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WHISTLEBLOWERS CASH IN, UNWARY CORPORATIONS PAY

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I. INTRODUCTION

Tough economic times of recession notwithstanding, whistleblowers can be paid handsomely for exposing the misdeeds of corporate America. Depending upon the statute under which they disclose, whistleblowers can be paid a windfall[1] of as much as thirty percent of the total recovery.[2] With corporate malfeasance cases regularly settling for hundreds of millions—sometimes billions—of dollars,[3] trial lawyers and whistleblowers are highly motivated to make cases for the government.

Until recently, whistleblowers only reaped these rewards when Uncle Sam's purse was involved.[4] But in the wake of corporate

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1. This term, or words of like connotation, are used in this Article not in the pejorative sense but, rather, to underscore the large sums whistleblowers stand to be paid for their information—sums that might eclipse what any individual might earn in a lifetime. These often substantial rewards raise an important public policy question, namely, whether they provide a basis for perverse incentives on the part of whistleblowers to provide improperly obtained or even manufactured and/or inaccurate information. An answer to this question is beyond the scope of this Article.

2. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(b)(1) (Supp. IV 2011); Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,366 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249).

3. *See, e.g.*, Press Release, U.S. Dep't of Justice, Eli Lilly and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-label Promotion of Zyprexa (Jan. 15, 2009), http://www.justice.gov/opa/pr/2009/January/09-civ-038.html [hereinafter Eli Lilly to Pay $1.415 Billion].

4. *See* William Gleeson, *What Corporate Managers Should Know About the SEC*

malfeasance, fraudulent accounting, and Ponzi schemes which defrauded investors to the tune of billions of dollars, many argued that it was time to loosen the whistleblower's terrible swift sword on corporate America at large.[5] In July 2010, Congress passed, and President Barack Obama signed, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[6] Among Congress's goals in passing this sweeping overhaul of U.S. financial regulation was to incentivize individuals with knowledge of possible misconduct to share their information with the government.[7] Ten months later, on May 25, 2011, the U.S. Securities and Exchange Commission (the "SEC") adopted regulations to implement Congress's mandate.[8] In the words of SEC Chairman Mary L. Schapiro, the SEC's newly-created Office of the Whistleblower will serve to strengthen the agency's efforts in detecting and preventing fraud:

> Today's proposed final rules build upon our efforts . . . and our experience with the Sarbanes-Oxley Act. . . . From that experience, we learned that despite Sarbanes-Oxley, too many people remain silent in the face of fraud. Today's rules are intended to break the silence of those who see a wrong.[9]

Part II of this Article places the Dodd-Frank Act whistleblower provisions in context with existing whistleblower provisions. Part III examines the particulars of the SEC's new whistleblower program, noting other federal whistleblower laws currently affecting American enterprises and assisting fraud enforcement. Finally, Part IV provides practical advice to the corporation on steps that can be taken now to

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Whistleblower Rules, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 10, 2011, 9:47 AM), http://blogs.law.harvard.edu/corpgov/2011/07/10/what-corporate-managers-should-know-about-the-sec-whistleblower-rules.

5. *See, e.g.*, Angela Canterbury, *Protecting Whistleblowers*, AMS. FOR FIN. REFORM (Aug. 6, 2009, 6:40 AM), http://ourfinancialsecurity.org/2009/08/protecting-whistleblowers/.

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered titles of the U.S.C.).

7. *See* Recent Legislation, *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC.—Dodd-Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (to be codified at 15 U.S.C. § 78u-6)*, 124 HARV. L. REV. 1829, 1829-30 (2011) [hereinafter *Corporate Law*].

8. *See* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249); *Final Rules*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/rules/final/finalarchive/finalarchive 2011.shtml (last updated Feb. 27, 2012) (reflecting that the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934 were implemented on May 25, 2011).

9. Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

strengthen internal compliance regimes so as to encourage early internal reporting of suspected corporate wrongdoing.

II. THE DODD-FRANK ACT TAKES ITS PLACE AMONG EXISTING WHISTLEBLOWER LAWS

As SEC Chairman Schapiro referenced, and as qui tam cases mentioned in this Article attest,[10] whistleblowers *already* played an integral role in exposing corporate criminality prior to the passage of the Dodd-Frank Act and the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act").[11] Indeed, the federal whistleblowing incentive policy has an ancient lineage—at least in the world of federal statutory regulation of trade and commerce. Fraudulent procurement activity affecting the Union Army during the Civil War gave rise to the False Claims Act (the "FCA"),[12] a mechanism federal and state enforcement officials utilize to this day to combat fraud involving government programs.[13] The FCA's qui tam[14] provisions allow a private individual—known as a "relator"—to bring a lawsuit on behalf of the United States.[15] The relator must have actual knowledge that a named defendant knowingly submitted or caused the submission of false or fraudulent claims to the United States.[16]

How important is the FCA in practice? Private-party whistleblowers—whether part of a qui tam action or otherwise—have played pivotal roles in unmasking corporate fraud at Fortune 500 giants such as Enron Corporation, Tyco International, MCI WorldCom, and Adelphia Communications Corporation.[17] But perhaps statistics tell the

10. *See infra* text accompanying notes 17-23.

11. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.).

12. False Claims Act, ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. §§ 3729–3733 (2006 & Supp. IV 2011)). The FCA provides for liability for triple damages and a penalty from $5000 to $10,000 per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States. 31 U.S.C. § 3729(a).

13. James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 470 (2005).

14. "Qui tam" is an abbreviation of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "he who brings a case on behalf of our lord the King, as well as for himself." *Id.* (internal quotation marks omitted).

15. *Id.* at 470-71.

16. False Claims Act, 31 U.S.C. § 3730(e)(4)(B). While a relator need not have been personally harmed by the defendant's conduct, he or she stands to gain a percentage of the recovered funds flowing from a successful suit. *Id.* § 3730(d); Barger et al., *supra* note 13, at 471, 474.

17. *See* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. UNIV. L.Q. 357, 360-64, 369-73 (2003) (discussing whistleblower involvement in unmasking fraud at various major corporations).

story best: The U.S. Department of Justice (the "DOJ") announced late last year that FCA recoveries following the 1986 FCA amendments[18] through 2010 exceeded $27 billion, with qui tam cases accounting for more than $18 billion of this amount.[19] During that same period, qui tam whistleblowers received over $2.8 billion from the government for their information.[20]

Whistleblowers are valuable precisely because they have first-hand knowledge of illegal corporate activity, and therein lies the success of FCA qui tam suits: The federal government has been *able* to harness internal information collected by private individuals with greater awareness of corporate activity than could ever be detected, at least initially, from the outside.[21] In addition, a whistleblower brings to a case a speaking witness who can identify responsible executives and key documents, and lay out the critical facts—essentially giving investigators, regulators, and assistant U.S. attorneys a roadmap to make a case.[22]

It would not be an exaggeration to state that qui tam lawsuits represent a unique cottage industry within the legal sector—and, in these lean economic times, a growing industry at that.[23] Some have argued that whistleblowers, and qui tam relators in particular, are a necessary resource of an increasingly cash-strapped government, as it relates to FCA cases, to stop fraud against the government and, as a rationale for the new SEC whistleblower program, to enforce federal securities laws.[24]

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18. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (current version at 31 U.S.C. §§ 3729–3733 (2006 & Supp. IV 2011)). Among other things, the False Claims Amendments Act of 1986 entitles qui tam relators to bounties of between fifteen to thirty percent of recovered funds received from defendants and to recover attorneys' fees, costs, and expenses upon a successful prosecution. False Claims Act, 31 U.S.C. § 3730(d)(1)–(2) (2006). In addition, the 1986 revisions contain explicit whistleblower protections for employees involved in actions against their employers. *Id.* § 3730(h). *See* United States v. Northrop Corp., 59 F.3d 953, 964-69 (9th Cir. 1995) (describing congressional imperatives related to the 1986 FCA amendments). *See also* Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Jurisdictional Bar to* Qui Tam *Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237 (1995) (discussing the "public disclosure bar" in relation to the 1986 FCA amendments).

19. Press Release, U.S. Dep't of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html [hereinafter Department of Justice Recovers $3 Billion].

20. *Id.*

21. *See* Barger et al., *supra* note 13, at 475.

22. *See id.*

23. Douglas W. Baruch & Nancy N. Barr, *The SEC's Whistleblower Program: What the SEC Has Learned from the False Claims Act About Avoiding Whistleblower Abuses*, 2 HARV. BUS. L. REV. ONLINE 28, 29 (2011), http://www.hblr.org/wp-content/uploads/2011/07/Baruch-Barr-Whistleblower.pdf. *See supra* text accompanying notes 18-20.

24. *See* United States v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995); Baruch & Barr, *supra* note 23, at 28-29.

An inherent conflict of interest in this activity, aggravated by the huge sums at stake, needs to be acknowledged: By design, the percentage-of-reward structure payable to these whistleblowers means that higher recoveries, fines, and monetary sanctions translate to higher whistleblower rewards.[25]

In this respect, whistleblowers have a perverse incentive to sit on knowledge of suspected wrongdoing instead of reporting at the first opportunity—after all, whistleblower information related to malfeasance that is allowed to fester and grow means a potentially higher bounty.[26] Moreover, just as delayed reporting benefits a whistleblower, enforcement authorities also stand to gain the greater the recovery or the fine.[27] While individuals who work for enforcement authorities do not stand to personally financially gain from large awards, they do gain professionally and reputationally from the publicity and notoriety associated with large awards.[28]

Whether the disincentives to report on time cause actual delay, the fact remains that the government receives valuable tips from whistleblowers leading to successful civil and criminal actions. As much value as whistleblowers provide to U.S. taxpayers, shareholders, and corporate executives alike, disclosing corporate criminality could come at a price—employer retaliation, harassment, discrimination—that might deter individuals in a position to minimize the potential scope of the

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25. *See* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,350 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249).

