

## Comment

### Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010

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#### I. INTRODUCTION

Instances of corporate fraud within the past ten years have been greater than at any time in this country's history.<sup>1</sup> The decade began with Enron manipulating accounting records and exploiting the energy markets.<sup>2</sup> It ended with Bernard Madoff's fifty billion dollar Ponzi scheme and the sub-prime mortgage crisis, which led to the 2008 collapse of the financial markets.<sup>3</sup> As a result of these instances of

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\* Loyola University Chicago School of Law, Juris Doctor expected May 2012. I would like to thank the editors and staff of the *Loyola University Chicago Law Journal* for their help and hard work without which this Comment would not have been possible. I would also like to thank my family and friends who continuously provide me with support and encouragement in all of my endeavors.

1. Sharon E. Foster, *Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis*, 78 MISS. L.J. 777, 789 (2009). In the 2008 financial market collapse, the risky moves made by banks and other financial institutions were only identified after the markets crashed, when it became clear that these corporations acted without concern for the external consequences. *Id.*; see also Nelson D. Schwartz & Julie Creswell, *What Created This Monster?*, N.Y. TIMES, Mar. 23, 2008, at BU1 (discussing the fraudulent activities being undertaken and the disastrous results).

2. John C. Coffee, Jr., *What Caused Enron? A Capsule and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 270–72 (2004) (discussing the chain of events leading up to the Enron collapse in 2001); Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES MAG. (Aug. 26, 2002), <http://www.forbes.com/2002/07/25/accountingtracker.html> (analyzing the major financial scandals leading up to 2002 and the creation of the Sarbanes-Oxley Act ("SOX")). The events preceding the Enron collapse were even unfathomable for the experts. Marianne M. Jennings, *A Primer on Enron: Lessons from A Perfect Storm of Financial Reporting, Corporate Governance and Ethical Cultural Failures*, 39 CAL. W. L. REV. 163, 164 (2003).

3. Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernard Madoff*, 2009 MICH. ST. L. REV. 947, 954 (discussing Bernie Madoff's Ponzi scheme); Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 9 (2009) (noting that while the 2008 financial crisis could largely be attributed to the banks, economic factors such as the decrease in home prices also contributed to the collapse). On September 18, 2008, the stock market experienced the largest drop since September 11, 2001, leading the government to enact emergency legislation in an attempt to save the markets. Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1613–15 (2009).

corporate fraud, corporations and politicians have attempted to restore integrity in the corporate world and the financial markets.<sup>4</sup>

Following the market collapse, Congress studied the elements that breed corporate scandal to provide the public with a sense of security and prevent similar disasters in the future.<sup>5</sup> One of the factors that Congress scrutinized as a facilitator—if not *the* source—of the collapse was corporate governance, or more accurately, the lack thereof.<sup>6</sup> Generally, corporate governance is defined as the set of principles by which companies are directed and controlled; this concept encompasses the relationship between the corporation and its shareholders as well as the preparation and publication of financial documents.<sup>7</sup> The parties comprising this realm of corporate governance include a corporation's employees, managers, directors, shareholders, and a less recognized party, whistleblowers.<sup>8</sup>

Historically, whistleblowers have been underutilized in the regulation of corporate governance.<sup>9</sup> This is unfortunate because they generally

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4. John Carney, *The Madoff Effect: Investor Confidence Crushed*, BUS. INSIDER (Dec. 15, 2008, 9:20 AM), <http://www.businessinsider.com/2008/12/the-madoff-effect-investor-confidence-crushed> (discussing the Bernie Madoff scandal and the role it played in eroding investor confidence); see also Stephanie Strom, *Giant Wall St. Fraud Leaves Charities Reeling*, N.Y. TIMES, Dec. 16, 2008, at A1 (explaining the effect that scams like the Bernie Madoff Ponzi scheme have had on investors and non-profit organizations such as charities).

5. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). The goal statement written at the beginning of the Act was as follows: "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." *Id.* at pmb1.; see also David Zaring, *A Lack of Resolution*, 60 EMORY L.J. 97, 97 (2010) (discussing the issues the President and Congress considered before enacting the Dodd-Frank Act).

6. John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501, 532 (2000). While discussing the corporate governance systems found around the world, the author contends that corporate governance is an ever-changing process. *Id.* Furthermore, he opines that the trend in the United States, more so than in other countries, is towards self-governance. *Id.* at 531. Recently, corporate governance scholars have begun focusing on lawyers, financial intermediaries, and institutional shareholders as the gatekeepers to preventing corporate fraud. Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS 55, 56 (2010).

7. Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW. 59, 60 (1992); *Definition of Corporate Governance*, APPLIED CORPORATE GOVERNANCE, <http://www.applied-corporate-governance.com/definition-of-corporate-governance.html> (last visited Dec. 15, 2011) [hereinafter *Definition of Corporate Governance*].

8. *Mulford v. Computer Leasing, Inc.*, 759 A.2d 887, 893 (N.J. Sup. Ct. 1999) (discussing the duties of a corporation's members); *Definition of Corporate Governance*, *supra* note 7 (explaining that corporate governance consists of the relationships between a company's management, board of directors, shareholders, employees, and other stakeholders).

9. Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 139 (2006) (detailing how whistleblowers are forced to litigate

have a strong connection to—and a wealth of knowledge about—the companies they speak out against.<sup>10</sup> The majority of whistleblowers are employees, auditors, and regulators—essentially those in a rare position to uncover and report corporate fraud.<sup>11</sup> In the past, the number of whistleblowers has been alarmingly low; to remedy this, Congress has created legal norms to elicit the support of whistleblowers and take advantage of their unique and valuable positions.<sup>12</sup>

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”), in part, to encourage whistleblower participation in the promotion of corporate governance.<sup>13</sup> Although the final effects of the Act remain to be seen, the whistleblower provisions are expected to increase the number of whistleblower reports and diminish the potential for corporate fraud.<sup>14</sup> However, the provisions are also likely to increase the financial burden on both corporations and the government, a consequence that could greatly diminish the positive impact of this legislation.<sup>15</sup>

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by their own devices, which oftentimes makes their complaints fruitless from both monetary and law enforcement standpoints). *See generally* Jisoo Kim, *Confessions of a Whistleblower: The Need to Reform the Whistleblower Provision of the Sarbanes-Oxley Act*, 43 J. MARSHALL L. REV. 241, 249 (2009) (documenting the lives of two whistleblowers and the trouble they faced after bringing their claims).

10. Jenny Mendelsohn, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 WASH. U. GLOB. STUD. L. REV. 723, 724 (2009) (discussing the options employees have when reporting the internal activities of their company and the dilemma they face because they might not want to hurt the company); *see also* Rapp, *supra* note 6, at 56 (recognizing that whistleblowers are an integral part of corporate structure and its regulation).

11. Richard E. Moberly, *Sarbanes-Oxley’s Structural Model To Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1107 (2006) (providing an analysis of corporate scandals in 2001 and how the whistleblowers came from within the corporations); Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* (Nat’l Bureau of Econ. Research, Working Paper No. 12882, 2007), available at <http://www.nber.org/papers/w12882> (examining data that tracks the origins of whistleblowers).

12. 148 CONG. REC. S1788 (daily ed. Mar. 12, 2002) (statement of Sen. Patrick Leahy) (discussing how whistleblowers’ affect corporate fraud). Following the collapse of Enron and the resulting financial crisis, Congress decided to increase whistleblower protection. Caryn R. Nutt, *Carnero v. Boston Scientific Corporation: Interpreting the Extraterritorial Effect of the Civil Whistleblower Protection Provision of the Sarbanes-Oxley Act*, 41 U.S.F. L. REV. 201, 202 (2006).

13. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat 1376 (2010); *see also* Adele Nicholas, *Bounty Hunters: Whistleblower Provisions of the Dodd-Frank Act Pressure Employers to Improve Compliance*, INSIDE COUNS., Oct. 1, 2010, at 28–29 (discussing the intentions behind the Dodd-Frank Act’s whistleblower provisions and predicting if they will succeed).

14. *See infra* Part IV (discussing the potential effects of the Dodd-Frank Act on individuals and corporate governance, generally).

15. *See infra* Part IV–V (analyzing the effect of the Dodd-Frank Act’s whistleblower provisions on corporations and the Securities and Exchange Commission and suggesting methods of application that would enable the relevant provisions to succeed).

This Comment explores how whistleblowers can affect corporate governance, details the specific whistleblower provisions of the Dodd-Frank Act, and analyzes the effect these provisions will have on individuals, corporations, and the United States Securities and Exchange Commission (“SEC”).<sup>16</sup> If properly executed, the Dodd-Frank Act’s whistleblower provisions could prove invaluable as Congress and the rest of federal government continue efforts to curb corporate fraud and improve corporate governance.<sup>17</sup>

Part II of this Comment provides background information on corporate governance and traces prior legislation that addressed whistleblowers.<sup>18</sup> Part II also outlines the defects in corporate governance that led to the 2008 financial crisis.<sup>19</sup> Part III discusses the Dodd-Frank Act, focusing on legislative intent, and provides a detailed explanation of the Act’s whistleblower provisions and their intended effects.<sup>20</sup> Part IV addresses the application of these provisions and the possible effects they will have on individuals, corporations, and the SEC.<sup>21</sup> Finally, Part V proposes methods by which corporations can approach this new legislation.<sup>22</sup> Part V also proposes ways in which the SEC can efficiently apply these provisions and avoid an unsustainable financial burden that would severely limit its effectiveness.<sup>23</sup>

## II. BACKGROUND

To delineate the goals and effects of any whistleblower provisions, it is important to understand the historical treatment of whistleblowers in

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16. See *infra* Part II–IV (discussing whistleblowers, the effects of past regulations and the Dodd-Frank Act’s whistleblower provisions, and the impact and application of the new provisions in terms of individuals, corporations, and the SEC).

17. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010). The Dodd-Frank Act’s whistleblower provisions are intended to increase the ability of individuals to disclose fraud. § 748, 124 Stat. at 1739–46. Congress and experts believe whistleblowers are valuable for combating fraud and maintaining integrity within the corporate framework. See *generally* Securities Whistleblower Incentives and Protection, 76 Fed. Reg. 34,300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (summarizing the SEC’s beliefs about the applications and effects of the Dodd-Frank Act’s whistleblower provisions).

18. See *infra* Part II.A–E (discussing corporate governance in the United States generally and previously enacted legislation affecting corporations, financial markets, and whistleblowers).

19. See *infra* Part II.F (analyzing the events leading to 2008 financial crisis).

20. See *infra* Part III.A (discussing the Dodd-Frank Act and the intentions behind its drafting).

21. See *infra* Part IV (analyzing the whistleblower provisions in the Dodd-Frank Act and how they could be used in practice).

22. See *infra* Part V.A (proposing methods that corporations can utilize to maximize the benefits and minimize the negative impact that the Dodd-Frank Act could otherwise have on them).

23. See *infra* Part V.B (suggesting methods that would allow the SEC to successfully handle the influx of whistleblower claims and avoid potential burdens that would limit its ability to successfully apply the Dodd-Frank Act’s whistleblower provisions).

legislation and corporate practice.<sup>24</sup> Accordingly, after examining the basic concepts of corporate governance,<sup>25</sup> this Part outlines prior treatment of whistleblowers<sup>26</sup> and details previous legislation that incorporated whistleblower provisions: the Securities Exchange Act of 1934 (“1934 Act”), the False Claims Act (“FCA”), and the Sarbanes-Oxley Act of 2002 (“SOX”).<sup>27</sup> Finally, this Part explains the condition of the United States’s financial markets in 2008 and the resulting dilemma Congress faced in addressing corporate fraud.<sup>28</sup>

#### A. Importance of Corporate Governance in a Market-Based Economy

Corporations within the United States operate in a market-based economy.<sup>29</sup> An important characteristic of this market-based system is the involvement of stakeholders, a group consisting of shareholders, managers, employees, clients, the government, and the public.<sup>30</sup> Both governmental and non-governmental organizations<sup>31</sup> constantly attempt to protect all of these stakeholders by passing regulations that hold corporations to certain ethical standards.<sup>32</sup> These regulations are

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24. See James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH L. REV. 833, 836 (1994) (describing the importance of understanding the history behind a law before using it in a legal proceeding); see also Mendelsohn, *supra* note 10, at 723 (analyzing the importance of understanding how and where to report an issue based on the whistleblower’s location).

25. See *infra* Part II.A (discussing corporate governance in the United States).

26. See *infra* Part II.B (discussing whistleblowers and their past role in dealing with corporate fraud).

27. See *infra* Parts II.C–E (describing previous legislation Congress used to incorporate whistleblower provisions).

28. See *infra* Part II.F (addressing the circumstance that led to the 2008 financial collapse).

29. Cioffi, *supra* note 6, at 504. Financial markets in the United States and United Kingdom follow a market-based approach, while markets in parts of Europe, specifically Germany, and Japan are structured much differently. *Id.* at 506; see also GROUP OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY 26 (2009), available at [http://www.group30.org/images/PDF/Financial\\_Reform-A\\_Framework\\_for\\_Financial\\_Stability.pdf](http://www.group30.org/images/PDF/Financial_Reform-A_Framework_for_Financial_Stability.pdf) [hereinafter FINANCIAL REFORM] (analyzing financial systems throughout the world and their difference from the United State’s market-based economy).

30. Jennings, *supra* note 2, at 231. Stakeholders have a significant role in corporations that operate in a market-based economy. *Id.* These parties are important because the corporation is theoretically run by them for their prosperity. *Id.*; see also Manuel A. Tipgos & Thomas J. Keefe, *A Comprehensive Structure of Corporate Governance in Post-Enron Corporate America*, CPA J. 46, 47–51 (2004), available at <http://www.nysscpa.org/cpajournal/2004/1204/essentials/p46.htm> (discussing the different members of the market-based economy and explaining that each stakeholder plays a significant but, often unrecognized, role).

31. FINANCIAL REFORM, *supra* note 29, at 5, 9 (explaining that governmental groups include organizations such as the SEC and the United States Government Accounting Office, while non-governmental entities include organizations such as the Group of Thirty, a private, non-profit body consisting of senior-level representatives from around the country representing different all sectors of business).

32. Saule Omarova & Adam Feibelman, *Risks, Rules, and Institutions: A Process for Reforming Financial Regulation*, 39 U. MEM. L. REV. 881, 891 (2009) (discussing the public

commonly referred to as “standards of corporate governance.”<sup>33</sup> Two of the primary goals of corporate governance in a market-based system include full disclosure and the production of accurate financial information.<sup>34</sup> Whistleblowers have the potential to play an important role in this system because they are often the first to know when corporate disclosures are inaccurate.<sup>35</sup>

Corporate governance regulations are also intended to align the goals of the corporation’s leaders with those of its shareholders.<sup>36</sup> Shareholders primarily expect to realize a profit from the resources they put into the company—an increase in the value of their investments.<sup>37</sup>

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sector’s role in regulating financial markets as a result of the common belief that markets cannot self-regulate). *See generally* Anthony Faiola et al., *What Went Wrong*, WASH. POST, Oct. 15, 2008, at A01 (stating that over the past two decades, many have expressed the need for more structure within the financial markets based on the failures that have led to multiple financial disasters).

33. R.P. Austin, *Corporate Governance Symposium: What is Corporate Governance? Precepts and Legal Principles*, 2005 N.Z. L. REV. 335, 336 (2005). Corporate governance consists of standards dealing with corporate structure, financial markets, and any related entities. *Id.* at 338. Although there are many opinions regarding what makes up corporate governance, a widely accepted definition of corporate governance is a “set of structures and behaviors by which a company or other entity is directed and managed.” *Id.* at 336; *see also* *Definition of Corporate Governance*, *supra* note 7 (describing the important concepts used to define corporate governance).

34. Clyde Stoltenberg et al., *A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the US and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404*, 53 AM. J. COMP. L. 457, 460 (2005) (explaining that the best way to regulate a corporation is to understand the business and possess unbiased access to its financial information); Lipton & Lorsch, *supra* note 7, at 65 (discussing a corporation’s duty to ensure that shareholders are given fair and accurate information).

35. Moberly, *supra* note 11, at 1113. Traditionally, many “gatekeepers” have been expected to monitor corporations to ensure they are being honest to shareholders. *Id.* But this is ineffective because there is no internal mechanism for verifying this information—a role that whistleblowers are able to fill. *Id.* at 1114; *see also* John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1144 (1977) (discussing external gatekeepers’ ineffectiveness based on an inability understand a corporation internally).

36. Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 632 (2009). There is an unsettled debate over whether a corporation’s goal is to serve the interests of its shareholders or the interests of all stakeholders. *Id.* at 631–32. This unsettled debate is important because a corporation’s goal is an important factor in defining a manager’s role within the corporation as well as in shaping corporate law. *Id.* Thus, a corporation must align the interests of all of its stakeholders. *Id.* at 632.

