast FCA bounty awards, the Dodd-Frank Act has the potential to provide significant incentives.²⁰⁷ The Dodd-Frank Act requires the SEC to establish a separate whistleblower office within the Commission to deal with

200. SEC Awards \$1 Million for Information Provided in Insider Trading Case, SEC v. Pequot Capital Mgmt., Inc., Litig. Release No. 21601, (July 23, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21601.htm> [hereinafter SEC Insider Trading].

201. *Id.*

202. See SEC Executive Summary, *supra* note 33, at iii.

203. INTERNAL REVENUE SERVICE WHISTLEBLOWER OFFICE, ANN. REP. TO CONGRESS ON THE USE OF SECTION 7623, 10 (2008), available at http://www.irs.gov/pub/whistleblower/annual_report_to_congress_september_2009.pdf.

204. *Id.* at 7.

205. *Id.* at 11. During 2008, the IRS received 476 whistleblower submissions regarding over 1200 taxpayers that potentially meet the \$2 million minimum of “tax, penalties, additions to tax threshold in section 7623(b).” *Id.* Of the 994 cases resulting from those submissions, 228 cases involved \$10 million and 64 cases involved \$100 million of potential recovery. *Id.*

206. LaCroix, *supra* note 122.

207. FCA Claims, *supra* note 123.

whistleblower provisions.²⁰⁸ The office is charged with distributing awards to whistleblowers from the \$451 million dollars within the Fund.²⁰⁹ While the SEC's Insider Trading Act failed to entice and award whistleblowers, the SEC has shown an increased propensity to reward whistleblowers.²¹⁰ The SEC must ensure that the whistleblower office created by the Dodd-Frank Act is properly equipped to handle future whistleblower claims.²¹¹ SEC Commissioner Paredes warned that the Act would "inundate" the SEC with fraud allegations and stress SEC resources to their fullest capacity.²¹²

Awards under the Dodd-Frank Act have the potential to be a significant motivator for external whistleblowers.²¹³ For example, although the Kaisers received a substantial award under the SEC's Insider Trading Act, they may have received a larger monetary award under the Dodd-Frank Act.²¹⁴ Since Section 21A(e) of the SEC Insider Trading Act applied to the Kaiser Award, the SEC was only permitted to procure an award of up to 10% of the recovery.²¹⁵ As the judgment totaled \$10 million, the SEC awarded the full 10%, or \$1 million.²¹⁶ However, since the Dodd-Frank Act repealed Section 21A(e), whistleblowers could now receive up to 30% of the recovery and the Kaisers could have collected \$3

208. Chairman Mary L. Schapiro, SEC, *Testimony on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act by the U.S. Securities and Exchange Commission* (Feb. 17, 2011), <http://www.sec.gov/news/testimony/2011/ts021711mls.htm>.

209. SEC REPORT, *supra* note 13. The new SEC Office of the Whistleblower created a website allowing whistleblowers to submit tips online and answering questions for potential whistleblowers. OFFICE OF THE WHISTLEBLOWER, *supra* note 102.

210. See SEC Insider Trading, *supra* note 200.

211. See generally SEC *Executive Summary*, *supra* note 33, at 8–19. After analyzing the SEC's bounty program under the Insider Trading Act, the Office of Inspector General suggested that the SEC have standardized application forms, frequent communication with whistleblowers, and a tracking program for complaints and tips by whistleblowers. *Id.* These suggestions should be used for the SEC's new whistleblower office under the Dodd-Frank Act.

212. Amanda Becker, *Legal Briefs: SEC Debates Whistleblower Incentives*, WASHINGTON POST (Nov. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/05/AR2010110507406.html>.