26. *Id.*

27. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") established a national Health Care Fraud and Abuse Control Program ("HCFAC"), under the joint direction of the Attorney General and the Secretary of the Department of Health and Human Services ("DHHS"), to coordinate federal, state, and local law enforcement activities with respect to health care fraud and abuse. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, sec. 201(a), § 1128C, 110 Stat. 1936, 1992-93 (codified at 42 U.S.C. § 1320a-7c (2006 & Supp. IV 2011)). Under HIPAA, an amount equaling recoveries from health care investigations—including criminal fines, forfeitures, civil settlements and judgments, and administrative penalties—is deposited into a trust fund, which is then appropriated to an expenditure account, called the Health Care Fraud and Abuse Control Account, in amounts that the Secretary of the DHHS and Attorney General jointly certify as necessary to finance anti-fraud activities. *Id.* sec. 201(b), § 1817(k), 110 Stat. at 1993-95 (codified at 42 U.S.C. § 1395i(k) (2006)). *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANN. REP. FOR FISCAL YEAR 2010, at 5, 7 (2011) [hereinafter HCFAC FY 2010 REPORT], *available at* http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2010.pdf (noting that in fiscal year 2010, the HCFAC program deposited approximately $4 billion into the trust fund, and appropriated $85 million and $492 million to the DOJ and DHHS, respectively).

28. *See* Gleeson, *supra* note 4 (explaining that if the SEC does not receive the appropriate resources for its new enforcement responsibilities, it is likely that the SEC will pursue only the most serious violations with higher monetary sanctions, making "whistleblowing more attractive").

wrongdoing from sharing what they know.[29] Notably, the SEC has had a whistleblower bounty program for reports of insider trading violations since 1989.[30] As of the date the Dodd-Frank Act was passed, the program resulted in an aggregate of $159,537 paid to a mere five claimants.[31] The Dodd-Frank Act, layering percentage-of-recovery bounties and erecting new anti-retaliatory measures similar to those already available to relators under the FCA,[32] was intended to counterbalance the potential chilling effect.[33]

Why, then, has the SEC's adoption of final whistleblower rules sparked such heated debate, both within the legal and business communities and, perhaps more surprisingly, among the SEC commissioners themselves?[34] Commentators like the U.S. Chamber of Commerce bluntly warned that the SEC's new whistleblower regime makes it "harder and slower to detect and stop corporate fraud—by undermining the strong compliance systems set up under Sarbanes Oxley to ensure companies take whistleblowers seriously."[35] Private enterprise

29. *See* Section 21F of the Securities Exchange Act of 1934, 76 Fed. Reg. at 34,355 n.433.

30. U.S. SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS, REP. NO. 474, ASSESSMENT OF THE SEC'S BOUNTY PROGRAM 4-5 (2010), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf.

31. *Id.* at 5. Perhaps in a nod to the passage of the Dodd-Frank Act, on July 23, 2010, the SEC announced its largest payoff—$1 million—to two individuals who furnished information related to insider trading in Microsoft Corporation securities by Pequot Capital Management, Inc., the hedge fund's chief executive, and a Microsoft employee. Sec. & Exch. Comm'n v. Pequot Capital Mgmt., Inc., Litigation Release No. 21,601, 98 SEC Docket 3586 (July 23, 2010).

32. Section 1079A(c) of the Dodd-Frank Act strengthens the anti-retaliation provision of the FCA, 31 U.S.C. § 3730(h), by providing a three-year statute of limitations on civil claims against retaliatory employers and revising the definition of protected conduct, thereby expanding the class of protected persons and activities that could inform a qui tam action or otherwise report an FCA violation. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 1079A(c), § 3301(c), 124 Stat. 1376, 2079 (2010) (codified at 31 U.S.C. § 3730(h) (Supp. IV 2011)).

33. *Corporate Law*, *supra* note 7, at 1831.

34. The SEC voted three to two to adopt final rules implementing the Dodd-Frank Act whistleblower provisions. Edward Wyatt, *Overcoming Dissenters, S.E.C. Adopts Revised Whistle-Blower Rules*, N.Y. TIMES, May 26, 2011, at B3. Dissenting SEC Commissioners Kathleen L. Casey and Troy A. Paredes both issued statements concerning their respective reservations with the final rules as adopted. *See* Kathleen L. Casey, Comm'r, U.S. Sec. & Exch. Comm'n, Statement by SEC Commissioner: Adoption of Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511klc-item2.htm [hereinafter Casey Dissent] (opining that the SEC "has elected to implement a whistleblower program that favors a pound of cure over an ounce of prevention"); Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511tap-item2.htm [hereinafter Paredes Dissent].

35. Press Release, U.S. Chamber of Commerce, U.S. Chamber Warns New SEC Whistleblower Rule Will Undermine Corporate Compliance Programs (May 25, 2011),

is not alone in vocalizing strong concern, if not outright opposition, to the new measures. Shortly before the SEC's announcement of the final rules, Representative Scott Garrett, Chairman of the U.S. House Subcommittee on Capital Markets and Government-Sponsored Enterprises, remarked at a congressional hearing convened to further examine the Dodd-Frank Act.[36] Representative Garrett stated:

> The goal of providing an environment where whistleblowers can be most effective in helping to right wrongs and where they have proper safeguards is a laudable one. The details of writing into law the proper incentives and rules to create such an environment . . . are very important, as well. We must be careful not to do more harm than good.[37]

Without question, passage of the Sarbanes-Oxley Act ushered in an era of heightened awareness of the need for robust compliance programs and governance regimes.[38] From a deterrence standpoint, whistleblowers perform a wholly different function and at an entirely distinct time: Whereas compliance programs are designed to *prevent* the commission of illegal activity in the first instance, whistleblowers instead act as a backstop to minimize the damage *already done* by the uncovered misconduct.[39]

Major American corporations well understand the cost of creating and maintaining compliance and reporting programs which meet the requirements of the Sarbanes-Oxley Act. As several studies confirm, compliance is costly even to "compliant" organizations that operate within the bounds of the law.[40] Calculating the costs of noncompliance

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http://www.uschamber.com/press/releases/2011/may/us-chamber-warns-new-sec-whistleblower-rule-will-undermine-corporate-complia. The U.S. Chamber of Commerce went on to state that "whistleblowers will go straight to the SEC with allegations of wrongdoing and keep companies in the dark. This leaves expensive, robust compliance programs collecting dust, while violations continue to fester, eroding shareholder value." *Id.*

36. *See* Press Release, Representative Scott Garrett, Chairman, U.S. House Subcomm. on Capital Mkts. & Gov't-Sponsored Enters., Garrett Chairs Subcommittee Hearing to Review Dodd-Frank Whistleblower Provisions (May 11, 2011), http://garrett.house.gov/press-release/garrett-chairs-subcommittee-hearing-review-dodd-frank-whistleblower-provisions.

37. *Id.* (internal quotation marks omitted).

38. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 107-09 (2007).

39. *See* Casey Dissent, *supra* note 34.

40. *See* OFFICE OF ECON. ANALYSIS, U.S. SEC. & EXCH. COMM'N, STUDY OF THE SARBANES-OXLEY ACT OF 2002 SECTION 404 INTERNAL CONTROL OVER FINANCIAL REPORTING REQUIREMENTS 37-55 (2009), *available at* http://www.sec.gov/news/studies/2009/sox-404_study.pdf (explaining the costs of compliance with the Sarbanes-Oxley Act); Anwer S. Ahmed et al., *How Costly Is the Sarbanes Oxley Act? Evidence on the Effects of the Act on Corporate Profitability*, 16 J. CORP. FIN. 352, 353 (2010) (finding that average cash flows declined by 1.3% of total assets after the Sarbanes-Oxley Act was passed, with annual costs ranging from $6 million for

discovered by an internal whistleblower is an entirely different matter. The reputational penalties attendant with public disclosure of corporate wrongdoing could, of course, pose the harshest penalties companies stand to bear.[41] With respect to quantifiable costs, however, and from the standpoint of the corporate defendant, whistleblower rewards and monetary sanctions imposed in connection with civil and/or criminal enforcement by governmental entities are two sides of the same coin: both flow from company coffers and, in the case of public companies, from their shareholders.[42]

The costs of noncompliance resulting in a whistleblower exposure of malfeasance are exponentially higher for the defendant corporation. The ultimate price to pay is the deprivation of personal liberty when an executive goes to jail for wrongdoing that is exposed. Short of that, the penalties are potentially devastating to corporations who save in the short run on compliance. These penalties range from debarment in federal programs—a corporate life-threatening event for firms with a high percentage of government business such as defense contractors, medical device manufacturers, and pharmaceutical companies—to reputational damages costing the target company customers and shareholder value.[43] In addition, actual monetary penalties, particularly in FCA actions, frequently range into the hundreds of millions of dollars.[44]

Prudent companies weigh the costs of a well-conceived, functional compliance regime against the less certain but potentially devastating costs of illegality. Faced with the Dodd-Frank Act's mandate to erect additional whistleblower incentives, the SEC chose to allow whistleblowers to pass go, potentially bypassing corporate compliance programs altogether to collect their $200 (euphemistically—realistically, effective whistleblowers stand to collect tens of millions of dollars) from

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smaller firms to $39 million for larger firms); Roberta Romano, *Does the Sarbanes-Oxley Act Have a Future?*, 26 YALE J. ON REG. 229, 252 (2009). *See also* Francesco Bova et al., The Sarbanes-Oxley Act and Exit Strategies of Private Firms 9-10 (May 5, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1730242 (noting that compliance costs have shifted incentives of private firms seeking to go public through merger with a public acquirer or via an initial public offering); Ellen Engel et al., The Sarbanes-Oxley Act and Firms' Going Private Decisions 6-8 (Mar. 1, 2005) (unpublished manuscript), *available at* http://www.hbs.edu/units/am/pdf/imo2005papers/IMO2005EngelHayesWang.pdf.

41. *See* Rapp, *supra* note 38, at 119-20 (noting that public disclosure of corporate wrongdoing might lead to a collapse in a company's stock price).

42. *See* Gleeson, *supra* note 4.

43. *See* Rapp, *supra* note 38, at 119-20; Jacqueline Wood, *Government Contractor Standards of Ethical Conduct: The Need for a More Detailed Regulatory Scheme*, 36 PUB. CONT. L.J. 437, 444 (2007).

44. Department of Justice Recovers $3 Billion, *supra* note 19.

the SEC as a reward for their cooperation and information.[45] As such, the SEC prioritized its own enforcement actions ahead of encouraging corporations to deal directly with internal compliance issues when the issues first arise and before they become a contagion that infects the entire corporation.[46] To date, members of Congress have attempted to revise the Dodd-Frank Act by drafting legislation which would, among other things, mandate internal reporting as a prerequisite to receiving a financial reward from the SEC.[47]

III. OVERVIEW OF THE DODD-FRANK ACT WHISTLEBLOWER PROVISIONS

Since 1989, pursuant to Section 21A(e) of the Securities Exchange Act of 1934 (the "Exchange Act"),[48] the SEC has exercised discretion in granting awards to persons who provide information leading to the imposition of insider trading penalties.[49] Expanding upon that authority, the Dodd-Frank Act repeals Section 21A(e) and adds new Section 21F to the Exchange Act,[50] empowering the SEC to award bounties to parties

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45. *See, e.g.*, Casey Dissent, *supra* note 34 (noting the "fundamental failure" of the final rules is underestimating the "inherent risk . . . that the monetary sums at stake will provide a significant enough incentive for whistleblowers to completely bypass internal reporting in favor of coming straight to the [SEC]"); Paredes Dissent, *supra* note 34 (remarking on the importance of "[e]nsuring the integrity of corporate compliance programs . . . because companies with well-functioning compliance programs may be able to detect and remedy misconduct more swiftly than the SEC can").