37. *Id.* If the corporation’s only goal was to serve the interests of the shareholder, it would mean that managers were only responsible for maximizing the company’s profits. *Id.*; *see also* Patricia Graybeal Lobingier, *Compensation Choice—The Effect on Firm Performance: An Interindustry Look at Performance Plans and Restricted Stock 1* (Mar. 24, 1997) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University), *available at* <http://scholar.lib.vt.edu/theses/available/etd-5312182239721111/unrestricted/chapter1.pdf> (stating that a corporation must balance the competing interests of shareholders to take as much money as possible out of a corporation and the interests of the corporation to reinvest money to

Managers and executives, on the other hand, strive to advance the company and increase their own personal wealth.<sup>38</sup>

The strongest corporate governance policies, however, are those that strike a balance between the competing interests of not only the managers and shareholders but also the employees.<sup>39</sup> Generally, managers oversee the corporation's operations, dictate the direction of the corporation, and create financial data for stakeholders.<sup>40</sup> Though it seems practical for managers to be the first line of defense against fraud, their incentives are often tied to the corporation's—and in turn, their own—financial success.<sup>41</sup> In contrast, employees are responsible for the day-to-day success of the corporation.<sup>42</sup> As a result, they have a stronger interest in the success of the company as a whole and inhabit a closer proximity to the corporation's inner workings.<sup>43</sup> This position gives employees a strong incentive to “blow the whistle” and is a major reason they have become a more prominent focus of the government in recent years.<sup>44</sup>

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sustain itself).

38. Lobingier, *supra* note 37, at 1. Managerial interests are inherently different from shareholder interests because a manager's job is to consider both non-shareholder and shareholder interests. *Id.*; see also Choudhury, *supra* note 36, at 632 (stating that managerial actions will often depend on the company's needs rather than solely on the shareholders' desire for profits).

39. Larry E. Ribstein, *SARBOX: The Road to Nirvana*, 2004 MICH. ST. L. REV. 279, 296. The alignment of shareholder and manager interests allows a corporation to function with limited friction. Lobingier, *supra* note 37, at 1–2. If the different stakeholders within the corporation agree, studies show that this results in a stronger performance by the corporation. *Id.*

40. Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1336 (1996) (explaining that management is responsible for the accuracy of and signing off on the corporation's financial disclosures); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (describing the role of managers within a corporation).

41. Robert A. Prentice & Dain C. Donelson, *Insider Trading as a Signaling Device*, 47 AM. BUS. L.J. 1, 37 (2010). When a company is successful, that success trickles down from the shareholders to the managers and even the employees. *Id.* In general, the higher an individual's position, the more he stands to benefit from the company's success. *Id.*; see also Z. Jill Barclift, *Scheme Liability and Common-Law Fraud Under State Law: Holding Corporate Officers and Their Co-Conspirators Accountable to Shareholders*, 26 T.M. COOLEY L. REV. 273, 276 (2009) (describing how tying a manager's benefits to the corporation's profits makes him or her more likely to commit fraud).

42. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 (1999) (explaining that an employee's responsibilities include performing the corporation's general business activities); Tippos & Keefe, *supra* note 30, at 47 (defining an employee's responsibilities to include handling the more general tasks within a company).

43. Barclift, *supra* note 41, at 278 (arguing that an employee's work has a greater effect on the stakeholders of the organization than managers who function in more of an oversight role); see also Prentice & Donelson, *supra* note 41, at 37 (stating that management's responsibility is to ensure the organization is headed in a proper direction).

44. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.) (documenting that whistleblowers are important figures in the eyes

### B. *The Whistleblower's Position in Corporate Governance*

By definition, whistleblowers have existed for centuries, with evidence suggesting that the *qui tam* principle<sup>45</sup>—where a citizen brings a claim of fraud on behalf of government—was used in thirteenth and fourteenth century English law.<sup>46</sup> Whistleblowers have become a well-known part of corporate culture and have been subjected to a wide range of treatment.<sup>47</sup> Praise for whistleblower action is starkly contrasted with ridicule and dismissal.<sup>48</sup> In theory, whistleblowers could play a large role in maintaining corporate integrity, but fear of retaliation has resulted in an alarming failure to disclose fraud.<sup>49</sup>

#### 1. The Whistleblower's Impact on Corporations

An intriguing relationship exists between a corporation and its shareholders because the shareholders own the company, but they are

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of the government and corporate leaders).

45. Valerie R. Park, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1061 (1991). The term *qui tam* literally means “who as well.” *Id.* The principle allows individuals to bring claims on behalf of the government. *Id.*; see also James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 PUB. CONT. L.J. 56, 63 n.20 (1990) (describing Congress’s definition of *qui tam* when it passed the FCA).

46. Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty Of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN’S L. REV. 875, 880 (2002). Individuals in this role have been treated negatively throughout history. *Id.* at 882. Academics have drawn comparisons between whistleblowers and the “bearer of bad news,” a concept from ancient Greece. *Id.* When examining the application of whistleblower provisions, it is clear that this negative perception has continued throughout history. *Id.*; see also Dan Ackman, *Sherron Watkins Had Whistle, But Blew It*, FORBES MAG. (Feb. 14, 2002, 3:50 PM), <http://www.forbes.com/2002/02/14/0214watkins.html> (arguing that Enron “whistleblower” Sherron Watkins actually provided cover for the fraud at Enron).

47. William J. Kilberg et al., *A Measured Approach: Employment and Labor Law During the George W. Bush Years*, 32 HARV. J.L. & PUB. POL’Y 997, 1003 (2009) (praising Enron whistleblower Sherron Watkins for revealing her knowledge of Enron’s fraudulent activities); Rapp, *supra* note 6, at 56 n.10 (arguing that Watkins’s delay in providing this information was likely based on the threat of retaliation from her peers and superiors).

48. Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 369 (2003); Rapp, *supra* note 6, at 61. Cynthia Cooper, WorldCom’s Vice President for Internal Auditing, came forward after her own investigation, but she was too late to stop the fraud. Brickey, *supra*, at 369–70. Many praised her actions, citing the difficulty of opposing one’s mentors and the potential harassment that could result. *Id.*; see also Paula Dwyer & Dan Carney, *Year of the Whistleblower*, BUS. WK., Dec. 16, 2002, at 108 (quoting Sen. Charles Grassley) (noting that a whistleblower loses clout at work once she is identified).

49. See *Carnero v. Bos. Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006) (holding that an international employee working for an American company could not bring a case of fraud against his company); see also Richard Alexander, *The Role of Whistleblowers in the Fight Against Economic Crime*, 12 J. FIN. CRIME, no. 2, 2004 at 131, 131–38, available at <http://eprints.soas.ac.uk/89/> (noting that only one person, who is likely to be closely associated with the fraud, is needed to come forward).

also—especially within public corporations—part of the general public.<sup>50</sup> Despite the shareholders' ownership stake in a corporation, they often have little input in how the corporation operates and possess little knowledge of the daily occurrences.<sup>51</sup> This places whistleblowers in a valuable position because they are frequently employees within the company or outsiders with an unusually deep understanding of it.<sup>52</sup> Essentially, whistleblowers possess knowledge that shareholders and the public would not otherwise uncover.<sup>53</sup>

The decision to invest in a company requires obtaining knowledge about that company and gathering a range of financial perspectives.<sup>54</sup> This information gives an investor the security to enter into the financial market and has been the focus of many regulations.<sup>55</sup> Numerous instances of collapsed markets have been plagued by a significant lack of investor security.<sup>56</sup> When properly utilized, whistleblowers play an important role in the preservation of investor security.<sup>57</sup> As discussed above, these individuals possess, and should be empowered to disclose, information the public could not otherwise access.<sup>58</sup> Based on this

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50. See *supra* Part II.A (describing the significant aspects of the market-based economy, including the role of corporate shareholders).

51. Stoltenberg et al., *supra* note 34, at 485 (describing the limited access shareholders have to a corporation and the recent push for more transparency); see also Peter J. Wallison, *Blame Sarbanes-Oxley*, WALL ST. J., Sept. 3, 2003, at A16 (noting that SOX gave corporate boards of directors more power at the expense of corporate management's power).

52. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 437 (2009) (stating that individuals within a corporation are perfect candidates to be whistleblowers because they typically know about a problem before it occurs).

53. Rapp, *supra* note 6, at 56–57 (acknowledging the government's classification of whistleblowers as a group possessing knowledge others cannot access).

54. Austin, *supra* note 33, at 338. An individual takes many factors into consideration before becoming a shareholder. *Id.*; see also Ribstein, *supra* note 39, at 288 (discussing the information investors expect to have before deciding to invest in a corporation).

55. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (discussing the Dodd-Frank Act's goals and reasons for its whistleblower provisions); see also Brad Levy, *Pretty New SOX, But Plenty of Holes: An Analysis of the Government's Inability to Apply Section 806 of the Sarbanes-Oxley Act of 2002 Extraterritorially*, 40 TEX. TECH. L. REV. 225, 227 (2007) (noting that one of the reasons SOX was passed was to rebuild investor confidence after scandals shook the financial markets in 2001).

56. Hurt, *supra* note 3, at 963. The Bernie Madoff scandal hurt investor confidence around the time of the 2008 financial crisis. *Id.* Many investors were afraid to place their hard-earned money into a market they no longer trusted. *Id.*; see also Paul Rose, *The Corporate Governance Industry*, 32 J. CORP. L. 887, 889 (2007) (demonstrating a similar lack of investor confidence following the corporate scandals of 2001). As its slow recovery demonstrated, many considered the market to be unreliable. *Id.* at 890.

57. See Lobel, *supra* note 52, at 437 (noting the importance of insider information as a result of the significant hurdles outsiders face to otherwise uncover such information).

58. Baynes, *supra* note 47, at 877–80. If Sherron Watkins, considered by many to be the whistleblower who helped uncover the 2001 Enron scandal, was able to come forward earlier,

ability to uncover fraud and provide investor security, the public and the media have received whistleblowers positively.<sup>59</sup> These outlets often shower whistleblowers with praise,<sup>60</sup> but many commentators and corporations continue to view them in a negative light.<sup>61</sup>

## 2. Negative Treatment of Whistleblowers Has Reduced Their Influence

Congress has demonstrated its belief that employees and other insiders are in a unique position to uncover fraud<sup>62</sup> through its attempts at improving whistleblower provisions, particularly within major pieces of financial regulation.<sup>63</sup> Unfortunately, these legislative attempts have not translated into corporate practice.<sup>64</sup> Many factors play a role in the limited number of whistleblowers reporting cases of corporate fraud.<sup>65</sup> Although some blame employee apathy, it is more likely that the

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many of the issues the Enron scandal created might have been avoided. *Id.*

59. See Levy, *supra* note 55, at 230 (showing how even minor whistleblowing incidents gain major publicity); see also Charles Thomas, *Alleged Whistleblower in Oglesby Case Talks*, ABC INC., WLS-TV/DT (Oct. 5, 2010), <http://abclocal.go.com/wls/story?section=news/politics&id=7708130> (exemplifying the media's willingness to highlight alleged whistleblowers).

60. See, e.g., Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME MAG. (Dec. 22, 2002), <http://www.time.com/time/subscriber/personoftheyear/2002/poyintro.html> (discussing the praise given to the whistleblowers that came forward against several corporations in 2001); see also, e.g., Eric Boehlert, *The Betrayal of the Whistleblowers*, SALON (Oct. 21, 2003), <http://dir.salon.com/story/news/feature/2003/10/21/whistleblower/index.html> (explaining how movies like *The Insider* have portrayed whistleblowers in a positive light).

61. *Graham Cnty. Soil & Water Conservation Dist. v. U.S.*, 545 U.S. 409, 412 (2005) (observing that even with regulations in place, employers are unwilling to admit their participation in fraud or retaliation against whistleblowers); see also Dain C. Donelson, *Insider Trading as a Signaling Device*, 47 AM. BUS. L.J. 1, 55 (considering the factors a whistleblower must consider prior to coming forward, including the possibility of retaliation).

62. See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.) (finding that whistleblowers are more likely than others to prevent fraud in public corporations). See also Moberly, *supra* note 11, at 1108–09 (describing Congress's push to encourage employees to monitor fraud through new and increasingly flexible laws).

63. See *infra* Part II.C–E (analyzing Congress's intent in creating and updating whistleblower provisions, most recently in the Dodd-Frank Act).

64. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, 29 C.F.R. §§ 1980.110–1980.114 (2004) (showing that even the avenues created for whistleblowers require very specific action before a claim is accepted); see also Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1761 (2007) (asserting that past whistleblower provisions have created many barriers for bringing a successful claim). Whistleblowers have also been subjected to considerable negative treatment, which is evidence of a strong desire to impede their claims. *Id.* at 1762.

65. See generally Dworkin, *supra* note 64 (describing the problems that whistleblowers faced before and after SOX despite being enacted to ease the restraints on whistleblowers). See also Robert Johnson, *Whistling While You Work: Expanding Whistleblower Laws to Include Non-Workplace-Related Retaliation after Burlington Northern v. White*, 42 U. RICH. L. REV. 1337, 1337–38 (2008) (describing the legislative gaps preventing whistleblowers from bringing successful claims).

historically negative treatment of whistleblowers has deterred subsequent employees who want to avoid a similar fate.<sup>66</sup> Employee complaints are often diluted or dismissed by management, and after a claim has been made, many employees are subjected to various forms of retaliation<sup>67</sup> ranging from workplace harassment to termination or even worse in extreme cases.<sup>68</sup> Furthermore, many companies refuse to hire known whistleblowers because of their negative reputation and the stigma of disloyalty attached to them.<sup>69</sup>

Another major issue whistleblowers face is the lack of recourse available after retaliatory actions have been taken against them.<sup>70</sup> For example, even when courts ordered corporations to reinstate or reimburse whistleblowers, they find ways to skirt their legal obligations.<sup>71</sup> Additionally, there is a limit to the resources a whistleblower can expend—or the power he can exert—to collect what he is legally due.<sup>72</sup> Bringing a fraud claim can become a large

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66. Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK & OCCUPATIONS 107, 121 (1999), available at <http://www.uk.sagepub.com/fineman/Reading%20On/Chapter%2012d%20-%20Rothschild%20and%20Miethe.pdf>. Studies show that many whistleblowers struggle through personal troubles, such as depression and mistreatment at work, after coming forward. *Id.*; see also Johnson, *supra* note 65, at 1342–43 (analyzing the problems whistleblowers face after coming forward).

67. See Roberta Ann Johnson, *Whistleblowing and the Police*, 3 RUTGERS J.L. & URB. POL'Y 74, 74 (2006) (describing the many dire consequences whistleblowers face after coming forward). See generally C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* (2001) (offering in-depth accounts from whistleblowers and the negative consequence that resulted from exposing organizational fraud).

68. See, e.g., *Welch v. Chao*, 536 F.3d 269, 279 (4th Cir. 2008) (holding that an employee could not make a prima facie case of retaliatory discharge because he did not engage in protected activity as defined the law). In *Welch*, plaintiff David Welch lost his job after blowing the whistle on his former bank, which resulted in extended unemployment based on his reputation as a whistleblower in the industry. *Id.* at 274.

69. See Kim, *supra* note 9, at 243 (describing the trouble David Welch and other whistleblowers faced following complaints of fraud).

70. Kim, *supra* note 9, at 242 (“He had to look for a new job after his former employer Cardinal Bancshares refused to reinstate him . . . even after a Department of Labor Administrative Law Judge ordered that Welch be reinstated.”); see also Nutt, *supra* note 12, at 204–07 (describing cases where courts found retaliation existed, but little recourse was afforded to the whistleblower).

71. Kim, *supra* note 9, at 242 n.7. In litigating claims of fraud and retaliation, individuals have limited resources, and once these are depleted, individuals have little power to protect themselves from retaliation and other forms of negative treatment. *Id.*; see also Stephen Taub, *Five Years Out of Work*, CFO (May 18, 2007), [http://www.cfo.com/article.cfm/9210493/1/c\\_9211482](http://www.cfo.com/article.cfm/9210493/1/c_9211482) (describing the plight of a banking executive who blew the whistle, which included being forced out of the company and struggling to get his life back to a sense of normalcy).