213. See LaCroix, *supra* note 122.

214. See SEC Insider Trading, *supra* note 200; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(b)(1)(B) (2010)).

215. SEC Insider Trading, *supra* note 200.

216. *Id.*

million.²¹⁷

On the other hand, even after its enactment, the SEC is having difficulty implementing the Dodd-Frank Act whistleblower provisions. The SEC announced a plan to delay the creation of the new whistleblower office required by the Dodd-Frank Act.²¹⁸ Under the Dodd-Frank Act, the SEC's budget would double from \$1.1 billion in 2010 to \$2.25 billion by 2015²¹⁹; however, the SEC should anticipate a budget battle with Congressional Republicans. As Republicans currently control the House of Representatives, the SEC must consider that most Republicans oppose the Dodd-Frank Act and may not be sympathetic with the SEC's funding demand.²²⁰ While Democrats defend the need for funding and the significance of the legislation, which was a momentous victory for the Obama administration, the Republicans could undermine the legislation by cutting the SEC's funding.²²¹ Republicans, such as Rick Perry, Mitt Romney, Michele Bachmann, and Newt Gingrich, all oppose the Dodd-Frank Act for economic reasons and hope to repeal the Act.²²² Nevertheless, Democratic Representative Barney Frank claimed that "the GOP and Tea Party [would not] want to go before their constituents and say they defunded the regulation" provided by the SEC.²²³ Fortunately, unless "Republicans capture the presidency and can also muster [sixty] votes in the Senate, it appears unlikely that Dodd-Frank will be repealed in full."²²⁴

Until the SEC receives sufficient funding to staff the whistleblower office, the functions of the office will be

217. Dodd-Frank Act, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(b)(1)(B) (2010)).

218. SEC Insider Trading, *supra* note 200.

219. *Id.*

220. *Id.*

221. Charles Riley, *SEC Starved for Reform Funds*, CNNMONEY.COM (January 11, 2011, 12:31 PM), http://money.cnn.com/2011/01/11/news/economy/SEC_funding/.

222. Edward Wyatt, *Dodd-Frank Act a Favorite Target for Republicans Laying Blame*, N.Y. TIMES, Sept. 20, 2011, at B1. Economically, the Dodd-Frank Act enacted regulations to decrease abusive lending practices and protect consumers from financial fraud. *Id.* Republicans claim that these new regulations negatively effects small business who are "reluctant to take on risk and expand their operations." *Id.*

223. Riley, *supra* note 221.

224. Wyatt, *supra* note 222.

delegated to existing staff members.²²⁵ Budget deficiencies caused the SEC to ask defendants to travel to the SEC offices for interviews, take testimony over the phone, or simply postpone such depositions.²²⁶ Frank stated that “[t]he lack of funding means [the SEC] cannot carry out their responsibilities.”²²⁷ Yet, even with the lack of funding, the SEC has the capability, granted by the Dodd-Frank Act, to grant an award and use it to make public statements regarding their tolerance of fraud.

WikiLeaks adds another element of uncertainty to the potential success of the Dodd-Frank Act. WikiLeaks is a non-profit media organization that publishes groundbreaking articles about war, torture, corruption, and corporate transparency to the public with secure, anonymous, independent sources.²²⁸ WikiLeaks claims that it will never reveal sources, and the lack of records prevents the government from seizing valuable information.²²⁹ The accessibility and guarantee of anonymity provided by WikiLeaks may create a competitive alternative to reporting to the SEC under the Dodd-Frank Act to receive whistleblower protections.²³⁰ Sherron Watkins, former Vice President of Enron, engaged in whistleblowing when she discovered knowledge of accounting violations.²³¹ Watkins claimed she would take her concerns to WikiLeaks now rather than the Securities and Exchange Commission.²³² Watkins believes that the SEC is not capable of evaluating and acting on tips effectively.²³³ She stated that because “[t]he label whistleblower is stuck on [her] head,” she can no longer get a job in corporate America.²³⁴

225. *Id.*

226. *Id.*

227. Riley, *supra* note 221.

228. *About*, WIKILEAKS, <http://wikileaks.ch/About.html> (last visited Nov. 13, 2011).

229. *Id.*

230. *Id.*

231. Michael Cohn, *Enron Whistleblower would go to WikiLeaks Now*, ACCOUNTING TODAY (January 28, 2011), <http://www.accountingtoday.com/news/Enron-Whistleblower-WikiLeaks-57078-1.html>.