46. Press Release, U.S. Chamber of Commerce, *supra* note 35. Robert Khuzami, Director of the SEC's Division of Enforcement, stated that "[e]arly and quick law enforcement action is the key to preventing securities fraud and avoiding investor losses, and the whistleblower program gives us the tools to help achieve that goal." Press Release, U.S. Sec. & Exch. Comm'n, SEC's New Whistleblower Program Takes Effect Today (Aug. 12, 2011), http://sec.gov/news/press/2011/2011-167.htm (internal quotation marks omitted).

47. *See* Whistleblower Improvement Act of 2011, H.R. 2483, 112th Cong. § 2(a)(2)(A) (2011). *See also* Press Release, Representative Michael Grimm, Reps. Grimm, Garrett, Campbell, and Stivers Introduce Whistleblower Improvement Act (July 12, 2011), http://grimm.house.gov/press-release/reps-grimm-garrett-campbell-and-stivers-introduce-whistleblower-improvement-act ("Dodd-Frank undermines these internal programs by incentivizing whistleblowers to go directly to the SEC, so H.R. 2483 makes internal reporting a prerequisite for such a reward.").

48. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C.).

49. Securities Exchange Act of 1934, 15 U.S.C. § 78u-1(e) (2006); U.S. SEC. & EXCH. COMM'N, *supra* note 30, at 1.

50. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (codified as amended at 15 U.S.C. § 78u-6 (Supp. IV 2011)). Section 21F, titled "Securities Whistleblower Incentives and Protection," generally directs the SEC to pay awards to whistleblowers who voluntarily provide the SEC with "original information" leading to a successful SEC enforcement action resulting in monetary sanctions totaling more than $1 million. Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(a)–(b). *See also* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300,

who provide information leading to the recovery of monetary sanctions across a broader range of cases than those of civil penalties for insider trading cases.[51] Modeled after an arguably successful Internal Revenue Service ("IRS") whistleblower program established in 2007,[52] the newly-created Dodd-Frank Act whistleblower rewards are designed to facilitate the flow of information to federal enforcement authorities, including the SEC, in connection with violations of the federal securities laws.[53] Observers studying the impact of the passage of the Dodd-Frank Act note that it is already affecting both the flow and quantity of information reaching enforcement authorities.[54]

A. *Paying Uncle Sam: The IRS Whistleblower/Informant Program*

The Dodd-Frank Act's whistleblower rewards borrow from the IRS Whistleblower/Informant Program created by the Tax Relief and Health Care Act of 2006[55] and launched by the IRS in 2007.[56] New Section

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34,304-05 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249) (setting forth the final rules for Section 21F).

51. *Compare* 15 U.S.C. § 78u-1(e), *with* 15 U.S.C. § 78u-6(b).

52. *See, e.g.*, I.R.S. News Release IR-2007-201 (Dec. 19, 2007), *available at* http://www.irs.gov/newsroom/article/0,,id=176632,00.html. According to a recent U.S. Government Accountability Office report, since its inception, the IRS Whistleblower Office received over 1300 whistleblower submissions alleging tax fraud in excess of $2 million involving more than 9500 taxpayers. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-683, TAX WHISTLEBLOWERS: INCOMPLETE DATA HINDERS IRS'S ABILITY TO MANAGE CLAIM PROCESSING TIME AND ENHANCE EXTERNAL COMMUNICATION 1 (2011) [hereinafter GAO REPORT], *available at* http://www.gao.gov/assets/330/322595.pdf. *But see* Letter from Charles E. Grassley, U.S. Senator, to Douglas L. Shulman, I.R.S. Commissioner 1-2 (Sept. 13, 2011), *available at* http://www.grassley.senate.gov/about/upload/Shulman-re-IRS-9-13-11.pdf (urging, among other things, that the IRS look for ways to shorten the time needed to process whistleblower claims and to improve its communication with whistleblowers so as to encourage the "continued receipt of valuable whistleblower claims").

53. Observing that the Foreign Corrupt Practices Act ("FCPA") of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 to 78dd-3, 78ff), as amended, forms part of the Exchange Act, commentators have predicted that the enhanced whistleblower awards called for under the Dodd-Frank Act will serve to increase FCPA investigations and enforcement activity. *See, e.g.*, Miller Chevalier, *Whistleblower Rewards Could Drastically Change FCPA Practice*, CORPORATE COMPLIANCE INSIGHTS (Apr. 1, 2010), http://www.corporatecomplianceinsights.com/2010/whistleblower-rewards-could-drastically-change-fcpa-practice/.

54. *See* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,354 & n.421 (estimating that the SEC "will receive approximately 30,000 tips, complaints and referrals submissions each year"). *But see* John F. Savarese, *Hype and Reality in the Dodd-Frank Whistleblower Rules*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 28, 2011, 9:14 AM), http://blogs.law.harvard.edu/corpgov/2011/07/28/hype-and-reality-in-the-dodd-frank-whistleblower-rules/ (reporting that as of mid-July 2011, SEC Enforcement Director Robert Khuzami's staff had not seen a "big spike" in whistleblower reports).

55. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (codified in scattered sections of 26 U.S.C.). The IRS Whistleblower/Informant Program created by such legislation itself borrows from the FCA whistleblower award model, as the FCA explicitly excludes

7623(b) of the Internal Revenue Code of 1986 (the "Code")[57] establishes a mandatory whistleblower award program concerning the submission of information leading to the collection of tax, penalties, interest, or other amounts from a noncompliant taxpayer.[58] Handled by a new IRS Whistleblower Office which operates at the direction of the Commissioner of Internal Revenue,[59] the program represents an enhancement of informant awards concerning internal revenue law violations, in place since March 1867.[60]

The updated program has attracted a high volume of informant information from the start: In the first twelve months after the IRS Whistleblower Office was established, the IRS received 116 submissions that each alleged more than $2 million in tax noncompliance, twenty-four of which alleged more than $10 million.[61] The increased efficacy of

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tax fraud from its purview. *See* False Claims Act, 31 U.S.C. § 3729(e) (2006) (stating that the FCA "does not apply to claims, records, or statements made under the Internal Revenue Code of 1986").

56. *See* Gleeson, *supra* note 4 (commenting that Congress "consciously modeled" the SEC whistleblower program on the updated IRS program begun in 2007). *See also* Letter from H. David Kotz, Inspector Gen., U.S. Sec. & Exch. Comm'n, to Representative Paul E. Kanjorski, Chairman, U.S. House Subcomm. on Capital Mkts., Ins., & Gov't-Sponsored Enters. (June 30, 2009), *available at* http://www.securitiesdocket.com/2009/07/01/sec-ig-kotz-responds-to-rep-kanjorski-with-legislative-suggestions-to-improve-sec/ (recommending that Congress consider amending the Exchange Act to provide specific criteria for awarding bounties in connection with information leading to the recovery of civil penalties from violators of the federal securities laws and to authorize the SEC to make such awards).

57. Tax Relief and Health Care Act of 2006, § 406(b), 120 Stat. at 2958-59 (codified at I.R.C § 7623(b) (2006)).

58. *See* I.R.C. § 7623(b)(1). Under the new mandatory award program, whistleblowers who bring information to the IRS (i) relating to a tax noncompliance matter in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2 million or (ii) relating to a taxpayer (and for individual taxpayers only) whose gross income exceeds $200,000 for at least one of the tax years in question, are eligible to receive between fifteen to thirty percent of the amount collected. *Id.* § 7623(b)(1), (5).

59. I.R.S., ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM 2 (2008) [hereinafter I.R.S. ANNUAL REPORT], *available at* http://www.irs.gov/pub/whistleblower/whistleblower_annual_report.pdf. The IRS Whistleblower Office is generally responsible for managing and tracking whistleblower claims, including analyzing submitted information and making award determinations, and has the authority to investigate matters itself or to assign them to an appropriate IRS office. *Id.* *See* GAO REPORT, *supra* note 52, at 4-5.

60. *See History of the Whistleblower/Informant Program*, I.R.S., http://www.irs.gov/compliance/article/0,,id=181294,00.html (last updated Apr. 21, 2008). Prior to passage of the Tax Relief and Health Care Act of 2006 and the attendant revisions to the Code, the IRS solely administered a discretionary award program, the particulars of which were re-designated in Section 7623(a). *Id.* The discretionary award program, providing for a maximum award of fifteen percent of collected taxes and penalties (up to $10 million), still applies to whistleblower information concerning taxes, penalties, interest, and other amounts in dispute below a certain dollar threshold, and to cases involving individual, noncompliant taxpayers below a certain gross income level. I.R.C. § 7623(b)(1), (5).

61. I.R.S. ANNUAL REPORT, *supra* note 59, at 3-4. Section 406(c) of the Tax Relief and Health Care Act of 2006 mandates that the Secretary of the U.S. Treasury conduct an annual study

the informant program[62] has much to do with the addition of mandatory awards to the IRS's already-existing discretionary awards.[63] The so-called "strong form" bounty provisions[64] further encourage would-be informants to come forward with information based, in part, on the relative certainty concerning the benefit of doing so.[65] As of the end of fiscal year 2010, the IRS received an aggregate 1328 submissions concerning 9532 taxpayers.[66] In April 2011, the IRS Whistleblower Office paid out its first Section 7623(b) award, of more than $4.5 million, to an in-house accountant of a national financial services firm who assisted the IRS in recovering $20 million in unpaid taxes from his employer.[67]

What does the increased information flow stemming from the revised IRS Whistleblower/Informant Program tell us about the potential efficacy of the newly-created SEC Whistleblower Office?[68] On the one

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for submission to Congress on the use of Section 7623 and the results obtained, detailing therein any legislative or administrative recommendations for Section 7623 and its application. Tax Relief and Health Care Act of 2006, § 406(c), 120 Stat. at 2960.