72. See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006) (denying a plaintiff's retaliation claim because he was located outside of the country); see also *Whistleblower Protections*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/laws/comp-whistleblower.htm> (last visited Dec. 15, 2011) (describing the protections whistleblowers are entitled to receive). Courts have failed to apply many legislative protections. *Welch*, 536 F.3d at

undertaking, especially when an individual is fighting a corporation with a much larger pool of resources.<sup>73</sup> These practical deterrents, coupled with an anti-whistleblower corporate culture, represent major hindrances for whistleblowers and provide an explanation for the current lack of whistleblower participation in the disclosure of corporate fraud.<sup>74</sup>

### C. *The Securities Exchange Act of 1934*

Congress created one of the first whistleblower provisions in the Securities and Exchange Act of 1934 (“1934 Act”) following the stock market crash of 1929 (“1929 crash”).<sup>75</sup> The 1929 crash legitimized the need for government regulation.<sup>76</sup> Banker ineptitude and deceptive practices, structural weaknesses of financial institutions, and lack of government market oversight contributed to the 1929 crash.<sup>77</sup> By the end of the 1920s, many institutions were lending money solely for the purpose of investing in the stock market, and at one point, the amount lent—\$8.5 billion—exceeded the total amount of U.S. currency in circulation.<sup>78</sup> As a result of the exorbitant risk in the financial markets,

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73. See *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010) (describing a whistleblower’s struggle to combat retaliation after he brought a claim of fraud); see also Kim, *supra* note 9, at 242 (noting that for David Welch, the litigation became so costly that he was forced to abandon the claim).

74. Kim, *supra* note 9, at 242; see also Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 977 (2008) (explaining that statutory and common law tort protections often fail to protect whistleblowers because they are unable to fit their claims into “the narrowly-drawn boundaries of the law”).

75. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006) (setting out the 1934 Act’s whistleblower provisions that became the template for future whistleblower provisions). See generally John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry*, 29 HOFSTRA L. REV. 1015, 1019 (2001) (describing Franklin Delano Roosevelt’s vision for the securities industry after the 1929 stock market crash).

76. See David A. Lipton, *Governance of Our Securities Markets and the Failure to Allocate Regulatory Responsibility*, 34 CATH. U. L. REV. 397, 397 (1985) (noting the securities industry’s inability to maintain fair and honest trading markets prior to the 1934 Act); see also Richard Lambert, *Crashes, Ban & Wallops*, FIN. TIMES (July 19, 2008), <http://www.ft.com/cms/s/0/7173bb6a-552a-11dd-ae9c-000077b07658.html> (discussing historical financial collapses and the regulatory legislation enacted as a result).

77. See Lambert, *supra* note 76 (demonstrating the actions that contributed to the 1929 crash and how it eventually led to the Great Depression); see also *The Great Depression Causes and Effects*, CROFT COMM., <http://www.thegreatdepressioncauses.com> (last visited Dec. 15, 2011) (explaining several theories of the cause of the Great Depression). The 1929 crash and lack of integrity within the financial and banking sectors share a great deal of responsibility for the Great Depression. *Id.*

78. See JAMES G. SMITH, *FACING THE FACTS: AN ECONOMIC DIAGNOSIS* 14 (1968) (analyzing the U.S. financial situation in 1932); Lambert, *supra* note 76 (discussing the causes of the 1929 crash, which included excessive lending solely for investment purposes).

Congress enacted the Securities Act of 1933 (“1933 Act”).<sup>79</sup> Although the 1933 Act protected investors in the primary market through the creation of securities requirements—such as the registration of all public securities<sup>80</sup>—it lacked regulations for the secondary security markets.<sup>81</sup>

Congress passed the 1934 Act to regulate the secondary securities markets, creating the SEC, a federal administrative agency developed to oversee these markets.<sup>82</sup> The 1934 Act required issuers of securities to file public reports with the SEC and imposed requirements for documentation (to increase shareholder knowledge) and voting rights (to promote shareholder power) to attach to these securities.<sup>83</sup> Furthermore, the 1934 Act was one of Congress’s first attempts at regulating corporate governance from within the corporation through the creation of whistleblower provisions.<sup>84</sup>

Section 21F of the 1934 Act, entitled “Securities Whistleblower Incentives and Protection,” was enacted to promote corporate integrity by encouraging whistleblowers to come forward with complaints of fraud and illegal activity and ensuring those whistleblowers protection.<sup>85</sup> Specifically, it provided the first codified definition of “whistleblower,” created an award for—and method of distributing this award to—whistleblowers, established an investor protection fund, and expressly prohibited employer retaliation.<sup>86</sup> Despite its intent, § 21F

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79. Securities Act of 1933, 15 U.S.C. § 77 (2006); *A Brief History of Securities Regulation*, WISC. DEP. OF FIN. INST., <http://www.wdfi.org/fi/securities/regexemp/history.htm> (last visited Dec. 15, 2011).

80. BLACK’S LAW DICTIONARY 1475 (9th ed. 2009) (defining a security as any “[c]ollateral given or pledged to guarantee the fulfillment of an obligation”).

81. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006); Elisabeth Keller & Gregory A. Gehlmann, *A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 347 (1988) (describing the events that led to the passing of the 1934 Act and the deficiencies it addressed).

82. Walsh, *supra* note 75, at 1049. Congress felt the 1934 Act was necessary, in part, to regulate secondary trading in the securities markets; therefore, it created the SEC to do so. ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL, 1933–35* (1958).

83. Lambert, *supra* note 76 (discussing the 1934 Act’s requirements); William L. Wunder, *Securities Exchange Act of 1934: The New Deal Legislation That Regulated the Stock Market*, SUITE101 (Dec. 30, 2009), <http://suite101.com/content/securities-exchange-act-of-1934-a184228> (describing the 1934 Act’s provisions).

84. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006). Section 21F became the foundation for future whistleblower regulations. *Id.*

85. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (describing the whistleblower provisions found in § 21F of the 1934 Act).

86. *Id.*; see also Doug Cornelius, *Proposed Rules for Implementing the Whistleblower Provisions from Dodd-Frank*, COMPLIANCE BLDG. (Nov. 3, 2010), <http://www.compliancebuilding.com/2010/11/03/proposed-rules-for-implementing-the-whistleblower-provisions-from-dodd-frank> (explaining that the Dodd-Frank Act’s whistleblower provisions were based on the

proved ineffective, partially due to a ten percent reward cap that reduced the incentives for employees to come forward.<sup>87</sup> Although unsuccessful at the time, the concepts the provisions created continue to exist today in a modified form.<sup>88</sup>

#### D. *The False Claims Act*

Whistleblower regulation saw little improvement until 1986 when Congress amended the FCA, and it dramatically changed the structure of whistleblower incentives.<sup>89</sup> Congress originally enacted the FCA in 1863 to combat contractors selling faulty weapons and supplies to the military.<sup>90</sup> In 1986, Congress expanded the scope of this law to prevent the false submission of claims for the payment of government contracts.<sup>91</sup> Traditionally, the government used resources such as auditors and civil investigators to uncover this type of fraud.<sup>92</sup> However, expert estimates showed that the government was losing as much as fifty billion dollars annually because of fraudulently submitted claims.<sup>93</sup>

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1934 Act).

87. 15 U.S.C. § 78u-6 (2006) (amended 2010); *see also* Robert R. Stauffer & Andrew D. Kennedy, *Dodd-Frank Act Promises Large Bounties for Whistleblowers*, LAW.COM (Aug. 23, 2010), [http://www.law.com/jsp/law/article.jsp?id=1202470880915&DoddFrank\\_Act\\_Promises\\_Large\\_Bounties\\_for\\_Whistleblowers](http://www.law.com/jsp/law/article.jsp?id=1202470880915&DoddFrank_Act_Promises_Large_Bounties_for_Whistleblowers) (analyzing the reasons why prior whistleblower provisions were inadequate).

88. *See infra* Part II.E (discussing SOX's whistleblower provisions, which incorporated § 21F of the 1934 Act); Part III.B (analyzing the Dodd-Frank Act's whistleblower provisions, which also incorporated § 21F of the 1934 Act).

89. *See* Joshua W. Averill, *Encouraging Individuals to Report Government Contracting Fraud: The Anti-Retaliation Provision of the Federal False Claims Act Should Protect Everyone Who Reports or Helps Prosecute Fraudulent Conduct*, 77 WASH. U. L.Q. 901, 906 (1999) (explaining that the 1986 amendments to the FCA added whistleblower provisions to protect employees who exposed fraud perpetrated on the U.S. government by their employers).

90. Averill, *supra* note 89, at 906; *see also* Robert E. Johnston, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 GEO. WASH. L. REV. 609, 613-14 (1994) (discussing the history of the FCA and Congress's specific reasons for enacting the 1986 amendments).

91. 31 U.S.C. §§ 3729-3733 (2006). The Senate Judiciary Committee stressed the need to protect employees coming forward with fraud. S. REP. NO. 99-345, at 1; *see also* *What is the False Claims Act & Why is it Important?*, TAXPAYERS AGAINST FRAUD, <http://www.taf.org/whyfca.htm> (last visited Dec. 15, 2011) (analyzing the important provisions of the FCA).

92. Depoorter & De Mot, *supra* note 9, at 138. Until 1986, the government only used internal resources to track down and litigate claims of fraud against it. *Id.* Because the government's losses were so large, lawmakers amended the FCA in 1986 to decrease such losses. Todd B. Castleton, Comment, *Compounding Fraud: The Costs of Acquiring Relator Information Under the False Claim Act and the 1993 Amendments to Federal Rules of Civil Procedure*, 4 GEO. MASON L. REV. 327, 328 (1996). Since then, the FCA has been effective in soliciting the public's help based on the ease of bringing a claim and the size of awards that induce individuals to step forward. *Id.*

93. S. REP. NO. 99-345, at 3 (explaining the government's losses that were remedied by the FCA). *See generally* Averill, *supra* note 89 (suggesting that a major concern with the FCA was

With such staggering annual losses, the government looked to enlist citizens to reduce the fraud being perpetuated against it.<sup>94</sup> Under the FCA, in exchange for bringing forward claims of fraud on behalf of the government in a *qui tam* action, the government awarded citizens with a percentage of its total recovery.<sup>95</sup> This law increased public awareness of corporate fraud against the government and simultaneously made it more difficult for corporations to commit fraud.<sup>96</sup> Based in part on claims brought by citizens under the FCA, the Department of Justice estimated a collection of \$2.4 billion dollars in 2009 and more than \$24 billion since the FCA passed in 1986.<sup>97</sup> The FCA influenced future whistleblower provisions because it proved that individuals with private knowledge are able to uncover and prevent a significant amount of corporate fraud.<sup>98</sup> Congress passed the FCA to attract whistleblowers through incentives<sup>99</sup> and, unlike prior legislation, it was successful.

#### E. The Sarbanes-Oxley Act of 2002

SOX represents a more recent attempt at effective whistleblower legislation.<sup>100</sup> Much like its predecessors, SOX was enacted as a

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application of the *qui tam* concept to the losses being faced by the government).

94. Robert D. Cooter & Nuno Garoupa, *The Virtuous Circle of Distrust: A Mechanism to Deter Bribes And Other Cooperative Crimes* (Nov. 7, 2000) (unpublished manuscript), available at <http://www.bepress.com/blewp/default/vo12000/iss2/art13>; see also Averill, *supra* note 89, at 906–08 (describing the government’s objective to diminish the number of fraudulent claims brought); *What is the False Claims Act & Why is it Important?*, *supra* note 91 (describing *qui tam* claims).

95. Press Release, U.S. Dep’t of Justice, *Justice Dep’t Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986* (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html> (describing the FCA’s success in encouraging whistleblowers to bring claims on behalf of the government and the losses recovered as a result); see also Averill, *supra* note 89, at 902 n.9 (discussing the FCA’s promotion of *qui tam* actions).

96. Rapp, *supra* note 6, at 61. Compared to securities litigation, the FCA has been more effective in shedding light on serious cases of fraud. *Id.* Thus, the methods utilized in the FCA seem to be more effective deterrents than those in other laws and regulations. Geoffrey Christopher Rapp, *On the Liability of Corporate Directors to Holders of Securities for Illegal Corporate Acts: Can the Tension Between the “Net Loss” and “No-Duty-to-Disclose” Rules be Resolved?*, 7 *FORDHAM J. CORP. & FIN. L.* 101, 122 (2001) (noting lessons from the FCA that could reduce corporate fraud).

97. Stauffer & Kennedy, *supra* note 87 (noting the money the government recovered and awarded to whistleblowers).

98. *Id.* (suggesting that the FCA has influenced states and cities to institute similar provisions to prevent corporate fraud); see also Castleton, *supra* note 92, at 335 (explaining how it is easier to recover under an FCA claim because the statute holds companies liable for the actions of their employees).

99. See S. REP. NO. 99-345, *supra* note 91 (discussing the steps necessary to accomplish Congress’s goal of encouraging whistleblowers to come forward); see also Averill, *supra* note 89, at 906–07 (highlighting Congress’s plan to have employees bring claims the government might not otherwise discover).

100. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, PUB. CO. ACCOUNTING REFORM AND

reaction to events that ravaged the financial markets.<sup>101</sup> In the years leading up to 2002, many multinational corporations were victims of corporate fraud, which ended up costing investors billions of dollars and sent many of these investors and corporations into insolvency.<sup>102</sup> This fraudulent activity was attributed to a lack of corporate governance and left lawmakers questioning the structure of “Corporate America.”<sup>103</sup>

Following this chain of events, Congress sought to address the weaknesses in corporate structure and avoid a similar catastrophe in the future.<sup>104</sup> A major goal of SOX was to reduce fraud by forcing corporations to submit more reliable financial statements and to ensure that auditors could recognize problems at earlier points in time.<sup>105</sup>

SOX was supposed to minimize fraud perpetrated by individuals within the corporation or closely connected to it.<sup>106</sup> However, because compensation for these parties was tied to the corporation’s performance, the monetary incentive to participate in fraud outweighed the fiduciary duty to verify the corporation’s adherence to rules and regulations.<sup>107</sup>

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INVESTOR PROT. ACT, S. REP. NO. 107-205, at 4 (2002). SOX’s goal was to address weaknesses in the capital markets, which were evidenced by the failures of audit functions and other checks and balances. *Id.*; see also Valeria Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 832 (2007) (discussing the failure of prior whistleblower provisions to adequately address corporate fraud as expected).

101. Andrew Skouvakis, Comment, *Exiting the Public Markets: A Difficult Choice for Small Public Companies Struggling with Sarbanes-Oxley*, 109 PENN ST. L. REV. 1279, 1281 (2005) (stating that a purpose of SOX was to address the major corporate bankruptcies in 2001); see also Brickey, *supra* note 48, at 358 (noting that one reason SOX was enacted was to prevent corporate scandals such as Enron).

102. Brickey, *supra* note 48, at 357. Leaders of corporations such as Enron, WorldCom, and Tyco were found guilty of false reporting and fraudulent issuance of their corporations’ financial data. *Id.* In fact, fraud penetrated such deep levels within these corporations that even external auditors were involved. *Id.* For example, partners at accounting giant Arthur Andersen were complicit in Enron’s fraudulent behavior. Daniel Kadlec et al., *Enron: Who’s Accountable?*, TIME MAG. (Jan. 13, 2002), <http://www.time.com/time/magazine/article/0,9171,1001636,00.html>.

103. Stoltenberg et al., *supra* note 34, at 457. Critics highlighted the lack of regulation of the U.S. corporate system and argued that other countries’ regulations would have prevented the proliferation of fraud at such high levels. Andrew Leckey, *Enron Waves Fade, but Effects Remain*, CHI. TRIB. (July 1, 2007), <http://www.chicagotribune.com/business/chi-ym-enron-0701jul01.0,230,4064.story>.

104. Stoltenberg et al., *supra* note 34, at 457; Eric Pfanner, *Investor Beware: The Next Enron May be Lurking in Europe or Japan*, N.Y. TIMES (Jan. 26, 2002), [http://www.nytimes.com/2002/01/26/business/worldbusiness/26iht-burnout\\_ed3.html](http://www.nytimes.com/2002/01/26/business/worldbusiness/26iht-burnout_ed3.html) (warning that a similar fate could befall other countries if regulatory changes were not made).

105. Skouvakis, *supra* note 101, at 1283–87 (describing SOX’s requirements and its potential to catch fraud before its effects become irreversible); Leckey, *supra* note 103.

106. S. REP. NO. 107-146, at 10 (2002). Congress believed that whistleblowers could play a major role in preventing fraud. *Id.*; see also Levy, *supra* note 55 (analyzing SOX’s goals).