232. *Id.*

233. Ben Hallman, *WikiLeaks More Effective Than SEC, Says Enron Whistleblower*, THE CENTER FOR PUBLIC INTEGRITY (January 28, 2011, 7:28 PM), <http://www.publicintegrity.org/blog/entry/2871/>.

234. Cohn, *supra* note 231.

The Inspector General of the Commission will be charged with the responsibility of conducting a whistleblower protections study under the Dodd-Frank Act.²³⁵ He must determine if the whistleblower protection program enacted by the Dodd-Frank Act is “clearly defined and user-friendly,” by evaluating the public’s knowledge of the provision, the prompt responses by the Commission, and the effect of the whistleblower award’s enticement.²³⁶ The Inspector General will provide new insight into the efficiency and effectiveness of the Dodd-Frank Act whistleblower program.²³⁷ The SEC will use this information to report to the Congress each year.²³⁸

IV. EFFECTIVE COMPLIANCE PROGRAMS FOR CORPORATIONS RESPONDING TO EXTERNAL INCENTIVES OF THE DODD-FRANK ACT

Despite some drawbacks and uncertainties concerning the Dodd-Frank Act, its potential success through the creation of enticing incentives and significant retaliatory protections suggests that corporations must remodel their compliance programs to ensure employees utilize internal reporting mechanisms.²³⁹ Under the Sarbanes-Oxley Act, an effective compliance and ethics program concerns five essential issues: (1) an environment encouraging an honest and ethical conduct; (2) accurate and timely disclosures in reports; (3) the corporation’s compliance with laws; (4) the corporation’s internal reporting system, capable of receiving information about possible reporting or compliance issues; and (5) holding employees accountable for complying with the corporation’s code of ethics.²⁴⁰ While the SEC suggests a

235. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, § 922(d)(1).

236. *Id.*

237. See generally *SEC Executive Summary*, *supra* note 33, at i–v.

238. Dodd-Frank Act, § 922(d).

239. Telephone Interview with Tim Mazur, *supra* note 63. Wikileaks also provides an alternative external reporting mechanism that could threaten the effectiveness of internal compliance programs; however, since Wikileaks does not provide monetary compensation, that may entice employees, the Dodd-Frank Act provides a greater threat to corporate compliance programs. See also *About, WIKILEAKS*, <http://wikileaks.ch/About.html> (last visited Nov. 13, 2011).

240. *Corporate Compliance Survey*, *supra* note 20, at 1770 (citing 17 CFR 229.406(b) (2010)).

model “Code of Ethics,”²⁴¹ it does not entice employees to use internal reporting mechanisms when they can receive a large monetary award for informing the SEC.²⁴²

Further, corporations must consider the amended Sentencing Guidelines to determine what courts will review when determining the culpability of the corporation in mitigating or increasing punishment, such as: “(i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice.”²⁴³ The Sentencing Guidelines also express two specific factors that can mitigate the ultimate punishment of an organization: “(i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.”²⁴⁴

While the Sarbanes-Oxley Act promoted internal whistleblowing, critics claim that internal reporting programs “failed to fully investigate employee complaints, preserve whistleblowers’ anonymity, and [proceed] objectively.”²⁴⁵ Jason Zuckerman, a plaintiffs’ attorney, stated that corporate compliance programs are “window dressings” used to retaliate against whistleblowers.²⁴⁶ While Tim Mazur, the Chief Operating Officer of the Ethics and Compliance Officer Association, believes that only approximately 15% of compliance programs are corrupt.²⁴⁷ Corrupt compliance programs failed to alert corporations such as Enron and WorldCom of their fraudulent misconduct.²⁴⁸ Ms. Eckard, the GSK whistleblower,²⁴⁹ used ineffective internal procedures before externally blowing the whistle under the False Claims Act.²⁵⁰ While Ms. Eckard claims that she never wanted to blow the whistle and was only concerned about safety, she may receive \$96 million for her whistleblowing actions.²⁵¹

241. 17 C.F.R. § 229.406(b) (2010).