62. I.R.S. ANNUAL REPORT, *supra* note 59, at 4-5 (stating that under the previous discretionary whistleblower award program, "only 12 of 227 full paid claims in 2007 involved collections of more than $2 million, and only 3 involved collections of more than $10 million").

63. *Id.* at 1-2.

64. Gleeson, *supra* note 4; *see generally* Rapp, *supra* note 38 (discussing "bounty" provisions).

65. Once a whistleblower fulfills the requirements set forth in Section 7623(b) and the information furnished is deemed to have "substantially contributed" to the IRS's detection and recovery of amounts from a noncompliant taxpayer, the IRS is obligated, with certain exceptions, to pay the individual a reward of between fifteen to thirty percent of the amount collected, with no limit on the dollar amount of the award. *See* I.R.C. § 7623(b)(1)–(3). *See also* IRM 25.2.2.7 (June 18, 2010), *available at* http://www.irs.gov/irm/part25/irm_25-002-002.html#d0e589 (discussing the processing of a claim for a Section 7623 award).

66. *See* I.R.S., FISCAL YEAR 2010 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623, at 7 tbl.1 (2010) [hereinafter I.R.S. FY 2010 REPORT], *available at* http://www.irs.gov/pub/whistleblower/annual_report_to_congress_fy_2010.pdf. Award payments related to such information have been much less fruitful, explained in part by the IRS's processing backlog: As of April 2011, sixty-six percent of claims submitted in the first two years of the program, fiscal years 2007 and 2008, were still in process. *See* GAO REPORT, *supra* note 52, at 8.

67. *See* MaryClaire Dale, *IRS Awards $4.5M to Whistleblower*, USA TODAY (Apr. 8, 2011, 3:36 PM), http://www.usatoday.com/money/perfi/taxes/2011-04-08-irs-whistleblower-taxes-reward.htm.

68. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 924(d), 124 Stat. 1376, 1850 (2010) (codified at 15 U.S.C. § 78u-7(d) (Supp. IV 2011)). The SEC's Office of the Whistleblower (i) handles whistleblower tips and complaints, (ii) provides guidance to SEC Enforcement Division staff, and (iii) assists the SEC in determining the size of awards for each whistleblower. *See generally* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM: FISCAL YEAR 2011 (2011) [hereinafter SEC ANNUAL REPORT], *available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf (explaining the various functions of the SEC's Office of the Whistleblower). The SEC's Office of the Whistleblower has a stand-alone webpage which promotes and clarifies the whistleblower program and provides guidance on the same. *See SEC Office of the Whistleblower*,

hand, not all information furnished to enforcement authorities is as it purports to be: Owing to incomplete verification of informant tips concerning taxpayer noncompliance as of the printing of any given annual report, the Secretary of the U.S. Treasury readily admits that the number of cases reported as submitted to the mandatory Section 7623(b) informant program changes from year to year.[69] Furthermore, there is some concern that the IRS cannot currently handle the volume of whistleblower information it receives in a timely manner.[70] Regardless of the particular utility of the IRS whistleblower program as a means of increasing compliance with, in that instance, federal tax law, companies grappling with the new SEC whistleblower program should be focusing on how to preserve the integrity of their corporate compliance programs and internal control structures, and strengthen internal investigation protocols—in short, how to retain access to internal whistleblower information before it is turned over to federal law enforcement.

B. The SEC's Final Rules and New Whistleblower Program

The Dodd-Frank Act was promulgated, in part, to ameliorate certain perceived shortcomings of whistleblower incentive awards and protections[71] erected pursuant to the carrot-for-the-whistleblower, stick-for-the-company approach to combating fraud as found in the FCA and the Sarbanes-Oxley Act.[72] Setting the backdrop for what has become one

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U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/whistleblower (last visited Apr. 20, 2012).

69. *See* I.R.S. FY 2010 REPORT, *supra* note 66, at 7 n.12 (stating that the classification of a particular submission as a potential Section 7623(b) case, and the number of taxpayers identified, can change as additional information is developed, and as such, "the numbers for a particular fiscal year included in previous annual reports do not match the numbers reported").

70. *See* Letter from Charles E. Grassley, *supra* note 52, at 2 (Senator Grassley expressed concern over the Government Accountability Office's data that suggests that whistleblower information spends "years of languishing in a review to determine whether a taxpayer should be even audited. The numbers in audit for these years are more troubling.").

71. Critics have noted that the Sarbanes-Oxley Act's whistleblower protections have fallen far short of their promise. *See, e.g.*, Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764 (2007) (stating that the Sarbanes-Oxley Act "gives the illusion of protection without truly meaningful opportunities or remedies for achieving it"); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 94-95 (2007). For a discussion of potential FCA qui tam abuses, see Baruch & Barr, *supra* note 23, at 30 (noting the potential for "whistleblower abuses under the *qui tam* enforcement mechanism," citing, among other things, that while the FCA provides that "a prevailing relator's attorneys' fees are paid by the defendant, a prevailing defendant may recover reasonable attorneys' fees only if the *qui tam* action was clearly frivolous, vexatious, or brought in bad faith under the FCA"). *See also* False Claims Act, 31 U.S.C. § 3730(d)(4) (2006) ("[T]he court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.").

72. *See* Baruch & Barr, *supra* note 23, at 29-30; *Corporate Law*, *supra* note 7, at 1829-30.

of the most successful private party-governmental enforcement collaborations to date,[73] the 1986 amendments to the FCA, among other things, expanded liability to persons with "deliberate ignorance" or "reckless disregard" of the veracity of information contained in a claim submitted to the federal government, and encouraged the submission of whistleblower information by trebling damages and increasing awards for successful qui tam relators.[74]

While the Dodd-Frank Act did not authorize qui tam enforcement of federal securities laws, it fashioned a whistleblower bounty scheme which prizes cooperation with, and disclosure to, the SEC—*potentially entirely in lieu of* an enterprise's internal compliance remediation.[75] Following the Dodd-Frank Act directive set forth in Section 922(a),[76] the SEC's final rules allow for awards of between ten to thirty percent of collected monetary sanctions[77] to whistleblowers who (i) voluntarily provide the SEC (ii) with original information about a violation of the securities laws (iii) that leads to the successful enforcement of an action brought by the SEC (iv) resulting in monetary sanctions exceeding $1 million.[78] Parsing the various elements of such award criteria, the SEC defines a "whistleblower" as any individual[79] who provides information to the SEC regarding a "possible violation" of the federal securities laws that "has occurred, is ongoing, or [that] is about to occur."[80] As such, the list of possible whistleblowers is long, including individuals such as

73. Press Release, U.S. Dep't of Justice, Health Care Fraud Prevention and Enforcement Efforts Recover Record $4 Billion; New Affordable Care Act Tools Will Help Fight Fraud (Jan. 24, 2011), http://www.justice.gov/opa/pr/2011/January/11-asg-094.html. *See also* HCFAC FY 2010 REPORT, *supra* note 27, at 5 ("$4.021 billion was deposited with the Department of the Treasury and the Centers for Medicare and Medicaid Services . . . .").

74. False Claims Amendments Act of 1986, Pub. L. No. 99-562, sec. 2, § 3729(a)–(b), 100 Stat. 3153, 3153-54 (codified as amended in 31 U.S.C. § 3729(a)–(b) (2006 & Supp. IV 2011)). Unlike the FCA, the Dodd-Frank Act does not provide for treble damages concerning violations of the Exchange Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 922, § 21F(b), 124 Stat. 1376, 1842 (2010) (codified at 15 U.S.C. § 78u-6(b) (Supp. IV 2011)).

75. *See* Baruch & Barr, *supra* note 23, at 29-30, 41.

76. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922(a), 124 Stat. at 1841.

77. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,366 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249).

78. *Id.* at 34,363.

79. Importantly, and in contrast with the expansively permissive definition of a qui tam relator pursuant to the FCA, 31 U.S.C. § 3730(b) (2006), the SEC expressly excludes companies and other entities from the definition of an eligible whistleblower. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,363. Pursuant to SEC Rule 21F-7(b), an individual may anonymously report to the SEC, though he or she must have attorney representation and follow the procedures delineated in SEC Rule 21F-9. *Id.* at 34,367.

80. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,363.

employees and former employees, third-party vendors and contractors, agents, clients, customers, and even company competitors.[81]

Mirroring FCA qui tam relator exclusions,[82] among those excluded from award eligibility are individuals who (i) are convicted of a criminal violation related to the SEC action or to a "related action" for which the individual otherwise would receive a reward[83] or (ii) obtain the information relayed to the SEC by a means or in a manner "determined by a United States court to violate applicable Federal or state criminal law."[84] The final rules also exclude certain categories of persons as being incapable of conveying "original information" due to the fact that they obtained their information through the commission of preexisting duties and, as such, lack the "independent knowledge" or "independent analysis" of the information.[85]

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81. Following the Dodd-Frank Act's whistleblower exclusions set forth in Section 922(a), the final SEC rules do exclude from bounty eligibility persons falling into certain categories, including, but not limited to, individuals who (i) are, or were at the time the original information was acquired, (a) employed at certain governmental or law enforcement agencies or (b) foreign government officials; (ii) acquired the original information through audit work of the company's financials; or (iii) are related or in the same household as an SEC member or employee. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,367-68.

82. *See* False Claims Act, 31 U.S.C. § 3730(d)(3). Courts have discretion to reduce a relator's share of the qui tam recovery when that relator is found to have "planned and initiated the [FCA] violation." *Id.* In addition, qui tam awards cannot be collected by relators convicted of criminal conduct related to the qui tam action. *Id.* Similarly, the SEC has discretion to reduce an award to a whistleblower who is deemed to have a certain degree of "culpability or involvement . . . in matters associated with the [SEC's] action or related actions." Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,366-67. The SEC will also take into consideration whistleblower culpability when determining the $1 million threshold set forth in SEC Rule 21F-10, subtracting from such dollar threshold monetary sanctions (i) payable by the whistleblower or (ii) payable by any entity whose liability is "based substantially on conduct that the whistleblower directed, planned, or initiated." *Id.* at 34,371.

83. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,367-68.

84. *Id.* at 34,364-65. The FCA has no similar prohibition concerning qui tam relators. *See* False Claims Act, 31 U.S.C. § 3730(d)(3) ("If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.").

85. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,364. Among the individuals excluded by the rule are officers, directors, and trustees; employees whose "principal duties" involve compliance or internal audit responsibilities, including employees of firms charged with performing such functions; individuals retained to conduct an inquiry or investigation into possible violations of law; and auditors who obtain their information through the performance of an engagement required of an independent public accountant under the federal securities laws. *Id.* However, any such individual may provide "original information" if: (i) he or she has a reasonable basis to believe that disclosure of the information is necessary to prevent "substantial injury" to the financial interest or property of the entity or investors; (ii) he or she has a reasonable basis to believe that the company is engaging in conduct that will impede an investigation of the misconduct; or (iii) at least 120 days have elapsed since the individual either provided the information to the company's compliance, legal, or audit

The SEC's administration of the whistleblower program will, of course, depend on interpretation of several key elements of the final rules. The final rules contain definitions clarifying what it means to, among other things, "voluntarily" provide "original information" which "leads to successful enforcement" by the SEC of an "action" involving "monetary sanctions."[86] In an effort to clarify award criteria, the SEC's Office of the Whistleblower set up a webpage covering basic procedural information such as how to submit a tip and how to go about claiming an award.[87] While a discussion of possible criteria interpretation is beyond the scope of this Article, it is sufficient to note that the award program ratcheted up incentives for would-be whistleblowers to tell what they know.

As anyone familiar with the growing pains of adapting to a Sarbanes-Oxley-mandated compliance regime would ask, the most pressing question is not who qualifies to receive a whistleblower reward but, rather, will whistleblowers choose to report internally or externally? In a hotly contested debate concerning whether to require whistleblowers to report up before reporting out, the prerequisite was deemed unnecessary: While an SEC whistleblower is permitted and, indeed, rewarded for participating in internal compliance programs,[88] internal reporting is not required in order to be considered for an award.[89] Issuing a staff recommendation in favor of the final rules to SEC commissioners, SEC Enforcement Director Robert S. Khuzami explained that the SEC weighed the possibility of conditioning awards on internal reporting and "concluded that an absolute requirement that whistleblowers report internally . . . would be detrimental to the enforcement program, and seemingly inconsistent with the statute's goal of motivating individuals

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personnel or received such information under circumstances indicating that such company personnel were already aware of the information. *Id.* at 34,365.

86. *Id.* at 34,364-65.

87. *Claim an Award*, U.S. SEC. & EXCH. COMM'N (Feb. 1, 2012), http://www.sec.gov/about/offices/owb/owb-awards.shtml; *Submit a Tip*, U.S. SEC. & EXCH. COMM'N, www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Apr. 20, 2012).

88. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,366. In exercising its discretion to determine the appropriate award percentage owed to a whistleblower, the SEC looks favorably on the whistleblower's participation in internal compliance systems, including reporting possible securities violations through whistleblower, legal, or compliance procedures before, or contemporaneously as, reporting them to the SEC. *Id.* In similar fashion, the SEC's award calculation will take into account whether a whistleblower "undermined the integrity" of internal compliance and reporting systems. *Id.* at 34,367.

89. *See id.* at 34,365. Whistleblowers may be eligible for an award for information initially reported internally if they also report the information to the SEC within 120 days of such internal reporting. *Id.* In addition, a whistleblower who initially reports internally and whose company thereafter self-reports to the SEC receives credit for the self-reported information in addition to his or her own information. *Id.*

to come to the [SEC] with evidence of securities law violations."[90] Whether the final rules will be effective in encouraging whistleblowers to first report internally—and, indeed, effective in bringing securities violations information to the SEC itself—remains to be seen.[91]

Congress was not confident that upping the potential rewards would be enough of a sweetener to properly motivate whistleblowers to turn information over to the government. Instead, relators and others were granted certain anti-retaliation whistleblower protections[92]—the stick against companies who would seek to quash government informants through intimidation, harassment, and discharging—protections which were strengthened in 2009[93] and, most recently, pursuant to the Dodd-Frank Act. Improving upon the FCA's anti-retaliation protections, the

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90. Robert S. Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: Remarks at Open Meeting—Whistleblower Program (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511rk.htm [hereinafter Khuzami Recommendation]. *See also* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. at 34,323 (explaining its decision not to require internal reporting by noting that the SEC's "primary goal, consistent with the congressional intent behind Section 21F, is to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the [SEC's] enforcement program").

91. As required by Section 21F(g)(5) of the Exchange Act, the SEC issued an annual report on the whistleblower program. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 922, § 21F(g)(5), 124 Stat. 1376, 1844-45 (2010) (codified at 15 U.S.C. § 78u-6(g)(5) (Supp. IV 2011)). Among other information, the report is required to contain statistics on the SEC whistleblower program, including a description of the number of whistleblower awards granted and the types of cases in which the awards were granted during the preceding fiscal year. Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(g)(i). In November 2011, the SEC issued the requisite report for fiscal year 2011 and the whistleblower program's impact is still unclear. *See* SEC ANNUAL REPORT, *supra* note 68, at 6 ("[I]t is too early to identify any specific trends or conclusions from the data collected to date.").

92. The FCA amendments of 1986 granted employees the right to sue their employers based on a good faith belief that they were being discriminated against—including being discharged, demoted, suspended, threatened, or harassed—and to seek to be made whole, including, but not limited to, reinstatement with same seniority status and two times the amount of any back pay. False Claims Amendments Act of 1986, Pub. L. No. 99-562, sec. 4, § 3730(h), 100 Stat. 3153, 3157-58 (codified at 31 U.S.C. § 3730(h) (2006 & Supp. IV 2011)). The Senate Judiciary Committee Report related to the 1986 FCA amendments makes clear the congressional intent behind the legislation:

> The Committee recognizes that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation. . . . [T]he Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence "whistleblowers", as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.

S. REP. NO. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299.

93. Pursuant to the Fraud Enforcement and Recovery Act of 2009, the anti-retaliation protections afforded in the 1986 FCA amendments were further expanded to protect "lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop [one] or more violations of [the FCA]." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4(d), § 3730(h), 123 Stat. 1617, 1624-25 (codified in scattered sections of 18 and 31 U.S.C.).

Dodd-Frank Act expands protected conduct to include lawful acts done by "the employee, contractor, or agent or associated others *in furtherance* of other efforts to stop [one] or more violations of this subchapter."[94] The Dodd-Frank Act likewise augments the whistleblower protections contained in the Sarbanes-Oxley Act, including (i) broadening Section 806 of the Sarbanes-Oxley Act to include employees of private subsidiaries and affiliates of publicly traded companies "whose financial information is included in the consolidated financial statements of such compan[ies]";[95] (ii) doubling the statute of limitations to 180 days;[96] and (iii) explicitly disallowing any "agreement, policy form, or condition of employment, including by a predispute arbitration agreement," which purports to waive whistleblower rights or remedies of Section 922(c) of the Dodd-Frank Act.[97]

Commentators have made remarks concerning the Dodd-Frank Act's two-tiered system of retaliation protection specifically afforded the SEC whistleblower.[98] As set forth in new Section 21F(h)(1)(A) of the Exchange Act, employers may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in (i) providing information to the SEC, (ii) initiating, testifying in, or assisting in any SEC investigation or action based upon or related to such information, or (iii) making disclosures that are required or protected under any law, rule, or regulation subject to SEC jurisdiction.[99]

94. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 1079A(c), § 3730(c), 124 Stat. 1376, 2079 (2010) (emphasis added) (internal quotation marks omitted). Section 1079A(c) also clarifies that individuals are afforded a three-year period for actions brought under Section 3730(h) of the FCA, clarifying the statute of limitations following the U.S. Supreme Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 422 (2005), which applied an analogous state statute of limitations for wrongful discharge actions to FCA retaliation claims. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 1079(A)(c), § 3730(c)(3), 124 Stat. at 2079.

95. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 929A, § 1514A, 124 Stat. at 1852 (codified as amended 18 U.S.C. § 1514A (Supp. IV 2011)) (internal quotation marks omitted).

96. *Id.* sec. 922(c), § 1514A(b)(2), 124 Stat. at 1848 (codified at 18 U.S.C. § 1514A(b)(2)). The limitations period starts on the date on which the employee becomes aware of the employer's retaliatory conduct, as opposed to the date the retaliation occurred. 18 U.S.C. § 1514A(b)(2)(D). Section 922 also clarifies that employees are entitled to have their retaliation claims tried before a jury. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 922(c), § 1514A(b)(2), 124 Stat. at 1848 (codified at 18 U.S.C. § 1514A(b)(2)(E)).

97. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 922(c), § 1514A(b)(2), 124 Stat. at 1848 (codified at 18 U.S.C. § 1514A(e)).

98. *See, e.g.*, *Corporate Law*, *supra* note 7, at 1830-32.

99. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922(a), 124 Stat. at 1845-

Echoing the strongest criticism leveled against the new SEC whistleblower rules, as discussed in more detail below, a strict interpretation of the wording of Section 922 of the Dodd Frank Act—and, more specifically, the definition of the term "whistleblower"[100]—would indicate that Congress meant to bolster the anti-retaliation rights of whistleblowers reporting externally to the SEC, but not those of individuals providing information to internal compliance departments.[101]

C. *Public Backlash and the Future of SEC Whistleblower Reporting*

Legal observers, as well as critics within legal and business communities, have analyzed the SEC's whistleblower program at length—both following the SEC's publication of proposed rules for public comment[102] and, most recently, when the SEC adopted final rules concerning Section 21F of the Exchange Act. On the heels of the Sarbanes-Oxley Act's mandate to erect internal compliance systems and controls designed to detect and deter financial fraud, requirements which turned out to be much more expensive than originally estimated,[103] the

46 (codified at 15 U.S.C. § 78u-6(h)(1)(A) (Supp. IV 2011)). Enforcement of this anti-retaliation measure is found in new section 21F(h)(1)(B), which creates a private right of action for individuals alleging a violation thereof. Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(h)(1)(B) (Supp. IV 2011).

100. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922(a), 124 Stat. at 1842 (codified at 15 U.S.C. § 78u-6(a)(6) (Supp. IV 2011)) (defining a whistleblower as "any individual who provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC]").

101. Despite the apparent intent of Congress to create disparate anti-retaliation rights as between internal- and external-reporting whistleblowers, in a case of first impression in the federal courts, Section 21F(h)(1)(A) has recently been broadly interpreted to protect internal whistleblowers who provide certain disclosures under law, rule, or regulation subject to the SEC's jurisdiction. *See* Egan v. TradingScreen, Inc., [2011 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,307 (May 4, 2011), *complaint dismissed*, 2011 WL 4344067 (S.D.N.Y. Sept. 12, 2011) (distinguishing between the Dodd-Frank Act's whistleblower reward provisions and its anti-retaliation provisions, and opining that the latter apply to whistleblowers claiming either that their information (i) was reported to the SEC *or* (ii) fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting under the Sarbanes-Oxley Act, the Exchange Act, 18 U.S.C. § 1513(e) (Supp. IV 2011), or other laws and regulations subject to the jurisdiction of the SEC).

102. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-63237, 75 Fed. Reg. 70,488 (Nov. 17, 2010) (to be codified at 17 C.F.R. pts. 240, 249). The SEC reports that it received more than 240 comment letters and approximately 1300 form letters on the Whistleblower Proposed Rules. SEC ANNUAL REPORT, *supra* note 68, at 2-3. Those comments are available at the SEC's website. *Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/comments/s7-33-10/s73310.shtml (last updated May 24, 2011).

103. Joseph A. Grundfest & Steven E. Bochner, *Fixing 404*, 105 MICH. L. REV. 1643, 1645 (2007) (citing the SEC's estimated average cost of compliance with Section 404 as $91,000,

overwhelming critique centers around the SEC's deliberate decision not to make internal reporting a prerequisite to obtaining whistleblower award bounties.[104] As reported by SEC Enforcement Director Khuzami, public comment regarding the lack of mandatory internal reporting noted that the whistleblower program would, among other things:

- Encourage whistleblowers to bypass internal compliance programs;
- Undermine the ability of an entity to detect, investigate, and remediate securities violations, particularly as to those complaints over which the [SEC] has no jurisdiction or that are too small for the [SEC] to investigate;
- Create adverse incentives for whistleblowers to see their companies sanctioned or to delay reporting potential violations; and
- Reduce the incentive for corporations to establish and maintain effective internal compliance programs.[105]

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whereas a 2005 survey revealed the direct cost for first year compliance at $7.3 million for large accelerated filers and $1.5 million for accelerated filers).

104. *See, e.g.*, Comment Letter from Barbara Hackman Franklin, Chairman, Nat'l Ass'n of Corporate Dirs., and Kenneth Daly, President & CEO, Nat'l Ass'n of Corporate Dirs., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 4 (Dec. 17, 2010), http://www.nacdonline.org/files/FileDownloads/PDF/SEC%20Whistleblower%20Comment%20Letter%20NACD.pdf ("[T]he proposed rule incentivizes employees to be whistleblowers first and loyal employees second. . . . [T]here is little motivation or reason for a company to build an effective internal compliance system if the corporate employees are not expected to use it and can bypass it at anytime."); Comment Letter from Neila B. Radin, Chair, Sec. Law Comm., Soc'y of Corporate Sec'ys & Governance Prof'ls, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Dec. 17, 2010), http://www.sec.gov/comments/s7-33-10/s73310-230.pdf ("[C]ompliance and hot line programs and policies generally require employees to internally report any potential violations of law. . . . It is important that the Rules work in tandem with, and not in contravention of, these processes and procedures."); Comment Letter from Jeffrey W. Rubin, Chair, Comm. on Fed. Regulation of Sec., Am. Bar Ass'n Bus. Law Section, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 16 (Jan. 4, 2011), http://apps.americanbar.org/buslaw/committees/CL410000pub/comments/20110104000000.pdf ("The Committees believe that in order for whistleblowers to be eligible for an award, whistleblowers should be required, absent extraordinary circumstances, to exercise reasonable efforts to exhaust all reasonably available internal processes a company has established for reporting compliance concerns.").

105. Khuzami Recommendation, *supra* note 90. SEC Enforcement Director Khuzami countered such objections by noting that (i) the SEC was not presented with, or otherwise aware of, empirical data showing that the absence of mandatory internal reporting would undermine internal compliance programs, (ii) "companies that take their fiduciary obligations and corporate citizenship responsibilities seriously will design and implement effective compliance programs regardless of whether a whistleblower is required to internally report wrongdoers to qualify for an award," (iii) Congress intended the Dodd-Frank Act to be utilized as a tool to increase the effectiveness of the SEC's enforcement program, and (iv) nothing in the Dodd-Frank Act requires internal reporting as a condition of award eligibility. *Id.*

Assuming for the moment that the whistleblower program will be effective, at least in the functional sense that it is capable of either minimizing ongoing corporate criminality or deterring it altogether, the next analysis concerns whether the costs of complying with such a regime—including the possibility that whistleblowers will report malfeasance to the SEC rather than internally—are worth the benefits of increased information flow to the SEC. To that end, SEC commissioners rightly questioned whether the cost-benefit analysis not only properly weighed the risk to companies, insofar as whistleblowers might choose to forego internal compliance regimes erected pursuant to the Sarbanes-Oxley Act, but perhaps also overestimated the SEC's role in the process itself.[106]

Arguing that a central purpose of the Dodd-Frank Act's whistleblower mandate is to supply the SEC with insider information, SEC Enforcement Director Khuzami predicted:

> [I]nformation from whistleblowers will allow us to build stronger cases and move more quickly, thus increasing the chance of stopping frauds early, of locating and returning more money to victim-investors, and of preventing small frauds from growing into bigger frauds with even more victims, more losses and more ruined lives.[107]

Critics opine that precisely the opposite results are most likely to be derived from the Dodd-Frank Act's incentives for whistleblowers: Whistleblowers will sit on information until the fraud becomes large enough to maximize their reward and, as a consequence, money that could have been saved for victim-investors will instead be paid to the government in fines and penalties and to the whistleblower.[108]

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106. *See* Casey Dissent, *supra* note 34. Noting that "the public investigative process can be substantially more ponderous and time-consuming than private investigative processes," former SEC Commissioner Casey warned that "[b]y diverting tips and complaints from private channels to the [SEC], we may end up permitting violations to last longer and grow more serious." *Id.*

107. Khuzami Recommendation, *supra* note 90.

108. *See* Harvey L. Pitt, Former Chairman, U.S. Sec. & Exch. Comm'n, Remarks Before the United States Senate Banking Committee on "Enhanced Investor Protection After the Financial Crisis" 8 (July 12, 2011), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=25ebf00f-03ca-481c-941b-4f42b14b76f2. Pitt generally criticized the Dodd-Frank Act and, with specific reference to the SEC whistleblower program, stated that the implementing rules:

> [C]reate overwhelming financial incentives to bypass internal reporting mechanisms and requirements, and go directly to the SEC with [whistleblower] tips. As a result, they may effectively deny companies the opportunity to detect and take prompt remedial action in response to internally reported tips from employees. . . . By diverting tips and complaints from internal compliance and legal channels to the SEC, the whistleblower provisions paradoxically may result in violations continuing and becoming more serious.

Id.

Furthermore, the SEC may not have the necessary resources to deal with the projected new influx of cases generated by whistleblowers. According to the SEC, the agency has "successfully resolved" ninety-two percent of the 681 enforcement cases brought in 2010.[109] However, is the SEC prepared to handle the estimated 30,000 tips it anticipates to receive yearly?[110] SEC Chairman Schapiro recently wrote concerning an organizational assessment of the SEC, mandated by the Dodd-Frank Act and conducted by the Boston Consulting Group, Inc. (the "BCG").[111] Rather than providing comfort, the BCG report underscores the SEC's "significant opportunity to further optimize its available resources," providing sixteen discrete recommendations organized around (among three other categories) reshaping the organization.[112] In the words of SEC Chairman Schapiro, the SEC has "more work to do."[113] If that is indeed the case—that the SEC will be swamped with more complaints than it can handle—the lack of a requirement for internal reporting will allow fraud that would otherwise have been reported to continue unabated until the SEC can find the time to address it. Likely, this will be most harmful to investors in smaller enterprises and those least scrutinized by the markets and media, since, like all other enforcement authorities, the SEC will target the worst—in this context, the biggest—offenders first.

By not conditioning whistleblower rewards on initial reporting to internal compliance, the Dodd-Frank Act may also motivate would-be whistleblowers to act as a secret police force, of sorts, for the government. This secret police will not be bound by the Constitution as federal authorities would be. Therefore, whistleblowers potentially could be collecting documents, reporting on conversations, and acquiring evidence that would be beyond the reach of subpoenas and warrants.[114]

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109. U.S. SEC. & EXCH. COMM'N, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 11, 27, 49 (2010), *available at* http://www.sec.gov/about/secpar/secpar2010.pdf#2010review (defining successful resolution of an action as one "result[ing] in a favorable outcome for the SEC, including through litigation, a settlement, or the issuance of a default judgment").

110. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,354 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249).

111. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 967, 124 Stat. 1376, 1913-14 (2010); BOS. CONSULTING GRP., INC., U.S. SECURITIES AND EXCHANGE COMMISSION: ORGANIZATIONAL STUDY AND REFORM (2011), *available at* http://www.sec.gov/news/studies/2011/967study.pdf; Mary L. Schapiro, *Fixing the Watchdog: Evaluating and Improving the SEC*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2011, 9:15 AM), http://blogs.law.harvard.edu/corpgov/2011/10/02/fixing-the-watchdog-evaluating-and-improving-the-sec/.

112. BOS. CONSULTING GRP., INC., *supra* note 111, at 5-8, 141-42; Schapiro, *supra* note 111.

113. Schapiro, *supra* note 111.

114. *See, e.g.*, Gundacker v. Unisys Corp., 151 F.3d 842, 845 (8th Cir. 1998) (noting that a document found to be privileged by the magistrate judge, a holding affirmed by the district court,

These issues are not unique to the whistleblower provisions of the Dodd-Frank Act, but are exacerbated by the lack of a requirement that disclosures first be made internally.

The most direct and impactful criticism of the whistleblower program comes from Congress in the form of pending legislation that has the potential to radically change the whistleblower program as currently designed. Among other things, the Whistleblower Improvement Act of 2011[115] would: (i) require corporate whistleblower employees to first report suspected violations of securities laws to their employer before reporting the information to the SEC; (ii) expand the current exclusion of eligible whistleblowers; and (iii) mandate that the SEC notify entities prior to commencing any whistleblower-related enforcement action to afford an opportunity to investigate and remedy the alleged misconduct.[116] Whether the SEC whistleblower program ends up being revised, through self-study, congressional action, or a combination of the two, companies should carefully examine their internal compliance programs with an eye toward preventing, detecting, and deterring fraud, and increasing the odds that individuals with information to share will do so internally in the first instance.