107. See Jonathan H. Gabriel, *Misdirected? Potential Issues with Reliance on Independent Directors for Prevention of Corporate Fraud*, 38 SUFFOLK U. L. REV. 641, 645 (2005) (noting that directors and other parties within a corporation sometimes lack independence); see also

The relevant provisions within SOX addressing whistleblowers were §§ 301 and 806.<sup>108</sup> Section 301 created an employee reporting system designed to catch instances of corporate fraud.<sup>109</sup> Its goal was to provide confidential reporting methods for questionable accounting and auditing practices and reduce employer retaliation.<sup>110</sup> Section 806 imposed both civil and criminal liability on companies that take retaliatory actions against whistleblowers and entitled these whistleblowers to reinstatement or some other form of recourse.<sup>111</sup> Although no financial incentives similar to those found in the FCA were created, § 806 was significant, in theory, because it penalized corporations that failed to address fraud and/or punished the whistleblowers who exposed it.<sup>112</sup>

Several years after the enactment of SOX, it became clear that its provisions were not practical and would not be effective in practice.<sup>113</sup> Employees were subject to an exceptionally high burden of proof and had a very limited timeframe—ninety days—to develop a successful claim.<sup>114</sup> Furthermore, courts' varying interpretations of SOX created

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Donald E. Pease, *Outside Directors: Their Importance to the Corporation and Protection from Liability*, 12 DEL. J. CORP. L. 25, 33 (1987) (explaining that it is difficult for auditors and directors to maintain independence).

108. 18 U.S.C. § 1514A (2006); *see also* Watnick, *supra* note 100, at 835 (discussing SOX's whistleblower provisions).

109. *See* 18 U.S.C. § 1514A (describing the employee reporting system); *see also* *Sarbanes-Oxley: "Whistleblower" Provisions*, EDWARDS & ANGELL LLP, <http://www.eapdlaw.com/files/news/783c4747-110c-47ee-a66a-23c692656351/presentation/newsattachment/03e2ce05-6917-4c1e-8e5b-2460b922828a/media.33.pdf> (last visited Dec. 15, 2011) (noting that corporations must allow for internal complaints).

110. *Sarbanes-Oxley: "Whistle-Blower" Provisions*, *supra* note 109. The anonymity requirement does not extend to complainants made by non-employees. *Id.*

111. *Compare* *Graham Cnty. Soil & Water Conservation Dist. v. U.S.*, 545 U.S. 409 (2005), with *Ventress v. Japan Airlines*, 603 F.3d 676 (2010) (demonstrating that courts have applied SOX in different ways, meaning there is no guaranteed recourse for individuals who bring claims).

112. 17 C.F.R. § 240.10b-5 (2003). Section 806 provides a private right of action to employees experiencing retaliation at the hands of the corporation. *Id.* Delaware courts have applied this using the standard of fair dealing and the duties of care and loyalty. Skouvakis, *supra* note 101, at 1294.

113. TRACY COENEN, *ESSENTIALS OF CORPORATE FRAUD* 196 (2008). The initial excitement that SOX's whistleblower provisions generated quickly faded after nearly every case was dismissed or settled. Michael Hudson, *Federal Bureaucracy Dismisses Most Sarbanes-Oxley Whistleblower Claims*, CTR. FOR PUB. INTEGRITY (July 22, 2010), <http://www.publicintegrity.org/articles/entry/2275/> (demonstrating that only twenty-five out of the 1066 whistleblower claims brought to the Department of Justice through June 30, 2010 were upheld).

114. Kim, *supra* note 9, at 260. SOX's whistleblower provisions gave claimants ninety days to bring a claim. *Id.* Otherwise, whistleblowers had to go through other administrative avenues, such as the Department of Labor or the Occupational Safety and Health Administration. *Id.*; *see also* Watnick, *supra* note 100, at 833 (claiming that SOX's whistleblower provisions were inadequate to protect employees because the process for bringing a claim proved too cumbersome).

discrepancies in its application, making it unfairly arbitrary.<sup>115</sup> These deficiencies greatly diminished the success of SOX's whistleblower provisions.<sup>116</sup>

#### F. Financial Crisis of 2008

Congress's most recent attempt to improve the ineffective whistleblower provisions in prior legislation followed the 2008 financial crisis.<sup>117</sup> Between 2002 and 2007, the U.S. economy experienced extraordinary growth as stock market indices reached record levels, the public benefitted from increased spending power, and unemployment rates fell to historically low levels.<sup>118</sup> However, beginning in April 2007, the U.S. economy began a rapid decline.<sup>119</sup> Many lenders—especially mortgage lenders—had issued large loans to unqualified individuals who could not finance these loans.<sup>120</sup> As a result, some of the industry's leading mortgage lenders were forced into bankruptcy, primarily those issuing subprime mortgages—high interest loans issued to borrowers who would otherwise be unable to qualify for a loan.<sup>121</sup>

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115. 148 Cong. Rec. E1451-03 (daily ed. Jul. 25, 2002) (statement of Rep. Sununu) (explaining that the inconsistencies in cases relating to whistleblowers included how to define an employee, what constitutes retaliation, and whether a court has jurisdiction over claims); see also James L. Buchwalter, *Construction and Application of Whistleblower Provision of Sarbanes-Oxley Act*, 18 U.S.C.A. § 1514(A)(a)(1), 15 A.L.R. Fed. 2d 315, 325–36 (2010) (analyzing case law that interpreted SOX's whistleblower provisions inconsistently).

116. See *Welch v. Choa*, 536 F.3d 269, 279 (4th Cir. 2008) (demonstrating SOX's failure to adequately protect whistleblowers and noting that after a whistleblower came forward, he was in a worse position than before he brought his claim); see also Moberly, *supra* note 74, at 1121 (describing how fear of retaliation prevented many employees from filing a whistleblower claim under SOX).

117. See *infra* Part III.F (discussing the 2008 financial crisis and the problems that arose as a result).

118. Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39, 40 (2009) (discussing the events leading up to the 2008 financial crisis); David Blanchard, *Good News for U.S. Economy (Unless You Work In A Factory)*, INDUSTRY WK. (Jan. 2, 2007), <http://forums.industryweek.com/showthread.php?t=705> (discussing the prosperity throughout the world and in most parts of the United States).

119. Andrew J. Ceresney, Gordon Eng & Sean R. Nuttall, *Regulatory Investigations and the Credit Crisis: The Search for Villains*, 46 AM. CRIM. L. REV. 225, 225–227, 231 (2009) (noting how state and federal governments began looking for a scapegoat following the 2008 financial crisis because they were unable to explain the rapid economic decline); see also *60 Minutes: A Look at Wall Street's Shadow Market* (CBS television broadcast Oct. 5, 2008), available at <http://www.cbsnews.com/stories/2008/10/05/60minutes/main4502454.shtml> (documenting that the economy was continuing its historic rise until it suddenly collapsed with little warning).

120. See Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 2 (2009) (analyzing the fraudulent lending practices that contributed to the 2008 financial crisis); see also Stephen Labaton, *Agency's '04 Rule Lets Banks Pile Up New Debt*, N.Y. TIMES, Oct. 3, 2008, at A1 (discussing many banks' irresponsible lending practices).

121. Steven M. Davidoff & David T. Zaring, *Regulation by Deal: The Government's*

Fraudulent activities, including misrepresentation on financial statements, nontraditional lending, and excessive borrowing, were rampant.<sup>122</sup>

The 2008 financial crisis can partially be attributed to large financial institutions' risky business practices.<sup>123</sup> In hindsight, some type of internal intervention may have reduced the damages these fraudulent activities caused.<sup>124</sup> The 2008 financial collapse demonstrated the need for individuals within corporations capable of discovering and exposing fraudulent activity before the effects of such activity are irreversible.<sup>125</sup>

There were vast grievances in corporate governance leading up to the 2008 financial crisis.<sup>126</sup> Specifically, the crisis raised questions of corporate oversight and fraud.<sup>127</sup> Critics have cited issues ranging from excessive executive compensation to the government's inability to regulate corporations as additional factors contributing to the financial collapse.<sup>128</sup> At the heart of all these theories lies the failure of corporate

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*Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 471 (2009) (analyzing the wide range of institutions that were providing subprime loans to borrowers); *see also* Peter Boone & Simon Johnson, *Way Too Big to Fail*, NEW REPUBLIC (Nov. 7, 2010, 11:00 PM), <http://www.tnr.com/article/economy/magazine/78563/way-too-big-fail> (defining subprime mortgages).

122. Zywicki & Adamson, *supra* note 120, at 2 (explaining that the actions taken by banks and other entities should have been classified as fraudulent). In the middle of the decade, the FBI investigated mortgage lenders and found their activities to be fraudulent. Terry Frieden, *FBI Warns of Mortgage Fraud 'Epidemic'*, CNN (Sept. 17, 2004, 5:44 PM), <http://www.cnn.com/2004/LAW/09/17/mortgage.fraud/>. The FBI found many loans supported by insufficient down payments and even non-existent money. *Id.* But banks, homeowners, and the government largely ignored these discoveries. *Id.*

123. Moran, *supra* note 3, at 8. Several Wall Street financial institutions struggled and ultimately failed to survive the 2008 financial crisis. *Id.* at 13. As a result of these failures, channels of credit that were sources of economic growth and prosperity dried up. *Id.* at 13–14. The crisis evolved so quickly that no one could respond to it fast enough. *Id.*; *see also* Edmund L. Andrews, *U.S. Details \$800 Billion Loan Plans*, N.Y. TIMES, Nov. 26, 2008, at A1 (acknowledging that the financial sector was largely responsible for the 2008 financial crisis; yet the government still sent much of its aid money to these institutions).

124. *See supra* Part II.B (opining that if a whistleblower stepped in at any of these suspect institutions, it is possible that the banks would not have been able to commit fraud to the extent they did).

125. Moran, *supra* note 3, at 51; Rapp, *supra* note 6, at 61 (suggesting that corporate fraud can be prevented by increasing the incentives for whistleblowers to expose such fraud).

126. *See Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions: Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs*, 110th Cong. (2008) (identifying several major causes of the 2008 financial crisis).

127. Moran, *supra* note 3, at 12 (discussing the excessive spending and compensation within corporations prior to the 2008 financial crisis); Posner & Vermeule, *supra* note 3, at 1619 (contending that many of the practices within banks bordered on fraud).

128. Posner & Vermeule, *supra* note 3, at 1621 (listing the many factors analysts believe contributed to the financial crisis, many of which were never considered before the financial crisis).

leaders to fulfill their fiduciary duties to stakeholders.<sup>129</sup> Generally, managers and executives have a duty to provide stakeholders with an honest, unbiased opinion of the corporation's condition.<sup>130</sup> The failure of corporate leaders to abide by this duty, coupled with a lack of motivation or ability for anyone else within these corporations to come forward, created a perfect storm that led to the disastrous collapse of U.S. financial markets.<sup>131</sup>

### III. DISCUSSION

The 2008 financial crisis was one of the most financially devastating events in U.S. history.<sup>132</sup> Congress reacted by enacting the Dodd-Frank Act in an effort to establish a more stringent corporate governance policy.<sup>133</sup> First, this Part discusses Congress's intentions in passing the Dodd-Frank Act and the corporate governance changes it promotes.<sup>134</sup> Second, this Part addresses how the Dodd-Frank Act's whistleblower provisions will effect whistleblower participation and regulation.<sup>135</sup>

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129. See Hurt, *supra* note 3, at 951–57 (exemplifying Bernie Madoff as a corporate leader who abandoned his responsibilities to stakeholders to improve his own financial position); see also Posner & Vermeule, *supra* note 3, at 1623 (explaining how each troubled corporation had leaders and subordinates who should have understood the likely consequences of their corporation's risky or fraudulent behavior).

130. ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 395–96 (S.D. Tex. 2008) (holding that a corporation's board of directors has a duty to its shareholders and, when the corporation becomes insolvent, to its creditors); Michelle Harner, *Economic Crisis and Boards' Fiduciary Duties*, CONGLOMERATE (Nov. 10, 2008), <http://www.theconglomerate.org/2008/11/economic-crisis.html> (noting that courts in Delaware, as well as other jurisdictions, have held that a corporation's board of directors owes a duty to the corporation's shareholders until the corporation becomes insolvent, when the board's duty shifts to the corporation's creditors).

131. Rapp, *supra* note 6, at 56–57 (discussing a whistleblower's failure to expose corporate fraud and prevent the 2008 financial crisis).

132. See Kenneth W. Dam, *International Law and the Financial Crisis: The Subprime Crisis and Financial Regulation: International and Comparative Perspectives*, 10 CHI. J. INT'L L. 581, 581–84 (2010) (describing several causes of the 2008 financial crisis and its impact on the economy); see also FIN. SERV. AUTH., THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS 18 exhibit 1.10 (2009), available at [http://www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf) (analyzing the potential impact of the financial sector on the economy).

133. *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS (July 1, 2010), [http://banking.senate.gov/public/\\_files/070110\\_Dodd\\_Frank\\_Wall\\_Street\\_Reform\\_comprehensive\\_summary\\_Final.pdf](http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf) (noting that the Dodd-Frank Act was passed in response to the failures that led to the 2008 financial crisis and that the goal of the Act was to “restore responsibility and accountability in our financial system”); see also Prentice & Donelson, *supra* note 41, at 45 (discussing corporate governance from the perspective of an inside trader and suggesting that some of the fraud that led to the 2008 financial crisis would have been discovered if there had been a whistleblower to notify the public of what was occurring).

134. See *infra* Part III.A (discussing the Dodd-Frank Act generally and the Congressional intent behind it).

135. See *infra* Part III.B (discussing the Dodd-Frank Act's whistleblower provisions).

### A. *The Dodd-Frank Act*

President Obama signed the Dodd-Frank Act into law on July 21, 2010 in response to the 2008 financial crisis that shook the global economy.<sup>136</sup> Encompassing 2300 pages and sixteen titles, the Dodd-Frank Act was enacted to deter fraud as well as other illegal activities that plagued business practice, financial regulation, and corporate policy.<sup>137</sup> Additionally, as a result of the very public collapse of multiple financial institutions and a universal concern surrounding corporate leadership, there was a glaring deficiency in the integrity of the country's financial structure.<sup>138</sup> The Dodd-Frank Act sought to restore public confidence in the financial system, prevent another financial crisis, and deflate any new economic bubbles before they caused a similar future crisis.<sup>139</sup> The Act addressed problems in the banking sector, the securities markets, and on Wall Street, as well as executive compensation, corporate governance, and, with less attention, whistleblowers.<sup>140</sup>

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136. *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133 (noting that the Dodd-Frank Act had considerable support based on the events that caused the 2008 economic collapse); *see also* Annie Lowrey, *Obama to Sign Dodd-Frank Financial Regulatory Reform Bill Into Law Today*, WASH. INDEP. (July 21, 2010, 11:20 AM), <http://washingtonindependent.com/92161/obama-to-sign-dodd-frank-financial-regulatory-reform-bill-into-law-today> (describing how the Dodd-Frank Act addressed several problems in the financial industry and corporate governance).

137. *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133. The Dodd-Frank Act sought to prevent corporations from creating another major economic collapse. *Id.* Congress assigned the application of many of the Dodd-Frank Act's regulations to the SEC. *Id.*; *see also* William Sweet, *Dodd-Frank Act Becomes Law*, HARV. L. SCH. FORUM ON CORP. GOV. & FIN. REG. (July 21, 2010, 11:49 AM), <http://blogs.law.harvard.edu/corpgov/2010/07/21/dodd-frank-act-becomes-law/> (discussing how the Dodd-Frank Act will affect businesses and the changes they must make to comply with the new law).

138. Sweet, *supra* note 137 (discussing the lack of regulation on Wall Street and other parts of the U.S. financial sector as a major cause of the financial crisis); James Lieber, *What Cooked the World's Economy*, VILLAGE VOICE (Jan. 28, 2009), <http://www.villagevoice.com/2009-01-28/news/what-cooked-the-world-s-economy/> (explaining the general fear created by the collapse of several banks that were considered to be part of the backbone of the financial sector); *see also* *60 Minutes: A Look at Wall Street's Shadow Market*, *supra* note 119 (criticizing the growing number of corporate leaders found abandoning their fiduciary duties to increase their personal wealth).

139. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376, 1376 (2010) ("To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."); *see also* Sweet, *supra* note 137 (exploring the Dodd-Frank Act's changes to banking regulations).