242. See Park, *supra* note 95.

243. Kuca & Myers, *supra* note 113, at 35.

244. *Id.*

245. Eggers, *supra* note 104.

246. *SEC Issues Proposed Whistleblower Rules; The Lobbying Continues*, WALL ST. J. BLOG (Nov. 4, 2010, 9:56 AM), <http://blogs.wsj.com/law/2010/11/04/secissuesproposedwhistleblowerrulesthelobbyingcontinues/tab/print/>

247. Telephone Interview with Tim Mazur, *supra* note 63.

248. Eggers, *supra* note 104.

249. See *supra* text accompanying notes 14–17.

250. Jones & Lublin, *supra* note 97, at B11.

251. Peter Loftus, *Whistleblower’s Long Journey: Glaxo Manager’s Discovery*

Considering the direct conflict with Dodd-Frank Act incentives, corporations can improve their compliance programs in an effort to increase internal reporting by offering motivating incentives, ensuring anonymity, and entrusting compliance officers with independent authority from corporate counsel.²⁵²

A. *Motivating Incentives*

Corporations can motivate employees to report internally by creating a comfortable environment for internal whistleblowing that inspires loyalty and rewards trust.²⁵³ Through an effective training program, management can educate employees on the standards and procedures required for compliance.²⁵⁴ An employee should know that honesty and ethical conduct is important to the corporation.²⁵⁵ If the employer has a strong ethical environment, the employee may feel that external reporting is disloyal.²⁵⁶ Corporations should reward the American psyche by acknowledging the whistleblower's loyalty to the corporation.²⁵⁷

Most importantly, corporations can discourage loyal employees from reporting externally by communicating with employees and addressing complaints promptly.²⁵⁸ The corporation must assure the whistleblower that the allegation is taken seriously, because a whistleblower who knows that the corporation is pursuing a fair investigation will trust the compliance process and will not report externally before the conclusion of the internal investigation.²⁵⁹ However, when a hotline does not record names and contact numbers, communicating with the employee is difficult; some compliance programs assign the whistleblower a number and encourage the whistleblower to call back for an update in

of Plant Lapses in 2002 Led to Her \$96 Million Payout, WALL. ST. J., Oct. 28, 2010, at B1. The guilty plea included a \$750 million dollar payment. *Id.*

252. *See id.*; Jones & Lublin, *supra* note 97.

253. Jones & Lublin, *supra* note 97, at B11 (statement by Kathleen Edmond, Chief Ethics Officer, Best Buy Co.).

254. *See* 18 U.S.C. § 8B2.1(b)(4)(A) (2011).

255. Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-Crawford/Burlington Northern World*, 77 TENN. L. REV. 253, 295 (2010).

256. *Id.*

257. Moberly, *supra* note 5, at 1143.

258. KAPLAN & MURPHY, *supra* note 66, at 14–25.

259. *Id.*

fourteen days.²⁶⁰ This is beneficial to both the employee and the employer, as the whistleblower can stay informed and the employer can continue to speak with the employee regarding his allegation of fraud.²⁶¹

Some labor law experts suggest that corporations should offer financial incentives to persuade employees to use internal reporting procedures.²⁶² Any monetary gift a corporation could afford would be insignificant compared to the potential federal award.²⁶³ Tim Mazur suggests that financial incentives will only cause chaos and distrust within the corporation—eventually leading to false claims.²⁶⁴ Kathleen Edmond, the Chief Ethics Officer at Best Buy, claims that Best Buy will not offer financial rewards to internal whistleblowers.²⁶⁵ Instead, Best Buy hopes to encourage internal reporting mechanisms by recognizing employees who “do the right thing” and inform the corporation first.²⁶⁶

B. Whistleblower Anonymity

Corporations have the ability to provide full anonymity to an employee.²⁶⁷ This is a huge incentive because the SEC cannot offer comparable retaliation protections to an employee.²⁶⁸ The best way to protect an employee from retaliation is to ensure anonymity and protect the employee