IV. NOTABLE, BIG-MONEY WHISTLEBLOWER CASES

While we do not have a concrete sense of the volume of whistleblower tips flowing to the SEC or of the resulting bounties paid for such information,[117] the public need not wait to understand the astronomically high numbers involved in federal enforcement cases assisted by private informants. Consider just a few names you might find in your medicine cabinet: Botox®, GlaxoSmithKline, AstraZeneca, Pfizer, Eli Lilly, and Merck. The unfortunate commonality among such companies and brands is that they all paid huge sums—altogether, some $3.795 billion[118]—to resolve civil charges brought by the federal

had to be returned to the defendant, but the plaintiff was allowed to proceed with the underlying claim).

115. Whistleblower Improvement Act of 2011, H.R. 2483, 112th Cong. (2011).

116. *See id.* §§ 2(a)(1), (e)(3), 3(c).

117. *See* SEC ANNUAL REPORT, *supra* note 68, at 6.

118. *See* Press Release, U.S. Dep't of Justice, Allergan Agrees to Plead Guilty and Pay $600 Million to Resolve Allegations of Off-Label Promotion of Botox® (Sept. 1, 2010), http://www.mainjustice.com/files/2010/09/Allergan-News-Release.pdf [hereinafter Allergan to Pay $600 Million]; Eli Lilly to Pay $1.415 Billion, *supra* note 3; Press Release, U.S. Dep't of Justice, GlaxoSmithKline to Plead Guilty & Pay $750 Million to Resolve Criminal and Civil Liability Regarding Manufacturing Deficiencies at Puerto Rico Plant (Oct. 26, 2010), http://www.justice.gov/opa/pr/2010/October/10-civ-1205.html [hereinafter GlaxoSmithKline to Pay $750 Million]; Press Release, U.S. Dep't of Justice, Justice Department Announces Largest Health Care Fraud Settlement

government concerning false claims submitted to federal and state health care programs such as Medicare and Medicaid. What is more, four of the six companies involved paid an *additional* aggregate $2.4 billion in fines and forfeitures to settle criminal liability associated with the same activity.[119] All told, the DOJ collected "$3 billion in civil settlements and judgments in cases involving fraud against the government in the fiscal year ending Sept. 30, 2010," with $2.5 billion of such amount representing health care fraud recoveries—the largest in DOJ history.[120]

A. *Increased DOJ Reliance on Whistleblowers*

According to the DOJ, the FCA is the federal government's "primary weapon in the battle against fraud."[121] Moreover, the driving force behind the settlements, criminal fines, and forfeitures is the insider information provided by qui tam whistleblowers to the government.[122] Once the DOJ receives insider tips of illegality—information that arguably might not have been discovered by enforcement authorities on their own—the investigative road is straight and swift, with the defendant company left to investigate the wrongdoing one step behind law enforcement already privy to the whistleblower information.[123]

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in Its History: Pfizer to Pay $2.3 Billion for Fraudulent Marketing (Sept. 2, 2009), http://www.justice.gov/usao/ma/news/Pfizer/Pfizer%20-%20PR%20%28Final%29.pdf [hereinafter Pfizer to Pay $2.3 Billion]; Press Release, U.S. Dep't of Justice, Merck to Pay More than $650 Million to Resolve Claims of Fraudulent Price Reporting and Kickbacks (Feb. 7, 2008), http://www.justice.gov/opa/pr/2008/February/08_civ_094.html [hereinafter Merck to Pay $650 Million]; Press Release, U.S. Dep't of Justice, Pharmaceutical Giant AstraZeneca to Pay $520 Million for Off-Label Drug Marketing (Apr. 27, 2010), http://www.justice.gov/opa/pr/2010/April/10-civ-487.html [hereinafter AstraZeneca to Pay $520 Million].

119. *See* Allergan to Pay $600 Million, *supra* note 118; Eli Lilly to Pay $1.415 Billion, *supra* note 3; GlaxoSmithKline to Pay $750 Million, *supra* note 118; Pfizer to Pay $2.3 Billion, *supra* note 118. In the case of these enforcement actions, the criminal fines primarily related to "off-label" marketing by the pharmaceutical manufacturers—that is, the marketing of a drug for a use not included in the drug's Food and Drug Administration ("FDA") approved product label. Allergan to Pay $600 Million, *supra* note 118; Eli Lilly to Pay $1.415 Billion, *supra* note 3; GlaxoSmithKline to Pay $750 Million, *supra* note 118; Pfizer to Pay $2.3 Billion, *supra* note 118. Under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 to 399d (2006 & Supp. IV 2011), "a company in its application to the FDA must specify each intended use of a biological product. After the FDA approves the product as safe and effective for a specified use, any promotion by the manufacturer for other uses—known as 'off-label' uses—[is illegal and] renders the product misbranded." Allergan to Pay $600 Million, *supra* note 118.

120. Department of Justice Recovers $3 Billion, *supra* note 19.

121. *Id.*

122. *See* Barger et al., *supra* note 13, at 477-78 (stating that qui tam provisions are "[k]ey to the FCA's success"); Department of Justice Recovers $3 Billion, *supra* note 19 (discussing the revision of the FCA's qui tam provisions and their importance to particular recoveries).

123. *See* Barger et al., *supra* note 13, at 475; Press Release, U.S. Chamber of Commerce, *supra* note 35.

Fraud enforcement, and more specifically health care fraud enforcement, is a clear priority of the federal government, and such activity has increasingly relied on the private citizen informant-for-hire—the corporate whistleblower.[124] Employees, former employees, outside parties such as vendors and contractors, and clients—any and all of these individuals could uncover potentially incriminating information against the corporation, and the Dodd-Frank Act's whistleblower provisions, as effectuated through the SEC's new Whistleblower Office, represent yet additional evidence that public law enforcement has come to increasingly rely on eyes and ears within the corporate walls to ferret out wrongdoing.

More than just a testament to the government's growing use of whistleblowers, the Dodd-Frank Act is also a harbinger of the expanding use of whistleblowers across industries—in this case, to any entity that must concern itself with following the federal securities laws. Indeed, while the natural result of the DOJ's particular focus on health care fraud is that many of the high-profile qui tam actions involve companies in the pharmaceutical and medical device sectors, consider that $500 million in fiscal year 2010 alone was recovered from companies in other industries.[125] For instance, in October 2011, Oracle Corporation and Oracle America Inc. agreed to pay nearly $200 million plus interest to resolve allegations concerning contractual negotiations with the General Services Administration (the "GSA").[126] The success of the DOJ's use of

124. *See* Department of Justice Recovers $3 Billion, *supra* note 19; Press Release, U.S. Dep't of Justice, Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More than $24 Billion Since 1986 (Nov. 19, 2009), http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html ("Of the $2.4 billion in settlements and judgments obtained in fiscal year 2009, nearly $2 billion was recovered in lawsuits filed under the [FCA's] *qui tam* provisions."); Press Release, U.S. Dep't of Justice, More than $1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008 (Nov. 10, 2008), http://www.justice.gov/opa/pr/2008/November/08-civ-992.html (noting that almost seventy-eight percent of fiscal year 2008 recoveries of $1.34 billion were associated with qui tam actions); Press Release, U.S. Dep't of Justice, United States Files Complaint Against BestCare Laboratory Services Alleging False Claims for Medicare Funds (Nov. 22, 2011), http://www.justice.gov/opa/pr/2011/November/11-civ-1523.html.

125. *See* Department of Justice Recovers $3 Billion, *supra* note 19.

126. *See* Press Release, U.S. Dep't of Justice, Oracle Agrees to Pay U.S. $199.5 Million to Resolve False Claims Act Lawsuit (Oct. 6, 2011), http://www.justice.gov/opa/pr/2011/October/11-civ-1329.html (disclosing that the single qui tam relator involved, a former Oracle Corporation employee, will receive a $40 million reward for his information). Oracle Corporation is hardly the lone high-tech company to become embroiled in an FCA enforcement action with the GSA. In April 2009, NetApp Inc. and NetApp U.S. Public Sector Inc. agreed to pay $128 million plus interest to resolve claims that the companies had failed to properly disclose product discounts to the GSA during the course of contract negotiations. *See* Press Release, U.S. Dep't of Justice, GSA Contractor NetApp Agrees to Pay U.S. $128 Million to Resolve Contract Fraud Allegations (Apr. 15, 2009), http://www.justice.gov/opa/pr/2009/April/09-civ-353.html (disclosing that the single qui tam relator involved, a former employee, will receive a $19.2 million reward for his information).

the FCA's qui tam provisions marks a seemingly new breed of prosecutors:[127] private citizens with access to the intricacies of business operations across America who stand ready, willing, and able to assist the government in performing its duty of detecting, deterring, and minimizing corporate fraud and malfeasance.[128] The passage of the Dodd-Frank Act whistleblower provisions is simply an affirmation of the congressional vote of confidence in the private-public law enforcement partnership that developed, in large measure, following the 1986 qui tam amendments and was later reaffirmed through the revamped IRS informant award program.[129]

B. Rising Bounties, Rising Enterprise Risk

Just as the lure of billions flowing back to the U.S. Treasury with the help of whistleblowers enticed Congress to act, so too does the prospect of big-money bounties spur whistleblowers to direct information to law enforcement.[130] The sums, particularly those involving health care fraud actions, are almost as striking as the amounts recovered by the DOJ. Awards given to qui tam relators in connection with the six pharmaceutical companies previously mentioned include: (i) $102 million to six whistleblowers in the September 2009 Pfizer settlement, with a single relator receiving $51.5 million of the award;[131] (ii) more than $45 million to a single whistleblower in the April 2010 AstraZeneca settlement;[132] (iii) $37.8 million to five whistleblowers in the September 2010 Allergan Botox®-related settlement;[133] (iv) nearly $79 million to nine whistleblowers in the January 2009 Eli Lilly settlement;[134] (v) $96 million to a single whistleblower in the October

127. Commentators have observed this phenomenon at length. *See, e.g.*, Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 IND. L.J. 525, 529 n.13 (2001) (likening qui tam relators to "private prosecutors" (internal quotation marks omitted)).

128. *See id.* at 583.

129. *See* Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 459 (2010) ("The False Claims Act promotes a 'working partnership' between the qui tam plaintiff and the government by effectively deputizing private citizens to prosecute fraud against the federal government as full participating parties in the litigation, whether or not the government intervenes.").

130. *See supra* note 45 and accompanying text.

131. *See* Pfizer Settlement Agreement at 1, 8 (Aug. 31, 2009), *available at* http://www.justice.gov/usao/ma/news/Pfizer/Pfizer%20Settlement%20Agreement.pdf.