140. § 1, 124 Stat. at 1376 (detailing the provisions of the Dodd-Frank Act, the majority of which were aimed at regulating corporations and the U.S. financial markets); *see also* Beth S. DeSimone, James D. Richman & Tengfei (Harry) Wu, *Down Payment: The Dodd-Frank Act Takes Aim at the Primary Abuses Uncovered During the Mortgage Meltdown*, 33 L.A. LAW. 35, 35 (2011) (analyzing whether the Dodd-Frank Act will succeed in addressing issues in the

### B. *The Dodd-Frank Act's Whistleblower Provisions*

The Dodd-Frank Act's whistleblower provisions are largely based on provisions in the 1934 Act and SOX.<sup>141</sup> These earlier provisions established significant standards, including the definition of a whistleblower, financial incentives and payouts for whistleblowers, and security features to prevent retaliation against whistleblowers.<sup>142</sup> Although its whistleblower provisions are based on prior legislation, the Dodd-Frank Act implemented significant changes to create provisions that are more effective in a practical sense.<sup>143</sup> A majority of these changes sought to prevent retaliation and add monetary benefits to create more significant incentives for whistleblowers to come forward.<sup>144</sup>

#### 1. The Dodd-Frank Act's Amendment to the Definition of a Whistleblower

The Dodd-Frank Act amended the definition of whistleblower to include four specific requirements.<sup>145</sup> To be a whistleblower under § 922 of the Act, an individual must “voluntarily furnish original information resulting in a successful enforcement action.”<sup>146</sup> An

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mortgage industry and whether it will limit the unjustified risks taken by banks that engage in unsecured lending practices).

141. § 922, 124 Stat. at 1841. SOX, which was based largely on the 1934 Act, gave the SEC the responsibility to regulate, and the SEC has adopted rules to supplement the Dodd-Frank Act. *Id.*; Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,300.

142. *See supra* Part II.C–E (describing past whistleblower provisions, the definitions and standards they created, and the effect they had on whistleblowers and corporate governance).

143. § 922, 124 Stat. at 1841–49 (explaining how Congress used general concepts from the whistleblower provisions in prior legislation in formulating the Dodd-Frank Act but made certain changes to alter the Act's practical application). *See generally* Securities Whistleblower Incentives and Protection, *supra* note 17 (adopting rules that alter the treatment of whistleblowers from past whistleblower provisions in the 1934 Act and SOX).

144. *See supra* Part II.E (discussing the negative treatment of whistleblowers that academics have documented and Congress has recognized).

145. § 922, 124 Stat. at 1841–49; *see also SEC's Proposed Rules for Implementing Dodd-Frank Whistleblower Provisions: Important Implications for Employers*, MORGAN LEWIS (Nov. 12, 2010), <http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/cd8ce0db435c-484f-b3f9-0b81c3df5a86> (discussing the SEC's proposed rules for applying the Dodd-Frank Act's whistleblower provisions and how the Act's definitions and requirements will affect practitioners).

146. § 922, 124 Stat. at 1841–49. By redefining “whistleblower,” the Dodd-Frank Act has changed who can come forward as a whistleblower and claim an award. Maxwell S. Kennerly, *The Idiot's Guide to Whistleblowing Under the Dodd-Frank Wall Street Reform Act*, LITIG. & TRIAL (Sept. 10, 2010), <http://www.litigationandtrial.com/2010/09/articles/the-law-for-non-lawyers/the-idiots-guide-whistleblowing-under-the-dodd-frank-wall-street-reform-act/>. The SEC is attempting to make it easier for individuals to become whistleblowers through its adopted rules. *Id.* Complaints that whistleblower can bring include: manipulation of a security's price or volume, fraudulent or unregistered offer or sale of securities (including Ponzi schemes, high yield investment programs, or other investment programs), insider trading, false or misleading

individual is one or more persons or corporations who come forward with original information.<sup>147</sup> The information in question must be given voluntarily and free from external pressure.<sup>148</sup> In addition, the information uncovered cannot include discoveries made in the course of employment or an individual's employment responsibilities.<sup>149</sup> Therefore, auditors and other individuals with regulatory positions cannot bring claims as whistleblowers.<sup>150</sup> The Act states that "original information" is derived from "the individual's independent knowledge or analysis."<sup>151</sup> Thus, the SEC cannot receive this information from any other source nor can it be derived from judicial or administrative hearings.<sup>152</sup>

Finally, the furnishing of information must result in successful enforcement, which requires the SEC to be able to apply sanctions or

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statements about a company, failure to file required reports with the SEC, abusive naked short selling, theft or misappropriation of funds or securities, fraudulent conduct or other problems associated with municipal securities transactions or public pension plans, bribery of foreign officials, and other fraudulent conduct. Allen B. Roberts, *The Sounds of New Whistleblower Awards and Protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 4 BLOOMBERG L. REP., no. 32, 2010.

147. § 922, 124 Stat. at 1841–49; *see also* Securities Whistleblower Incentives and Protection, *supra* note 17, at 34,301–04 (supplementing the Act's definition of an "individual" with comments to further explain the Act's requirements).

148. Securities Whistleblower Incentives and Protection, *supra* note 17, at 34,306–34,311 (supplementing the Dodd-Frank Act's definitions of "voluntary" and "information"); *see also* Christine Ricciardi, *SEC Details Whistleblower Protection Under Frank-Dodd*, HOUSING WIRE (Nov. 5, 2010, 12:10 PM), <http://www.housingwire.com/2010/11/05/sec-details-whistleblower-protection-under-dodd-frank> (considering the full extent of the term "voluntary" because the Dodd-Frank Act does not specifically define it).

149. § 922, 124 Stat. at 1841–49 (setting limits on from where information can come); *see also* Securities Whistleblower Incentives and Protection, *supra* note 17, at 34,301–04 (providing the SEC's interpretation of who qualifies as a whistleblower under the Dodd-Frank Act). A person who provides information protected by the attorney-client privilege, obtained illegally, or found in the course of legal, compliance, audit, or governance work within the corporation is not considered to be a whistleblower. *Corporate Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act*, MAYER BROWN (Jul. 29, 2010), <http://www.mayerbrown.com/publications/article.asp?id=9402&nid=6> [hereinafter *Corporate Protections Altered*].

150. *See SEC's Proposed Rules for Implementing Dodd-Frank Whistleblower Provisions: Important Implications for Employers*, *supra* note 145 (discussing individuals who qualify to bring a claim under the Dodd-Frank Act's whistleblower provisions).

151. *See SEC's Proposed Rules for Implementing Dodd-Frank Whistleblower Provisions: Important Implications for Employers*, *supra* note 145 (defining "original information"); *see also* Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,310–11 (clarifying what qualifies as original information under the Dodd-Frank Act's whistleblower provisions).

152. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,310–11 (defining "original information" under the Dodd-Frank Act); *see also* Kevin Griffith, *Whistle Blowing Galore Under the Dodd-Frank Act*, BANK. & FIN. L. REP. (Aug. 24, 2010), <http://www.bankingandfinancelawreport.com/2010/08/articles/bank-regulation/whistleblowing-galore-under-the-doddfrank-act> (noting that information from a source other than the whistleblower's independent knowledge or analysis will not qualify for an SEC award).

some other form of punishment against the corporation.<sup>153</sup> The Act includes successful enforcement as an element to deter individuals merely looking to claim large rewards without a proper cause of action from bringing fraudulent claims.<sup>154</sup> By requiring the establishment of four specific elements, the Act clearly established the class of individuals who can bring valid whistleblower claims and prevented the additional costs associated with fraudulent claims brought by other individuals.<sup>155</sup>

## 2. The Dodd-Frank Act's Facilitation of Whistleblower Participation

Although the Dodd-Frank Act narrowed the requirements to qualify as a whistleblower, those individuals that do qualify now have much larger incentives and easier thresholds for bringing a claim.<sup>156</sup> A hallmark of the Dodd-Frank Act's whistleblower provisions is the Whistleblower Bounty Program.<sup>157</sup> This program mirrors the FCA by

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153. Griffith, *supra* note 152 (stating that successful resolution is required before a whistleblower can qualify for an award under the Dodd-Frank Act); *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes New Whistleblower Program Under Dodd-Frank Act (Nov. 3, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-213.htm> (defining the fourth prong of the whistleblower definition as requiring the SEC to reach a decision in federal court or an administrative action where the SEC obtains monetary sanctions totaling more than \$1 million).

154. Press Release, SEC Proposes New Whistleblower Program Under Dodd-Frank Act, *supra* note 153. Successful completion of the claim is required to prevent the government from paying a fraudulent claim and then having to recoup the award. *Id.* Large awards are likely to attract much attention, requiring regulations to prevent the SEC from hearing or paying fraudulent claims. Michael J. Missal & Matt T. Morley, *Dodd-Frank's Whistleblower Bounties: An Effective Hotline May Keep You Out of Hot Water*, K&L GATES (Sept. 7, 2010), <http://www.klgates.com/dodd-franks-whistleblower-bounties-an-effective-hotline-may-keep-you-out-of-hot-water-09-07-2010/>. To avoid fraudulent claims, the SEC and Congress have created a narrower interpretation for whistleblowers, but they will need to continue to create additional safeguards. *Id.*; *see also infra* Part V.B (discussing methods the SEC could employ to prevent fraudulent claims).

155. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,301–05. The SEC wants to limit fraudulent claims, but it must balance this goal with its desire to maximize the number of quality tips it receives. *Id.* This goal requires the SEC to keep the rules simple to induce the highest possible number of quality whistleblowers. *Id.*; *see also* Griffith, *supra* note 152 (discussing the likelihood of fraudulent claims and methods the SEC can use to avoid the additional costs based as a result).

156. Griffith, *supra* note 152 (explaining how Congress eliminated some of the problems that plagued whistleblowers in the past with the inclusion of incentives and protection from retaliation); *see also infra* Part IV.A (analyzing the incentives the Dodd-Frank Act's whistleblower provisions created).

157. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(b)–(c), 124 Stat. 1376, 1842–43 (2010) (prescribing a significant reward for individuals who bring successful whistleblower claims); *see also* Lora Bentley, *Will Dodd-Frank Whistleblower Provisions Mean False Claims?*, IT BUS. EDGE (Oct. 7, 2010, 4:20 PM), <http://www.itbusinessedge.com/cm/blogs/bentley/will-dodd-frank-whistleblower-provisions-ean-false-claims/?cs=43672> (suggesting that the additional claims will require the SEC to find a way to handle the influx and create a system for separating valid claims from fraudulent claims); Sweet, *supra* note

handsomely awarding successful claims.<sup>158</sup> It not only increases incentives for whistleblowers, it also increases awareness and reduces the tolerance of corporate fraud.<sup>159</sup> The Whistleblower Bounty Program's awards are especially lucrative in large cases of fraud, entitling whistleblowers to between ten and thirty percent of a recovery over \$1,000,000.<sup>160</sup>

Another significant whistleblower provision within the Dodd-Frank Act is the increased protection from employer retaliation.<sup>161</sup> If a whistleblower is terminated in retaliation for coming forward, the Act provides for reinstatement, rewards him or her double back-pay for missed days, and reimburses his or her attorneys' fees.<sup>162</sup>

Additionally, the Dodd-Frank Act's whistleblower provisions increased the statute of limitations to bring a whistleblower claim to 180 days and to bring a retaliation claim to six years from the date on which the retaliation occurred or three years after the material facts are known.<sup>163</sup>

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137 (suggesting that the creation of the whistleblower bounty means more people are likely to bring claims to the SEC).

158. Kennerly, *supra* note 146 (discussing the additional incentive employees now have to bring claims of fraud against their corporations); *see also supra* Part II.D (discussing the FCA and its attraction of more whistleblowers after implementation of a bounty provision).

159. *See* Kennerly, *supra* note 146 (analyzing how the Dodd-Frank Act will affect fraud and corporate governance). *See generally* Securities Whistleblower Incentives and Protections, *supra* note 17 (discussing the purpose of the Dodd-Frank Act).

160. § 922(b)(1), 124 Stat. at 1842 (setting forth the reward amounts for successful whistleblower claims); *see also* Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,643–64 (detailing the awards given, the limitations on those rewards, and the SEC's discretion to decide the exact reward given to whistleblowers based on the quality of each claim and the type of fraud revealed); Doug Clark, *Opening the Floodgates: The Dodd-Frank Whistleblower Provisions' Impact on Corporate America*, BOARDMEMBER.COM (Oct. 28, 2010), <http://www.boardmember.com/Opening-the-Floodgates-The-Dodd-Frank-Whistleblower-Provisions-Impact-on-Corporate-America.aspx> (explaining the SEC's discretion to determine reward amounts for successful whistleblower claims).

161. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,301–05, 34,363 (explaining the anti-retaliation provisions protecting whistleblowers under the Dodd-Frank Act); *see also Corporate Protections Altered*, *supra* note 149 (analyzing the anti-retaliation provisions from a practitioner's perspective); *Whistleblowers Win with Dodd-Frank Reform*, BOARDMEMBER.COM, [http://www.boardmember.com/Article\\_Details.aspx?id=4294967374](http://www.boardmember.com/Article_Details.aspx?id=4294967374) (last visited Dec. 15, 2011) (providing insight from a corporation's view and detailing the effect the anti-retaliation provisions will have on corporations).

162. Griffith, *supra* note 152 (claiming that retaliation will become another lucrative portion of a whistleblower's claim); *see also* Bruce Carton, *Pitfalls Emerge in Dodd-Frank Bounty Provision*, COMPLIANCE WK., Oct. 2010, at 22, 22 (stating that the interest in bringing claims against corporations will be high because the downside of bringing a claim is limited even for invalid claims).

163. *See infra* Part IV.A (comparing the statute of limitations for whistleblowers under SOX and the Dodd-Frank Act); Griffith, *supra* note 152 (discussing the effect of the new statute of limitations under the Dodd-Frank Act); *see also* David Martin et al., *Enhanced Protection for Whistleblowers Against Employment Retaliation*, COVINGTON & BURLING LLP (July 29, 2010),

Finally, the Dodd-Frank Act's whistleblower provisions require whistleblowers to only identify themselves when collecting an award.<sup>164</sup> Section 922 even allows an individual who is potentially liable for fraud to come forward as an anonymous whistleblower without fear of punishment.<sup>165</sup>

#### IV. ANALYSIS

The Dodd-Frank Act's whistleblower provisions attempted to not only enact a change for whistleblowers, but also for corporate governance in general.<sup>166</sup> Spearheaded by provisions aimed at easing whistleblower participation and increasing potential reporting rewards, the Dodd-Frank Act will greatly influence employees, corporations, and the SEC.<sup>167</sup> However, although the Dodd-Frank Act and its whistleblower provisions sought to leverage corporations and individuals with financial incentives, applying these provisions will be difficult because of the monetary effect on corporations and the SEC.<sup>168</sup> But if these provisions are successful, they stand to change the structure of corporate governance in this country.<sup>169</sup> This Part will first address

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<http://www.cov.com/files/Publication/7ed821ae-f749-485a-9554-a06fde78bdc8/Presentation/PublicationAttachment/e7ed9251-9fa6-46ac-b963-a1ed93390779/Dodd-Frank%20Act%20%20Enhanced%20Protection%20for%20Whistleblowers%20Against%20Employer%20Retaliation.pdf> (discussing the extended statute of limitations under the Dodd-Frank Act for an individual looking to bring either a whistleblower or retaliation claim against a corporation).

164. Martin, et al., *supra* note 1633 (discussing the advantages for whistleblowers to not have to reveal their identities until they collect an award); *see also Dodd-Frank Financial Reform Act, the SEC and Whistleblowers*, *supra* note 145 (analyzing the impact of the anonymity requirement on whistleblowers).

165. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010); *see also Dodd-Frank Financial Reform Act, the SEC and Whistleblowers*, *supra* note 145 (analyzing how the Dodd-Frank Act allows whistleblowers to come forward with claims more frequently).

166. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,300-01 (summarizing how the SEC expects the whistleblower provisions to change the way corporations will act toward corporate governance).

167. *See infra* Part IV.A-C (analyzing the Dodd-Frank Act's effect on employees, corporations, and the SEC).

168. Luis R. Meija & Grayson D. Stratton, *The Extraterritorial Reach of the New Dodd-Frank Whistleblower Law*, DLA PIPER (Sept. 9, 2010), <http://www.dlapiper.com/the-extraterritorial-reach-of-the-new-dodd-frank-whistleblower-law/>. The Dodd-Frank Act's whistleblower provisions have made monetary rewards and sanctions an important factor in whistleblower claims. *Id.* Corporations that face potential sanctions are more likely to avoid fraudulent activity. *Id.* Under laws such as the FCA, the creation of bounties made it thirty percent more likely that an individual would bring a claim, a statistic that Congress would be very happy to duplicate. *Id.*; *see also* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* 13 (Chi. GSB Research Paper No. 08-22 & CRSP Working Paper No. 618, Apr. 22, 2008), *available at* <http://ssrn.com/abstract=891482> (discussing the impact monetary incentives have had on limiting fraud).