260. Telephone Interview with Tim Mazur, *supra* note 63. Mazur’s office contains twelve employees and 1200 members who are compliance or ethics officers. *Id.* The members of Mazur’s association create prophecies of internal procedures for whistleblowers to report. *Id.*

261. *Id.*

262. Jones & Lublin, *supra* note 97, at B11. Dan Westman, a labor and employment lawyer, claims that a company could easily offer small financial awards, such as \$1000 to people who limit their whistleblowing to internal procedures. *Id.*

263. Levick, *supra* note 14.

264. Telephone Interview with Tim Mazur, *supra* note 63.

265. Jones & Lublin, *supra* note 97, at B11. Best Buy recently recognized and celebrated an internal whistleblower who reported a scheme that cost the company \$41 million dollars in just four years. *Id.* (statement by Kathleen Edmond, Chief Ethics Officer, Best Buy Co.).

266. *Id.*

267. Telephone Interview with Tim Mazur, *supra* note 63.

268. *Id.* See also Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, § 922(a) (codified as amended at 15 U.S.C. § 78u-6(h)(2) (2010)).

when retaliation occurs.²⁶⁹ In fact, some compliance companies require that their hotlines do not record whistleblowers names, and instead assign arbitrary numbers to cases for complete anonymity.²⁷⁰ Other corporations prohibit employees from requesting information about the individual who participated in the fraudulent investigation.²⁷¹ If the corporation uses the whistleblower's name, the corporation should limit the number of people who know it and provide consequences if the whistleblower's name is disclosed.²⁷² When employees blow the whistle and complain of retaliation, feedback and immediate action would demonstrate that retaliation is serious and unacceptable.²⁷³

As the success of any internal reporting procedure will hinge on the management's ability to reassure employees that they will be treated with respect, the corporation must act promptly to discipline any retaliating employee.²⁷⁴ If corporations do not handle retaliation correctly, employees may become vengeful and will report externally to receive an award. Since the SEC gives the employee ninety days to report the complaint to the commission after reporting it to the board, employees may report on day eighty when they feel that the corporation has not substantially completed an investigation or improved the retaliatory conduct.²⁷⁵ Thus prompt investigatory action, for accusations of both fraud and retaliation, is essential to the success of the compliance program.

C. Compliance Officers Independent from Corporate Counsel

It is common practice for the compliance officer to report to the corporate counsel.²⁷⁶ Since the compliance officer is a

269. Telephone Interview with Tim Mazur, *supra* note 63.

270. *Id.* For example, when a compliance officer receives information regarding a whistleblower tip, he will only receive a case number explaining that the tip was received through an anonymous hotline or email. *Id.*

271. KAPLAN & MURPHY, *supra* note 66, at 14–24.

272. *Id.* at 14–27.

273. *Id.* at 14–25.

274. *See id.* at 14–28 to 14–29.

275. Telephone Interview with Tim Mazur, *supra* note 63.

276. Leonard Bucklin, *More Preaching, Fewer Rules: A Process for the Corporate Lawyer's Maintenance of Corporate Ethics*, 35 OHIO N.U. L. REV. 887, 890 (2009); *see also* Telephone Interview with Tim Mazur, *supra* note 63; JOSÉ A. TABUENA, SOCIETY OF CORPORATE COMPLIANCE AND ETHICS, *The Chief Compliance Officer vs. the General Counsel: Friend or Foe?*, 4 (2006), available

relatively new position in corporations, some corporations force their general counsel to wear two hats and play the role of a legal advisor and a compliance officer.²⁷⁷ There are some advantages to this practice, such as simplicity and cost, when the compliance officer either reports directly to corporate counsel or the same person fulfills both positions.²⁷⁸ However, the general counsel is responsible for *legal* compliance under the Sarbanes-Oxley Act, and the compliance officer should have a separate and independent function to enforce the administration of the compliance program.²⁷⁹ Even the Office of Inspector General expressed concern when the compliance program created an unequal balance between the compliance officer and the corporate counsel.²⁸⁰

While many compliance officers should go to general counsel for legal advice when addressing sensitive situations, the main purpose of the general counsels is to guard the corporation.²⁸¹ When it comes to deciding what issues to report to the SEC, the compliance officer and corporate counsel may disagree.²⁸² Thus, the independence of the compliance officer is essential to ensuring that the corporation is in compliance with SEC reporting requirements.