169. *See infra* Part IV.A-C (discussing the effects of the Dodd-Frank Act's whistleblower provisions).

how the Dodd-Frank Act's whistleblower provisions will affect whistleblowers.<sup>170</sup> Next, this Part will discuss the efficacy of the provisions in changing the culture of corporate governance.<sup>171</sup> Finally, this Part will analyze how the whistleblower provisions will affect the SEC.<sup>172</sup>

#### A. Increased Incentives for Individuals

Individuals generally stand to gain the most from the Dodd-Frank Act's whistleblower provisions because Congress created greater monetary incentives for employees to come forward.<sup>173</sup> The greatest effect will be seen once whistleblowers decide to come forward.<sup>174</sup> Inevitably, increased protections and monetary awards will make it easier and more enticing for individuals to bring claims.<sup>175</sup> The provisions also reduce the risks associated with coming forward, and whistleblowers now stand to lose much less compared to past whistleblowers.<sup>176</sup>

The Dodd-Frank Act's Whistleblower Bounty Program, which provides monetary awards to individuals who bring legitimate claims, has already begun to influence more whistleblowers than ever before. Within the first few months of the Act's passing, law firms saw a sharp rise in the number of whistleblower inquiries.<sup>177</sup> This spike is partially

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170. See *infra* Part IV.A (analyzing the potential effect the Dodd-Frank Act's whistleblower provisions will have on individuals).

171. See *infra* Part IV.B (analyzing the potential effect the Dodd-Frank Act's whistleblower provisions will have on corporations).

172. See *infra* Part IV.C (analyzing the potential effect the Dodd-Frank Act's whistleblower provisions will have on the SEC).

173. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,325–26. The SEC recognized that whistleblowers have the knowledge but need to be incentivized to come forward with it. *Id.*

174. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,323–27. The Dodd-Frank Act's increased protections for whistleblowers will encourage more individuals to come forward because they will be afforded a level of protection not previously given to similarly situated individuals. See Johnson, *supra* note 67, at 77 (describing how whistleblowers were previously viewed as outcasts or classified as disloyal).

175. *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 26–28 (Cal. Dist. Ct. App. 1959). In *Petermann*, the court held that a corporation cannot fire an employee because he or she refuses to falsely testify. *Id.* Absent laws protecting them, whistleblowers may be less likely to come forward with incriminating information for fear of punishment. *Id.* See generally Moberly, *supra* note 74 (discussing how whistleblowers may be protected by contract).

176. See Kevin LaCroix, *The Dodd-Frank Whistleblower Provisions: Some Other Things to Worry About*, THE D&O DIARY (Nov. 2, 2010), <http://www.dandodiary.com/2010/11/articles/securities-litigation/the-doddfrank-whistleblower-provisions-some-other-things-to-worry-about/> (describing how the Dodd-Frank Act's whistleblower provisions will prevent corporations from retaliating against whistleblowers).

177. Kennerly, *supra* note 146 (observing that an increased number of potential whistleblowers have contacted law firms following the passage of the Dodd-Frank Act compared to the number of potential whistleblowers following the passage of SOX in 2002); LaCroix, *supra*

attributable to the fact that in the past few years, many corporations have been found guilty of committing fraud.<sup>178</sup> As a result, these companies have been forced to pay millions of dollars to the government or regulatory agencies.<sup>179</sup> In turn, whistleblowers stand to receive large percentages of these payments.<sup>180</sup> Motivated by the potential to receive a significant portion of corporate fines, the number of whistleblowers coming forward is likely to significantly rise.<sup>181</sup>

In the past, individuals were reluctant to bring claims of fraud or even acknowledge that corporate fraud was taking place.<sup>182</sup> When employees identified such fraud, the potential for retaliation and other obstacles kept them from coming forward.<sup>183</sup> The Dodd-Frank Act's whistleblower provisions, however, are designed to curtail these obstacles and provide protections to these individuals.<sup>184</sup> Specifically,

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note 176 (hypothesizing that more claims will be brought under the Dodd-Frank Act's whistleblower provisions).

178. See *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 368 (Del. 2006) (citing decisions in which corporations were held responsible for internal fraud); see also Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 525 (2008) (discussing corporate fraud at Hewlett-Packard and noting how common these instances of fraud have become in corporations).

179. Amanda Becker, *New Whistleblower Reward Program Has Law Firms Gearing Up*, WASH. POST (Aug. 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/13/AR2010081305330.html>. Recent fines levied against companies have been larger compared to historical penalties. *Id.* Payments for violating financial regulations include the following: \$800 million (Siemens), \$575 million (KBR-Halliburton), and \$185 million (Daimler). *Id.* This trend began in the early 2000s with the Enron scandal and has continued to grow. *Id.*

180. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(b), 124 Stat. 1376, 1842 (2010) (creating a range of reward amounts whistleblowers stand to receive upon bringing a viable claim of corporate fraud); see also Griffith, *supra* note 152 (discussing the hefty rewards possible under the Dodd-Frank Act's whistleblower provisions).

181. See Missal & Morley, *supra* note 154 (indicating that there will be a larger interest in finding and disclosing fraud simply based on the awards available to whistleblowers and the protections they will receive); see also LaCroix, *supra* note 176 (noting that when corporations are large, the payouts are likely to be large as well, and at least some claims are likely to be successful).

182. See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006) (describing instances of employee retaliation, even after the enactment of SOX); see also Nutt, *supra* note 12, at 206 (describing the proliferation of retaliation throughout corporate America, even after rules were put in place to prevent it).

183. See Nutt, *supra* note 12, at 207 (stating that one of SOX's faults was that it did not prevent retaliatory acts against individuals—a reason why many whistleblowers were reluctant to bring claims); see also Baynes, *supra* note 46 (discussing the low rate of success for claims against retaliation—around thirty-three percent).

184. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34, 301–04 (providing details about the increased protections available against retaliation under the whistleblower provisions); see also *Corporate Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act*, *supra* note 149 (portraying the belief of practitioners that whistleblowers will be protected under the Dodd-Frank Act when bringing claims of shareholder fraud or a securities violation).

the provisions limit retaliatory action.<sup>185</sup> Under the Act, corporations will be subject to strict consequences for failing to comply with the anti-retaliatory requirement.<sup>186</sup> For whistleblowers, this could mean collection of lost earnings and legal fees incurred as a result of the retaliation.<sup>187</sup> The Act also provides for reinstatement, a benefit that did not exist in prior legislation.<sup>188</sup> By removing the fear of retaliation and the negative stigma associated with being a whistleblower, the Dodd-Frank Act's whistleblower provisions will lead to easier re-entry into the corporate world.<sup>189</sup>

Another consequence of increased corporate governance regulation will be an increase in awareness of fraud among employees.<sup>190</sup> As a result of the Act's whistleblower provisions, employees will be more apt to look for fraud.<sup>191</sup> Additionally, the Act provides employees with a longer statute of limitations to bring their claims.<sup>192</sup> Thus, the

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185. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,301–04 (outlining the SEC's explanations and comments regarding retaliation); Ricciardi, *supra* note 148 (explaining how the definition of retaliation under the new Dodd-Frank whistleblower provisions even includes threats or attempts at enforcing a confidentiality agreement).

186. Welch v. Choa, 536 F.3d 269, 279 (4th Cir. 2008) (describing the lack of limitations on retaliation under SOX); *Dodd-Frank Bill Provides Robust Whistleblower Protections*, WHISTLEBLOWER L. BLOG (July 15, 2010), <http://employmentlawgroupblog.com/2010/07/15/dodd-frank-bill-provides-robust-whistleblower-protections/> (suggesting the likelihood that employers will be precluded from treating whistleblowers negatively because of potential fines and reinstatement if the whistleblower is fired).

187. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 922(h)(1), 124 Stat. 1376, 1845–46 (2010) (documenting the requirements for corporations that retaliate against whistleblowers); *see also* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON WHISTLEBLOWER PROGRAM (2010) (documenting the amount of money the SEC expects to pay for certain future claims).

188. § 922(h)(1)(C)(i), 124 Stat. at 1846 (discussing the reinstatement rules under the whistleblower provisions); *see also* *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133 (discussing the consequences for retaliation under the whistleblower provisions).

189. *See* David W. Garland & Allen B. Roberts, *SEC's Proposed Dodd-Frank Anti-Retaliation Rules: What is an Employer To Do?*, WHISTLEBLOWING & COMP. L. BLOG (Dec. 20, 2010), <http://www.whistleblowingcompliancelaw.com/2010/12/articles/restoring-american-financial-s/secs-proposed-doddfrank-antiretaliation-rules-what-is-an-employer-to-do/> (discussing the steps corporations should take in light of the Dodd-Frank Act's anti-retaliation provisions); *see also* Griffith, *supra* note 152 (discussing the standards corporations must follow to comply with the Dodd-Frank Act's anti-retaliation provisions).

190. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (discussing Congress's goals in passing the Dodd-Frank Act). *See also* Baynes, *supra* note 46, at 884 (noting that whistleblowers often have an incentive and duty to bring claims of fraud when such protections are provided).

191. Prentice & Donelson, *supra* note 41, at 36 (explaining the surge in employee awareness regarding fraud following SOX's enactment); *see also* Robert Cookson, *In-house Fraud Cases Surge*, FIN. TIMES (London), May 11, 2009, at 1 (citing a study showing employee willingness to blow the whistle was growing, a phenomenon likely to continue with increased protection).

192. Levy, *supra* note 55, at 232 (reviewing the legislative problems with the SOX whistleblower provisions, one of which was the limited time for bringing valid claims); *Corporate*

changes in the Dodd-Franks Act's whistleblower provisions will increase an individual's ability and desire to bring claims.<sup>193</sup>

### B. Changes Within Corporations

If the effect of past whistleblower legislation is any indication, the Dodd-Frank Act will not completely eliminate corporate fraud.<sup>194</sup> At a minimum, however, these provisions are likely to force corporations to change the way they approach corporate governance.<sup>195</sup> Corporations will likely increase expenditures on corporate governance and pay closer attention to the prevention of fraud so as to avoid potentially steep penalties.<sup>196</sup>

The consequences for violating the Dodd-Frank Act's whistleblower provisions could place corporations in a precarious position.<sup>197</sup> In 2002, the enactment of SOX forced corporations to address significant internal issues in order to avoid negative consequences.<sup>198</sup> For corporations, the Dodd-Frank Act should have a *déjà vu* effect as it will require them to once again make significant improvements to corporate governance.<sup>199</sup> Most significantly, increased whistleblower activity

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*Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act, supra* note 149 (explaining past defenses for whistleblower claims where the statute of limitations had passed and that this problem is less likely under the Dodd-Frank Act).

193. *Corporate Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act, supra* note 149 (explaining the changes in whistleblower protection that will make it easier for whistleblowers to bring claims).

194. Dworkin, *supra* note 64 (expressing the need to improve upon whistleblower protections after the practical limitations of previous legislation became clear); *see also* Levy, *supra* note 55, at 232 (discussing the many problems found in SOX despite being considered ground-breaking at the time of its enactment).

195. *See* Nutt, *supra* note 12, at 201 (predicting that corporations will want to avoid the penalties that would result from fraud and retaliation); *see also* Moran, *supra* note 3 (noting that corporations are extremely motivated to avoid legal liability).

196. Griffith, *supra* note 152 (estimating that the largest influx of whistleblowers and cases of fraud originate within corporations).

197. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (defining the monetary consequences corporations would face for failing to comply with the Act's whistleblower provisions); *see also* Mike Koehler, *Will Dodd-Frank's Whistleblower Provisions Be Exported?*, CORP. COMP. INSIGHTS (Oct. 20, 2010), [http://www.corporatecomplianceinsights.com/2010/will-dodd-franks-whistleblower-provisions-be-exported/?utm\\_source=feedburner&utm\\_medium=twitter&utm\\_campaign=Feed+Corporate+ComplianceInsights+\(Corporate+Compliance+Insights\)](http://www.corporatecomplianceinsights.com/2010/will-dodd-franks-whistleblower-provisions-be-exported/?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed+Corporate+ComplianceInsights+(Corporate+Compliance+Insights)) (describing the financial consequences corporations could face if they do not adapt to the changes made by the Dodd-Frank Act).

198. *See* Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2006) (adding definitions for "investigative and enforcement authority" and "foreign auditor oversight authority," defining corporate expectations after SOX's enactment, and requiring corporations take steps needed to conform to SOX); *see also* Dworkin, *supra* note 64, at 1772 (describing corporate guidelines after SOX's enactment).

199. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,362 (suggesting improvements in corporate governance and strengthening of internal compliance programs).

could result in a surge of corporate expenditures to deal with the defense of whistleblower claims or improvement of internal corporate governance procedures.<sup>200</sup>

Moreover, corporations will face new challenges because one internal misstep could end up costing them millions of dollars.<sup>201</sup> The number of individuals bringing charges of fraud is likely to increase, meaning corporations will incur significant costs to defend themselves.<sup>202</sup> Simultaneously, corporations are more likely to spend money upfront to improve their corporate governance systems in an attempt to minimize lawsuits.<sup>203</sup> But if litigation costs are incurred too quickly, corporations could struggle to find the funds to preemptively address internal governance.<sup>204</sup>

In addition to defending an increasing number of whistleblower claims, corporations will also bear the increased costs arising from retaliation claims.<sup>205</sup> Under the Dodd-Frank Act, retaliatory actions give whistleblowers the right to bring a separate claim against the corporation.<sup>206</sup> As with standard whistleblower claims, corporations will increasingly be forced to defend retaliation claims—even when the

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200. LaCroix, *supra* note 176 (analyzing the issues corporations must consider based on the Dodd-Frank Act's whistleblower provisions); *see also Corporate Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act*, *supra* note 149 (discussing the struggles corporations might have in complying with the Dodd-Frank Act's whistleblower provisions).

201. See Justin Grant, *Dodd-Frank Whistleblower Provision Sparks Concerns Over Costs and False Claims*, WALL ST. & TECH., Oct. 1, 2010, at 29 (reporting the increase in potential cases received by practitioners since the Dodd-Frank Act was enacted); *see also* Griffith, *supra* note 152 (discussing the potential collections for employees and the likelihood of an increase in the number of claims).

202. Levy, *supra* note 55, at 227 (noting that corporations will have to defend themselves more frequently under the Dodd-Frank Act than under SOX); *see also* Carton, *supra* note 162 (noting that the Dodd-Frank Act will “be costly to the companies that may have to defend such complaints”).

203. Prentice & Donelson, *supra* note 41, at 37 (stating that one of the few alternatives to litigation will be for corporations to quickly meet the governance standards within the Dodd-Frank Act).

204. Houman B. Shadab, *Innovation and Corporate Governance: The Impact of Sarbanes-Oxley*, 10 U. PA. J. BUS. & EMP. L. 955, 956 (2007). When corporations are pressured into implementing systems of corporate governance, the result can be unfavorable. *Id.* When these systems are created to meet external requirements, the quality is more likely to suffer. *Id.*; *see also, e.g.*, Luigi Zingales et al., Interim Report of the Committee On Capital Markets Regulation 29–39, 131–34 (2006), *available at* [http://crapo.senate.gov/documents/committee/capmarkets\\_reg.pdf](http://crapo.senate.gov/documents/committee/capmarkets_reg.pdf) (finding that the SOX corporate governance controls made corporations less competitive).

205. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(h)(1), 124 Stat. 1376, 1845–46 (2010) (stating the retaliation claims that a whistleblower could bring and the possible impact on corporations).

206. *Id.*; *see also* Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,356 (commenting on the Dodd-Frank Act's anti-retaliation measures and instances when individuals can bring retaliation claims).

allegations are false.<sup>207</sup> As a result, corporations must change their policies to limit and prevent retaliatory action when whistleblowers decide to come forward. If handled efficiently, both fraud and retaliation claims can be controlled and prevented through appropriate systems of internal corporate governance, a consequence that advocates hope to see as a result of the Act's individual-friendly provisions.<sup>208</sup>

However, improving internal systems of corporate governance could place an additional financial burden on corporations.<sup>209</sup> The starting point for most corporations will be an examination of their internal structure.<sup>210</sup> Practically, this will consist of locating gaps in company structure that could facilitate fraud among leaders and employees.<sup>211</sup> Where these gaps exist, companies will need to implement systems for checks and balances or compliance programs to limit the amount of fraud actually occurring.<sup>212</sup> A compliance program would require initial due diligence to uncover any existing fraud in addition to standards and procedures for detecting future fraud.<sup>213</sup> Once a compliance program is in place, it would then require the corporation to train its leaders and other employees, monitor the program's progress, and consistently promote and enforce it.<sup>214</sup>

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207. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,303 (addressing frivolous retaliation claims); Kenneth C. Johnston et al., *Ponzi Schemes and Litigation Risks: What Every Financial Services Company Should Know*, 14 N.C. BANKING INST. 29, 36 (2010) (noting that whenever a claim is brought—even without merit—corporations are forced to defend themselves).