Instead, compliance officers should report directly to the CEO or the board of directors.²⁸³ Protocols should establish

at http://www.complianceethicsinstitute.org/handouts/2008/conference/tues/601/Tabuena_reprint1206.pdf. Tim Mazur believes that half of the corporations still have compliance programs that require the compliance officer to report to corporate counsel. Telephone Interview with Tim Mazur, *supra* note 63.

277. TABUENA, *supra* note 276, at 2. There are three different possible structures a company can implement to create a relationship between legal responsibility and compliance: one person acts as both the compliance officer and the general counsel; the compliance officer reports to the general counsel; or the compliance officer does not report and is independent of the general counsel. *Id.*

278. *Id.* at 4–6.

279. Telephone Interview with Tim Mazur, *supra* note 63; *see also* TABUENA, *supra* note 276, at 2.

280. TABUENA, *supra* note 276, at 2.

281. Telephone Interview with Tim Mazur, *supra* note 63.

282. *Id.*; TABUENA, *supra* note 276, at 2. This can occur when the compliance officer is concerned that an agreement will create violations and corporate counsel believes the agreement can be arranged with only a slight, insignificant wrongdoing. *Id.*

283. Telephone Interview with Tim Mazur, *supra* note 63.

what measures should be taken when the allegation of misconduct is against the CEO, the general counsel, or the compliance officer.²⁸⁴ As the CEO also retains the power to hire and fire the compliance officer, compliance employment contracts should contain provisions requiring the approval of the chairperson of the board of directors before the compliance officer can be discharged.²⁸⁵ This would provide a limit to the CEO's control over the compliance officer by requiring involvement of a third party in the employment decisions.²⁸⁶

CONCLUSION

Whistleblower incentives are not a novel concept in the United States; yet, the psychological conflict that inundates a potential employee with no particular legal knowledge is overwhelming. If a whistleblower chooses to disregard his allegiance to the corporation, he faces the difficulty of interpreting the Dodd-Frank Act and deciding whether he qualifies for an award. Yet based on past whistleblower incentives, the Dodd-Frank Act may be an intense motivator for external whistleblowing.²⁸⁷ However, there have been no Dodd-Frank Act whistleblower awards and employees are left with little guidance as to the scope and requirements of the act. Further, the employee must consider the risk associated with disclosing her identity to the SEC and having fewer protections than corporate anonymous compliance programs.²⁸⁸ These whistleblower obstacles should not make a corporation complacent because the Dodd-Frank Act has sufficient benefits and safeguards to entice an employee to use its provisions—particularly if the employee is not comfortable with the internal corporate compliance program.

Corporations can make internal whistleblowing a simple process by implementing straightforward procedures, ensuring confidentiality, rewarding loyalty, and providing an independent, uncorrupted compliance officer.²⁸⁹ This

284. *Id.*

285. *Id.* Currently only five percent of ECOA members have contracts with such provisions. *Id.*

286. *See id.*; *see also* TABUENA, *supra* note 276, at 2.

287. *See supra* Part III.C.

288. *See supra* Part III.A.5. and Part III.B.

289. *See supra* Part IV.

Comment suggests that even with the lack of funding, the SEC's power to award monetary incentives may successfully entice employees to externally blow the whistle; however, these incentives can be overcome by promoting an effective compliance program with greater retaliation provisions.²⁹⁰ A corporation with a good compliance program can reduce the number of external whistleblowers, increase the use of internal reporting mechanisms, and capitalize on sentencing benefits by self-reporting securities law violations.²⁹¹

290. *See supra* Part III.D. and Part IV.

291. *See supra* Part IV.