208. Becker, *supra* note 179. Corporations will be forced to take a more proactive approach to combat internal misconduct as most businesses will not want to face the litigation that inaction could bring. *Id.*; *see also* Grant, *supra* note 201 (suggesting that employees should have an incentive to first bring their complaints internally, a solution that would help both corporations and the SEC).

209. Rose, *supra* note 56, at 891 (discussing the Dodd-Frank Act's influence in shaping corporate governance and the likely excessive costs borne by corporations in complying with the Act).

210. *Id.* (analyzing the ways that corporate governance can be improved); Shadab, *supra* note 204, at 961 (developing techniques for change within a corporation's economic system).

211. Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1335 (2006) (discussing the expansive methods utilized to reduce corporate fraud after SOX's enactment); Shadab, *supra* note 204, at 961 (analyzing how to successfully change a corporation's internal system to avoid fraud).

212. *See* Edward D. Rogers, *Striking the Wrong Balance: Constituency Statutes and Corporate Governance*, 21 PEPP. L. REV. 777, 779 (1994) (discussing different theories to effectively regulating corporations).

213. JEFFERY M. CROSS ET AL., *CORPORATE LEGAL COMPLIANCE HANDBOOK* (Frederick Z. Banks & Theodore L. Banks eds., Supp. 2008) (describing the requirements for creating an effective corporate compliance program).

214. *Id.* (detailing the requirements for a corporation following the creation of its corporate compliance program).

### C. The SEC's Burden

Although the Dodd-Frank Act's whistleblower provisions are aimed at corporations and the individuals within, they will also have a great impact on the government—namely the SEC.<sup>215</sup> Critics of the Act have raised the concern that, given the federal government's massive debt, the SEC does not have the funds or resources to properly handle these new responsibilities.<sup>216</sup> In the current political and economic climate, the government continues to battle the residual effects of the 2008 financial crisis.<sup>217</sup> Because of this, the strength of the whistleblower provisions—and the SEC's ability to handle them—are sure to be tested.<sup>218</sup>

Some legal practitioners estimate that the number of whistleblower inquiries has risen by a factor of ten since the Dodd-Frank Act was enacted.<sup>219</sup> Under the Act, whistleblowers looking for large payouts must bring their claims directly to the SEC.<sup>220</sup> This will require the creation of a system for fielding inquiries, in addition to a system for investigating the claims.<sup>221</sup> For the SEC, these requirements raise

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215. See Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,344 (diagramming the steps whistleblowers must take to bring a claim and demonstrating the SEC's significant responsibilities, which include reviewing claims and issuing final orders); see also ANNUAL REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 187 (analyzing the SEC's financial requirements under the Dodd-Frank Act).

216. S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, CONG. BUDGET OFFICE COST ESTIMATE (Apr. 21, 2010), available at <http://www.cbo.gov/ftpdocs/114xx/doc11454/s3217.pdf>. The Senate Committee on Banking, Housing, and Urban Affairs expected the national debt to rise because of the Dodd-Frank Act. *Id.* But the Act's advocates believe expenses will eventually be reduced. *Id.*

217. Posner & Vermeule, *supra* note 3, at 1619. The government loaned money through stimulus plans to help various corporations survive the 2008 financial crisis. *Id.* Some of the loans were issued with no guarantee of repayment. *Id.* Critics argue these loans have had limited success while adding to the national debt. *Id.* See generally Moran, *supra* note 3 (highlighting the causes and consequences of the 2008 financial crisis).

218. Bentley, *supra* note 157 (noting that the SEC may have to reduce the opportunities for litigation); see also Carlos Ortiz, *Dodd-Frank to Usher in 'Decade of the Whistleblower,' Attorneys Say*, PR NEWswire (Oct. 18, 2010), <http://www.prnewswire.com/news-releases/dodd-frank-to-usher-in-decade-of-the-whistleblower-attorneys-say-105170974.html> (analyzing the Dodd-Frank Act's whistleblower provisions).

219. *New Dodd-Frank Act Creates Important Rights for Whistleblowers*, FINDLAW (Jan. 5, 2011), <http://knowledgebase.findlaw.com/kb/2011/Jan/221001.html> [hereinafter *New Act Creates Rights*] (citing reports that whistleblower claims increased after enactment of the Dodd-Frank Act).

220. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,306–09 (requiring whistleblowers to bring claims directly to the SEC to receive a reward).

221. *Implementing Dodd-Frank Wall Street Reform and Protection Act - Upcoming Activity*, SEC, <http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml> (last modified Jan. 3, 2012) (pronouncing that the SEC's enforcement of the Dodd-Frank Act's whistleblower provisions will include verification of claims); see also Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,341–44 (requiring the submission of whistleblower statements for the SEC to review).

major funding issues.<sup>222</sup> Logistically, setting up such a system requires significant resources ranging from facilities and equipment to a skilled workforce.<sup>223</sup> An undertaking of this magnitude will be particularly burdensome given the large reporting rewards promised under the Act.<sup>224</sup>

Additionally, the SEC will be required to finance litigation of the influx of whistleblower claims.<sup>225</sup> A goal of the Dodd-Frank Act was to eliminate the types of corporate fraud that led to the 2008 financial crisis.<sup>226</sup> To achieve this goal, the Act's whistleblower provisions promised significant rewards to claimants who bring successful cases to the SEC.<sup>227</sup> As a result of the Act's potential reporting rewards, it is likely that an increasing number of employees will bring unfiltered claims to the SEC in hopes of being the first to file the complaint.<sup>228</sup> Not only does this mean that the SEC will be litigating against more corporations, but it will also be overwhelmed with more illegitimate claims.<sup>229</sup> Both of these scenarios involve increased expenditures for

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222. See Phil Mattingly & Joshua Gallu, *U.S. Congress Blunts Agency Fund Request to Enforce Dodd-Frank*, BLOOMBERG (Dec. 22, 2010), <http://www.bloomberg.com/news/2010-12-22/dodd-frank-enforcement-funds-delayed-as-lawmakers-pass-stopgap-legislation.html> (discussing the SEC's and Commodity Future Trading Commission's request for a budget increase to enforce the Dodd-Frank Act).

223. See Zachary A. Goldfarb, *SEC's Enforcement System can be Deaf to Whistleblowing*, WASH. POST, Jan. 21, 2010, at A1 (reporting that the SEC has ignored several whistleblowers and will need additional resources and better trained employees to effectively handle whistleblower tips).

224. Baynes, *supra* note 46, at 889 (explaining the inadequacy of SOX's whistleblower provisions and that there is little evidence that these inadequacies were addressed); see also *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133 (stating that the Dodd-Frank whistleblower provisions give whistleblowers much larger rewards than any previous whistleblower provisions).

225. Press Release, SEC, SEC Revamping Process for Reviewing Whistleblower Complaints and Enforcement Tips (Mar. 5, 2009), available at <http://www.sec.gov/news/press/2009/2009-44.htm> [hereinafter *SEC Revamping*] (stating that the SEC is planning to aggressively take on claims of fraud from whistleblowers, a process that will involve investigation and litigation).

226. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376, 1376 (2010) (stating the goals of the Dodd-Frank Act); see also BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, *supra* note 145 (describing how Congress wanted to eliminate corporate fraud and noting that this is a difficult and unlikely proposition without spending significant taxpayer dollars).

227. § 922, 124 Stat. at 1841-49 (creating the new whistleblower provisions and definitions); see also Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,300-01 (providing guidance for the application of the Dodd-Frank Act's whistleblower reward provisions).

228. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,310-11 (requiring a whistleblower to bring an original claim to receive an award).

229. § 922, 124 Stat. at 1841-49 (leaving open for interpretation whether the awards create an incentive for bringing illegitimate claims); see also Sarah Johnson, *Paid to Whistle*, CFO.COM (July 23, 2010), [http://www.cfo.com/article.cfm/14512666/c\\_14512957](http://www.cfo.com/article.cfm/14512666/c_14512957) (describing Congress's concern that the large rewards will lead to many illegitimate claims).

the federal government, which is already struggling to fulfill its current monetary obligations.<sup>230</sup>

The last significant financial hurdle for the federal government will be the payment of whistleblower rewards. Although the money paid to whistleblowers will eventually come from the offending corporations, the SEC is responsible for collecting this amount and making the related payments to whistleblowers.<sup>231</sup> Critics argue that both collection and disbursement by the SEC will be difficult tasks likely to hurt whistleblowers.<sup>232</sup> Evidence supporting this argument includes the fact that the SEC has already had to request additional funds to help pay for the new whistleblower provisions.<sup>233</sup> In response to these claims, however, the SEC has stated that payouts have been planned for and will not represent a burden.<sup>234</sup> In either circumstance, it is clear that the government will be forced to expend considerable amounts of money to effectively implement the goals of the Dodd-Frank Act's whistleblower provisions.<sup>235</sup> As a result, the success of these provisions, although rooted in corporations and individuals, will hinge on the SEC's ability to establish and maintain an effective system of response and regulation.<sup>236</sup>

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230. See *infra* Part IV.B–C (discussing the potential costs of the Dodd-Frank whistleblower provisions to corporations and the SEC).

231. § 922(a)(4), 124 Stat. at 1842 (establishing a fund into which guilty corporations will pay and from which whistleblowers will be paid); *Whistleblower – Informant Award*, IRS, <http://www.irs.gov/compliance/article/0,,id=180171,00.html> (last updated July 19, 2011) (demonstrating other government payment systems).

232. See Ashby Jones, *High Hopes for Quick Payouts under Dodd-Frank? Read This First*, WALL ST. J. L. BLOG (Dec. 14, 2010, 10:36 AM), [http://blogs.wsj.com/law/2010/12/13/high-hopes-for-quick-payouts-under-dodd-frank-read-this-first/?mod=djemlawblog\\_t](http://blogs.wsj.com/law/2010/12/13/high-hopes-for-quick-payouts-under-dodd-frank-read-this-first/?mod=djemlawblog_t) (noting that the SEC is struggling to pay for the investigation of whistleblower claims and that bounties promised by the Dodd-Frank Act are unlikely to be paid in a timely manner, if at all); see also Goldfarb, *supra* note 223 (documenting the lack of response for issues sent to the SEC).

233. Jones, *supra* note 232. In September 2010, the SEC received 5678 tips of which 460 were eligible for rewards under the Dodd-Frank Act's whistleblower provisions. *Id.* But even when a whistleblower brings a successful claim, collection of any award from the SEC is a challenge. Jean Eaglesham & Ashby Jones, *Whistleblower Bounties Pose Challenges*, WALL ST. J., Dec. 12, 2010, at C1.

234. ANNUAL REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 187. The SEC has been preparing for the potential whistleblower bounty claims. *Id.* According to its annual report, the SEC has collected millions of dollars in anticipation of these payouts, and they should be paid as they come due. *Id.*

235. See *infra* Part IV.C (discussing the potential monetary struggles facing the SEC because of the Dodd-Frank Act's whistleblower provisions).

236. Eaglesham & Jones, *supra* note 233. Critics doubt the SEC's ability to handle the influx of whistleblower claims created by the new whistleblower provisions. *Id.* If that is the case, those owed payments might not receive them for an extended period of time. *Id.* If people feel that their claims are not being addressed, the effectiveness of these provisions will be greatly diminished. Jones, *supra* note 232; see also Kim, *supra* note 9 (documenting the ineffectiveness of SOX's whistleblower provisions once the difficulty in winning a claim became clear).

## V. PROPOSAL

Whistleblowers are an important party needed to ensure effective regulation of corporations.<sup>237</sup> The Dodd-Frank Act's whistleblower provisions incentivize whistleblowers to come forward to decrease corporate fraud and prevent a future economic collapse as a result of such fraud.<sup>238</sup> Based on the failure of whistleblower provisions in prior legislation, corporations and the SEC will need guidance and support to effectively achieve the Act's goals.<sup>239</sup> This Part first proposes steps that corporations can take to comply with the requirements imposed by the Dodd-Frank Act's whistleblower provisions.<sup>240</sup> For most corporations, one step will be changing internal policies to conform to federal law while improving corporate governance.<sup>241</sup> Second, this Part suggests how the SEC can adapt to the new whistleblower provisions.<sup>242</sup> The success of the whistleblower provisions likely depends on the SEC's ability to manage an influx of complaints and increased monetary demands.<sup>243</sup>

*A. Corporate Embrace of the Dodd-Frank Act's Whistleblower Provisions*

The Dodd-Frank Act has created a relatively high set of standards for corporations.<sup>244</sup> Behind these standards lie significant consequences for those corporations unable to conform to the new regulations.<sup>245</sup> As a

237. 18 U.S.C.A. § 1514A (2006) (recognizing that whistleblowers play an important role in maintaining corporate integrity); *see also* Nutt, *supra* note 12, at 200 (describing Congress's belief that whistleblowers are an important part of corporate governance).

238. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010); *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133 (describing the Senate's goals in passing the Dodd-Frank Act).

239. *See infra* Part V.A-B (describing methods that corporations and the SEC could use to comply with the Dodd-Frank Act's whistleblower provisions).

240. *See infra* Part V.A (discussing methods that help corporations thrive under Dodd-Frank Act's whistleblower provisions).

241. *See New Act Creates Rights*, *supra* note 219 (discussing how the changes for whistleblowers will to affect corporations).

242. *See infra* Part V.B (discussing methods to help the SEC enforce the Dodd-Frank Act's whistleblower provisions).

243. *See* ANNUAL REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 187 (discussing the SEC's preparedness to take on additional whistleblower claims); *see also* Jones, *supra* note 232 (analyzing the early whistleblower claims where the SEC was unable to fulfill its monetary obligations).

244. *See* *Welch v. Choa*, 536 F.3d 269, 279 (4th Cir. 2008) (noting that, under SOX, courts were very lenient with corporations litigating whistleblower cases); *see also* *SEC Revamping*, *supra* note 225 (demonstrating the SEC's conviction for taking whistleblowers claims more seriously and holding corporations accountable).

245. *Missal & Morley*, *supra* note 154. Liability associated with fraud and retaliation within the corporation could cause considerable damage to the corporation and its leaders. *Id.*

result, corporations will need to monitor internal activity and financial reporting while proactively promoting a culture absent of fraud.<sup>246</sup> Furthermore, corporations will need to ensure that, along with avoiding fraud and illegal acts that could subject them to penalties, their leaders and employees do not retaliate against those who report corporate fraud.<sup>247</sup>

For corporations, the Dodd-Frank Act's whistleblower provisions should serve as a mandatory examination of federal compliance.<sup>248</sup> These provisions, coupled with the relative ease with which whistleblowers can now bring complaints, will multiply the number and types of claims against corporations.<sup>249</sup> As a result, corporations must commit time and resources to gain an understanding for—and find solutions to—internal issues that might raise questions of improper corporate governance.<sup>250</sup> Corporations must review, maintain, and verify recordkeeping systems to detect inconsistencies that could expose the corporation to liability.<sup>251</sup> With more checkpoints in place, fewer opportunities for fraud are likely to exist.<sup>252</sup>

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246. *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133, at 1. The Dodd-Frank Act aims to regulate major corporations in light of the 2008 financial crisis. *Id.* Under the Act, any kind of illegal activity will be monitored and punished harshly. *Id.* Therefore, corporations must ensure that their reporting and documentation systems meet government guidelines and that employees understand the consequences of failing to meet those requirements. *Id.*; *see also* Prentice & Donelson, *supra* note 41, at 56 (discussing the importance of managers and employees buying into the corporation's objectives).

247. Prentice & Donelson, *supra* note 41, at 55. Corporations must educate employees about the company's corporate governance goals. *Id.* When a corporation sends a message that fraud is not acceptable, employees are more likely to align their goals with those of the company. D. Brian Hufford, *Deterring Fraud vs. Avoiding the "Strike Out": Reaching an Appropriate Balance*, 61 *BROOK. L. REV.* 593, 602 (1995).

248. Nicholas, *supra* note 13. Corporations must be prepared for an onslaught of potential whistleblower claims. *Id.*

249. *Id.* (describing the opportunities for whistleblowers to report a claim); Baynes, *supra* note 46, at 890 (citing the exposure corporations could have to claims as well as expenses related to those claims).

250. Griffith, *supra* note 152; *see also Corporate Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act*, *supra* note 149 (explaining that corporations must make major changes to ensure that corporate governance policies align with the Dodd-Frank Act so as to limit exposure to major whistleblower claims).

251. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 *N.Y.U. L. REV.* 687, 690 (1997) (discussing the likelihood of corporate liability being created internally); *see also* U.S. Environmental Protection Agency, Final Policy Statement, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 *Fed. Reg.* 66,706 (Dec. 22, 1995) (outlining several non-financial corporate expectations of government agencies).

252. Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime From Task Force to Top Priority*, 93 *MARQ. L. REV.* 971, 972 (2010) (suggesting that many corporations do not catch fraud because they do not look for it); *see also* Michael A. Fletcher, *Former Fund Managers Face Fraud Charges in Credit Crisis*, *WASH. POST*, June 20, 2008, at A1 (describing the danger in allowing opportunities for fraud to exist because opportunities often lead to action).

Steps to improve corporate governance go beyond any one single entity. For companies with subsidiaries or partners, monitoring financial reporting and employee conduct in different entities and locations could prove equally important.<sup>253</sup> This is especially true for corporations with international affiliates, where conduct such as bribery or deception might be acceptable.<sup>254</sup> Although this kind of monitoring can be a costly and difficult undertaking, it is likely to reduce fraud over the long-term.<sup>255</sup>

One method for giving employees an opportunity to disclose fraud is the use of a fraud hotline.<sup>256</sup> A hotline not only gives whistleblowers an anonymous forum for bringing complaints, but also allows whistleblowers to avoid conflicts with superiors and other co-workers.<sup>257</sup> An additional advantage of the hotline is that it transmits information to an unrelated party and limits the desire to cover-up the fraud in question.<sup>258</sup>

For a corporation's compliance system to be effective, the opportunity to report should be accompanied by a monetary incentive to do so.<sup>259</sup> Based on past success, monetary awards within the company

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253. See *IIT v. Vencap*, 519 F.2d 1001 (2d Cir. 1975) (citing the potential liability for a corporation when its subsidiaries breached federal law); see also Natasha Singer, *Drug Maker Cited on Quality Issues*, N.Y. TIMES, Nov. 27, 2010, at B1 (discussing a U.S. company whose international manufacturing facility failed to comply with federal regulations).

254. Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385, 388 (1995). International business cultures vary greatly. *Id.* The Dodd-Frank Act makes it more important for corporations to monitor their international affiliates because they might be susceptible to lower standards of reporting, quality, and the use of bribes, all actions that could trigger whistleblower claims. *Id.*; see also Karen Pennar et al., *The Destructive Costs of Greasing Palms*, BUS. WK., Dec. 6, 1993, at 133 (discussing the culture of bribery in other countries).

255. *Dodd-Frank Bill Provides Robust Whistleblower Protections*, *supra* note 186 (describing the goals of the Dodd-Frank Act's whistleblower provisions).

256. Joshua L. Baker, *Chapter 484: The Strongest Whistleblower Protection Law in the Nation - Did We Need It, and Can We Really Afford It?*, 35 MCGEORGE L. REV. 569, 573 (2004). Some state whistleblower provisions, which have historically been stricter than federal provisions, have relied heavily on hotlines to give whistleblowers an avenue to bring claims. *Id.* Hotlines make corporations more accountable and put them in a better position to catch fraud. *Id.*

257. Marian Exall & John D. "Jack" Capers Jr., *Audit Committees under the Sarbanes-Oxley Act Establishing the New Complaint Procedures*, 23 CORP. COUNS. REV. 1, 8 (2003).

258. *Id.* Credible hotlines must demonstrate confidentiality, prompt action, and fair discipline to gain the trust of employees. Missal & Morley, *supra* note 154. Important hotline requirements include: employee ability to report issues outside the ordinary lines of supervision, employee awareness of—and access to—the hotline, employee understanding of when the hotlines can be used, employee confidentiality when reporting, and prevention of retaliation against employees who use the hotline. *Id.*

259. Moberly, *supra* note 11, at 1107 (discussing how whistleblowers who have protection are more likely to come forward than those without); see also Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 239 (1995) (analyzing the increased propensity for whistleblowers to come forward when incentives are involved).

would be an effective way to accomplish this.<sup>260</sup> Although an SEC award could be lucrative, bringing an internal claim would likely be easier.<sup>261</sup> The process for retrieving a whistleblower reward from the SEC is laden with regulations and involves a time-consuming process.<sup>262</sup>

Once a hotline or compliance system is in place, corporations must act on the information they receive.<sup>263</sup> Ignoring complaints or delaying action can frustrate employees and breed a corporate culture where illegal activities are permitted.<sup>264</sup> In contrast, when employees feel their contributions and concerns are taken seriously, they have less incentive to reach outside the corporation.<sup>265</sup> In other words, the individuals are more likely to remain faithful to the corporation, another characteristic that could lower the number of external claims made against that corporation.<sup>266</sup>

Along with the improvement of internal control systems and confronting fraud within the organization, corporations must change their reactions to and treatment of whistleblowers.<sup>267</sup> As part of this

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260. Rapp, *supra* note 6, at 61 (discussing *qui tam* actions and their effectiveness based on the incentives depending on the validity of the claims); *see also* Painter, *supra* note 259, at 224 (discussing the effectiveness of whistleblower incentive plans).

261. *See* Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,363–71 (outlining the procedural requirements to establish eligibility for a whistleblower award). Even though the Dodd-Frank Act's whistleblower provisions make it easier for whistleblowers to receive a monetary award, it is still considerably burdensome due to the need to hire a lawyer and comply with certain administrative requirements. *Id.* An award ranges between ten and thirty percent of the claim, and while a corporation is unlikely to match this amount, a corporation's payment of the award would draw less scrutiny than the SEC's would. *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 133.

262. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,368–69; *see also* Painter, *supra* note 259, at 240 (discussing the structure of whistleblower provisions that would provide the greatest benefit to all parties).

263. Exall & Capers, *supra* note 257, at 11–12 (analyzing methods for investigating claims and how the use of an internal but independent resource could prove essential in keeping employees from reaching outside the corporation); *see also* Ramirez, *supra* note 252, at 1009 (stating that investigating all claims is more likely to hold individuals within the corporation responsible for their actions).

264. Ramirez, *supra* note 252; *see also* Arlen & Kraakman, *supra* note 251, at 687 (discussing the importance of holding individuals within the corporation responsible for their actions and setting this standard throughout the corporation).

265. Martin et al., *supra* note 163 (determining some of the difficulties that an SEC claim could have on corporations and the advantages to keeping these claims internal).

266. Arlen & Kraakman, *supra* note 251, at 687 (analyzing the effectiveness of policies that gain employee trust); *see also* Brooks E. Kostakis, *Crafting a Hybrid Weapon Against Healthcare Fraud: Reflecting upon the Government's Use of the Civil False Claims Act as an Incentive for Whistleblowers and Advocating a More Aggressive Utilization of Permissive Exclusion as a Deterrent Measure*, 37 U. MEM. L. REV. 395, 400 (2007) (discussing successful whistleblower strategies in the healthcare field).

267. *See* *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006) (noting that retaliation against whistleblowers was rampant under SOX). Although existent, the retaliation

change, corporations must address retaliatory practices.<sup>268</sup> In the past, retaliation was a common occurrence, based partially on the lack of accountability to which corporations were held.<sup>269</sup> To protect whistleblowers and shed light on corporate fraud, Congress created financial consequences for corporations engaging in—or allowing acts of—retaliation.<sup>270</sup> Therefore, now more than ever, corporations must work with leadership and human resources departments to create mechanisms, such as training sessions and reporting systems, to minimize retaliation against whistleblowers.<sup>271</sup> When a claim is brought, the corporation should take steps to protect the identity of the whistleblower, a practice that should help to prevent retaliatory behavior.<sup>272</sup>

*B. The SEC's Contribution to the Success of Whistleblower Provisions*

Like most newly enacted legislation, there are major obstacles to the success of the Dodd-Frank Act's whistleblower provisions. Two of these obstacles are compliance by corporations, as discussed above, and the ability of the SEC to regulate if that compliance breaks down.<sup>273</sup> For the SEC, the major challenges lie in the large numbers of whistleblowers expected to come forward and the ability to handle those

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provision was applied sparingly under SOX. *Corporate Whistleblower Protections Significantly Altered by Dodd-Frank Wall Street Reform Act*, *supra* note 149. Under the Dodd-Frank Act, retaliation has become a major concern that could damage the reputation and financial health of a corporation. *Id.*

268. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,301–04 (discussing the importance given to the Dodd-Frank Act's anti-retaliation measures by the SEC); *see also* Ortiz, *supra* note 218 (commenting on the Dodd-Frank Act's anti-retaliation measures and the consequences to corporations that fail to implement them).

269. ETHICS RES. CTR., ETHICS RES. CTR.'S NAT'L BUS. ETHICS SURVEY: AN INSIDE OF PRIVATE SECTOR ETHICS 6 (2007), *available at* <http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/2007NationalBusinessEthicsSurvey.pdf> (finding that many potential whistleblowers have chosen not come forward because of fear of retaliation); *see also* Baer, *supra* note 178 (discussing the effects of retaliation within the corporation).

270. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,333–36; *see also* Rost, *supra* note 228 (analyzing the effect that a claim for fraud coupled with a claim for retaliation would have on a corporation).

271. James Treece & Jennifer A. Goldman, *How to Stop a Retaliation Claim in Its Tracks*, EPSTEIN BECKER GREEN (Nov. 17, 2010), <http://www.ebglaw.com/showarticle.aspx?Show=13687> (analyzing the various ways to implement an anti-retaliation system within the corporation); *see also* Baer, *supra* note 178, at 525 (analyzing past instances of retaliation and discussing effective ways to prevent it).

272. Treece & Goldman, *supra* note 271; Baer, *supra* note 178, at 525.

273. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010). Congress has given the SEC the power to regulate the whistleblower provisions. § 922, 124 Stat. at 1841–49. Although the law is supposed to be enforced against corporations, under previous legislation, corporations often found ways to avoid liability. Nutt, *supra* note 12, at 203. In such cases, an entity like the SEC is needed to ensure regulations are followed. *Id.*

inquiries.<sup>274</sup> To ensure that the whistleblower provisions are not overbearing on the government, remain relevant, and are seriously accounted for, the SEC must limit fraudulent whistleblower claims and ensure that corporate internal reporting systems do not become obsolete.<sup>275</sup>

Lost in the positive ramifications of the Dodd-Frank Act's whistleblower provisions is the increased incentive for individuals to bring fraudulent whistleblower claims.<sup>276</sup> Fraudulent claims brought to the SEC must be investigated like any other claim and, as a result, occupy valuable and limited government resources.<sup>277</sup> To minimize this, the SEC must create enforcement mechanisms that prevent fraudulent claims from reaching the point of investigation.<sup>278</sup> One method of achieving this objective would be a screening process in which whistleblowers would provide additional information that helps verify the validity of a claim.<sup>279</sup> This would deter individuals from bringing unfounded claims but would not be significant enough to discourage individuals with valid claims from coming forward.<sup>280</sup>

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274. See Eaglesham & Jones, *supra* note 233 (discussing the expected increase in whistleblower claims and the SEC's inability to pay in many cases that qualify for the Dodd-Frank Act's reward program); see also Martin et al., *supra* note 163 (estimating the rise in claims expected under the Dodd-Frank Act's whistleblower provisions).

275. Martin et al., *supra* note 163. If corporations have a system that deals with cases of fraud internally, that system benefits both the corporations and the SEC. *Id.* When whistleblowers bring these cases to the SEC, it costs all parties money to handle the claim. *Id.*; see also Baynes, *supra* note 46 (discussing the tendency for whistleblowers to withhold claims when they did not feel that the rules would be fairly applied).

276. 31 U.S.C. § 3728 (2006). When amending the FCA, the government addressed the problem of false claims. *Id.* Although the scenario is different under the Dodd-Frank Act, similar concerns remain because an individual with the opportunity to materially benefit is more likely to bring a false claim. *Id.*; see also Rost, *supra* note 228, at 3 (analyzing the large payouts for whistleblowers created by the Dodd-Frank Act).

277. See Bevis Longstreth, *A Look at the SEC's Adaptation to Global Market Pressures*, 33 COLUM. J. TRANSNAT'L L. 319, 319 (1995) (examining how the SEC investigates claims); *About the Division of Enforcement*, SEC. & EXCH. COMM'N., <http://www.sec.gov/divisions/enforce/about.htm> (last modified Aug. 1, 2007). The SEC investigates each claim in the same manner. *Id.* Thus, fraudulent claims will likely receive the same time and resources as valid claims. *Id.*

278. *About the Division of Enforcement*, *supra* note 277.

279. *Id.* Investigating each claim requires the claimant to gather and file documents. *Id.* During this process, there should be increased examination of the documents and steps should be taken to verify that the claim is legitimate, rather than completing this process and later discovering that the claim was false. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,341-44.

280. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest*, 107 COLUM. L. REV. 949, 950 (2007). Many whistleblowers have little inhibition to bring unfounded claims under the *qui tam* principle because of the high profit potential. *Id.* The Dodd-Frank Act creates a similar situation because the potential gain from a claim is high, meaning some individuals might bring a fraudulent claim in hopes of receiving a reward. Jones & Lublin, *supra* note 220.

A second solution is to devise a fine implementation system for fraudulent whistleblower claimants. The fear of a significant fine is likely to prevent some individuals from bringing unfounded claims.<sup>281</sup> A detriment to this, though, is that it could deter genuine whistleblowers.<sup>282</sup> Thus, the structure of this necessary burden should be balanced so that whistleblowers with legitimate claims are not also pushed away.<sup>283</sup>

To prevent an enormous spike in whistleblower claims that it might not be able to handle, the SEC must ensure whistleblowers have a corporate route to initially bring and screen claims.<sup>284</sup> In theory, the SEC should only become involved when corporations refuse to address claims<sup>285</sup> rather than act as a bypass to corporate authority.<sup>286</sup> By promoting stronger systems of corporate governance, the SEC would avoid unnecessary expenditures and preserve its resources to investigate legitimate claims.<sup>287</sup>

## VI. CONCLUSION

In the past decade, corporations in the United States have experienced the crippling effects of poor corporate governance. As corporations become more powerful, they tend to ignore their responsibilities to shareholders and other stakeholders. Instead, the focus shifts towards increasing the prosperity of the corporation's individual leaders. In 2008, the schemes of these leaders were

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281. S.B. 2096, 187th Gen. Ct. Sess., Reg. Sess. (Mass. 2002). In the Massachusetts auto insurance industry, fines and jail time were multiplied in an attempt to deter auto body shops from committing insurance fraud. *Id.* A similar concept could be applied to whistleblowers who might otherwise be tempted to bring unsubstantiated claims. Broderick *supra* note 280, at 970.

282. Broderick, *supra* note 280, at 961 (stating that the Dodd-Frank Act's whistleblower provisions encourage individuals to do the right thing and implying that when additional barriers are presented, but an individual believes her claim is not fraudulent, she will still bring the claim).

283. Painter, *supra* note 259.

284. See Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 90 (1997) (citing a similar belief for *qui tam* provisions that corporations can regulate themselves internally, an advantage for the corporations and the government); see also Eaglesham & Jones, *supra* note 233 (criticizing the SEC for failing to handle the more than 5000 claims brought in September 2010 and implying the need for assistance in regulating these provisions).

285. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,341-44 (describing the SEC's role in regulating the Dodd-Frank Act's whistleblower provisions and the effect this will have on corporations); Rost, *supra* note 228 (guiding corporations in applying whistleblower provisions and detailing steps to ensure the proper handling of claims).

286. Securities Whistleblower Incentives and Protections, *supra* note 17, at 34,301 (noting that the SEC has created incentives to encourage whistleblowers to use internal reporting mechanisms).

287. J. Brian Hudson, *Out of the Rabbit Hole: The D.C. Circuit Brings the EPA Back from Wonderland in New Jersey v. EPA*, 21 VILL. ENVTL. L.J. 45, 50 (2010) (discussing the regulation of government agencies and the relationship these agencies have with other entities).

discovered only after it was too late to reverse the consequences. Based on the perpetuation of fraudulent activity, many corporations were forced into insolvency or had to rely on a government bailout to survive. As a result, taxpayers bore the burden of keeping these corporations solvent.

The government has made several attempts to correct deficiencies in corporate governance, but these attempts have often failed. Congress again attempted to correct deficiencies in corporation governance and establish protections for their stakeholders through the Dodd-Frank Act. Notably, the Act's whistleblower provisions have created a stir in the legal and business communities because of their far-reaching implications.

Through the Dodd-Frank Act's whistleblower provisions, Congress created a system intended to ease the burden on whistleblowers and increase the standards by which corporations are held. However, these new standards could impose significant monetary burdens on corporations and the SEC—a factor that could limit the provisions' effectiveness. If corporations are able to implement and sustain these corporate governance requirements, and the SEC is able to enforce them, the Act's whistleblower provisions will achieve two related objectives: ease the burden on individuals who bring whistleblower claims and reduce corporate fraud by improving corporate governance. If properly implemented, these provisions can potentially prevent a future disaster like the 2008 financial crisis and its catastrophic effects on the global economy.