132. AstraZeneca to Pay $520 Million, *supra* note 118.

133. Allergan to Pay $600 Million, *supra* note 118.

134. *See* Eli Lilly to Pay $1.415 Billion, *supra* note 3; Sarah Rubenstein, *Justice Department Beats Chest Over Zyprexa Settlement*, WALL ST. J. HEALTH BLOG (Jan. 15, 2009, 2:30 PM), http://blogs.wsj.com/health/2009/01/15/justice-department-beats-chest-over-zyprexa-settlement/.

2010 GlaxoSmithKline settlement;[135] and (vi) $68 million to a single whistleblower in the February 2008 Merck settlement.[136]

Clearly, providing information pertinent to an FCA investigation could mean a windfall—per the particular statutory award scheme, as much as thirty percent of the government's recovery[137]—to a whistleblower in a position to share what he or she believes to be illegality. On the flip side, of course, a successful qui tam lawsuit could mean financial ruin for the defendant entity.[138] Unfortunately, the ever-expanding use of corporate whistleblowers, from uncovering suspected fraud against the U.S. government to exposing federal tax evasion to, now, reporting federal securities law violations, means that companies are increasingly susceptible to whistleblower reporting occurring before internal compliance systems are able to investigate the allegations and, if necessary, remedy the wrongdoing.

As the proverb goes, there is nothing new under the sun. To be sure, corporate whistleblowing has gone on long before qui tam provisions in the FCA sweetened the deal for would-be government informants.[139] What notably changes the landscape, however, is the dramatically expanded use of whistleblowers by the government.[140] Lured by exponentially rising bounties, whistleblowers have every incentive to report malfeasance to the government instead of to their company. More alarming, though, is the possibility that a whistleblower might stand to gain by collecting evidence for the government while the situation worsens.[141] Any fulsome normative argument calling for the necessity of whistleblowers as an aid to law enforcement must consider that a whistleblower who provides information to the government does so in lieu of offering the same to an internal compliance department which might very well be in a position to quickly investigate and, if necessary, remedy the illegality.

The nuances of erecting proper incentives for whistleblowers—proper in the sense that individuals and corporations are thereby

135. GlaxoSmithKline to Pay $750 Million, *supra* note 118.

136. Merck to Pay $650 Million, *supra* note 118.

137. Barger et al., *supra* note 13, at 474.

138. *See, e.g.*, *id.* at 475 & n.62.

139. *See supra* notes 10-11 and accompanying text.

140. *See* Neil Weinberg, *The Dark Side of Whistleblowing*, FORBES, Mar. 14, 2005, at 90, 91.

141. In a spectacular example of such behavior, an executive at TAP Pharmaceutical Products ("TAP") spent more than half a year at the company gathering evidence of suspected fraud, later compiling additional evidence over the course of eight years as an ex-employee while also filing a qui tam action alleging similar misbehavior at a company rival, Zeneca. *Id.* at 90. While the relator received a staggering $126 million for such efforts, the defendants connected to the alleged wrongdoing at TAP were later cleared. *Id.*

influenced to behave legally and ethically—are hard to finesse in a vacuum. Whether Congress and the SEC happened upon the correct formula will not be determined for some time to come. Nevertheless, certain striking differences between the SEC's final whistleblower rules and existing FCA provisions concerning qui tam plaintiffs deserve mention, including whether information arguably in the public domain is nevertheless deemed worthy of a whistleblower award. The Patient Protection and Affordable Care Act (the "Affordable Care Act")[142] passed in 2010 narrowed the FCA's then-existing public disclosure bar.[143] Following the revisions, the FCA allows for court dismissal of actions based on whistleblower information deemed to constitute "substantially the same allegations or transactions" as disclosed publicly unless the whistleblower either first provides such information to the government or, alternatively, has knowledge that is "independent of and materially adds to" the public allegations and provides such to the government before filing the qui tam action.[144] In comparison, the SEC final rule allows for award recovery where the whistleblower provides "original information," meaning, among other things, that the facts relayed to the SEC must not have been "exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless [the whistleblower is] a source of the information."[145]

A meaningful difference between the FCA and the SEC whistleblower program as currently designed is the inability, at least for the moment, for whistleblowers to file qui tam actions on behalf of the government. By design, the SEC whistleblower program keeps the agency in the driver's seat: A company cannot be sanctioned without the SEC exercising its sole discretion to file suit.[146] However, the Dodd-Frank Act requires that the SEC's Inspector General study several aspects of the SEC whistleblower program, including whether Congress should allow SEC whistleblowers to bring suit on behalf of the government and themselves.[147] This report, expected to be issued in

142. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S.C.).

143. False Claims Act, 31 U.S.C. § 3730(e)(4)(A)–(B) (2006 & Supp. IV 2011).

144. *Id.* The Affordable Care Act likewise lifted the previous FCA restriction against bringing a qui tam action based on information disclosed in state and private proceedings and generally granted the government the ability to oppose court dismissal of a qui tam case otherwise in violation of the public disclosure bar. *Compare* 31 U.S.C. § 3730(e)(4)(A) (2006), *with id.* (Supp. IV 2011).

145. Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,364 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249).

146. *See id.* at 34,310.

147. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203,

January 2013, could give Congress ammunition to pass legislation enabling SEC whistleblowers to enforce federal securities laws on behalf of the government. Whether allowing private plaintiffs this right would be "in the interest of protecting investors and identifying and preventing fraud"[148] or instead would spur frivolous claims by whistleblower plaintiffs merely fishing for the chance at big-time cash will need to be carefully considered in light of the whistleblower tips that do end up resulting in successful SEC enforcement actions.

With or without qui tam actions assisting the government to enforce federal securities laws, the reality is that fraud enforcement is big business. Viewed in a cynical light, rigorous enforcement of statutes which reward whistleblowers translates to increased funding to enforcement authorities themselves.[149] In this sense, we have evolved from using fines as a means of deterring future wrongdoing to using monetary sanctions as a way to grow government coffers and, with respect to enforcement of federal securities laws, doing so at the expense of shareholders.[150] Legislation introduced by Senators Patrick Leahy and Charles Grassley in May 2011, the Fighting Fraud to Protect Taxpayers Act of 2011,[151] would serve to further solidify this trend. Make no mistake: Law enforcement is in the business of enforcing laws, and whatever—*whomever*—can assist them in doing so, especially when the end result of a successful enforcement action means additional agency funding, will be paid generously.

V. ADVICE TO THE CORPORATION

Our experience at the highest levels of the DOJ and as U.S. attorneys across the country give us unique insight to observe this private-citizen-informant trend. In our time as prosecutors, we used whistleblowers to combat fraud and corporate misbehavior. Now, in our work with some of the world's largest and most well-known companies

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§ 922(d)(1), 124 Stat. 1376, 1848-49 (2010). The Dodd-Frank Act specifically requires that the SEC Inspector General, among other things, study whether the SEC "is prompt in responding to information provided by whistleblowers; . . . whether the minimum and maximum reward levels are adequate to entice whistleblowers to come forward with information and whether the reward levels are so high as to encourage illegitimate whistleblower claims." *Id.*

148. *Id.* § 922(d)(1)(G), 124 Stat. at 1849.

149. *See supra* note 27 and accompanying text.

150. Press Release, U.S. Chamber of Commerce, *supra* note 35.

151. Fighting Fraud to Protect Taxpayers Act of 2011, S. 890, 112th Cong. (2011). Among other things, the legislation would allow the DOJ (i) to retain a greater percentage of civil fraud action recoveries, resulting in a projected increase of $15 million in funding for FCA enforcement and (ii) to recover investigation and prosecution costs relating to FCA actions. *Id.*; S. REP. NO. 112-142, at 2 (2012).

and executives, we harmonize compliance and business objectives to design, implement, and—most importantly—operate profitably under internal compliance programs that *work*. We emphasize the points laid out below to focus companies on the elements of internal compliance that minimize the risk of malfeasance while also maximizing the chance that suspected wrongdoing is swiftly detected, investigated, and (if applicable) eradicated before it becomes a cancer on the corporation.

A. Prevention, Deterrence, and Detection: The Essentials of Compliance

The best defense against a government enforcement action initiated by whistleblower information is to operate within the bounds of the law. Corporate management committed to complying with the law will build, and thereafter operate under, an effective compliance program focused on three essential elements: (i) prevention, (ii) deterrence, and (iii) detection. By the time a corporation has valid whistleblower concerns, it has already failed at the first two elements of compliance.[152] Malfeasance of some kind has happened, and the corporation is at the stage of worrying about who will detect it first. As a result, the best advice to any practitioner is to nurture prevention and deterrence vigorously.

However, even the most responsible corporate citizens cannot always prevent or deter malfeasance by a rogue employee, group of employees, or business unit. Therefore, corporations that want to avoid the potentially crippling advent of a whistleblower who reports externally must aggressively deploy sophisticated detection tools and grow a culture of internal scrutiny. Furthermore, if the worst should happen and a corporation faces criminal charges, the U.S. Sentencing Commission Guidelines (the "Sentencing Guidelines")[153] recommend

152. This statement presumes that a whistleblower furnished a valid report of wrongdoing. It might well be the case that a whistleblower would supply inaccurate or misleading information, which once investigated would result in a determination that the company was not engaged in the impropriety alleged by the whistleblower.

153. U.S. SENTENCING GUIDELINES MANUAL (2011).

that a corporation be given credit for an effective compliance program and that penalties to such a corporation be reduced accordingly.[154]

While each company's particular circumstance requires individualized components, effective detection programs almost universally contain the following essential elements:

(1) A Suite of Compliance Policies. These policies set forth the standards and procedures to prevent and detect wrongdoing and unethical or illegal conduct. The policies should communicate the organization's commitment to a culture that promotes ethical conduct and a commitment to compliance.[155] Most often, corporations will adopt an overarching statement of principles, such as a code of conduct, that sets forth the corporation's expectations for ethical conduct.[156] The specifics for the implementation of compliance programs are best broken down into policies detailing specific functions. These policies should include clear consequences for failure to engage in compliant behavior,

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154. The Sentencing Guidelines will be quoted at length in the following footnotes to highlight the requirements for a compliance program to be given credit under the Sentencing Guidelines. Text which appears bold or italicized is reproduced as written in the Sentencing Guidelines.

> <u>Effective Compliance and Ethics Program</u>
>
> (a) To have an effective compliance and ethics program, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (b)(1) of § 8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
>
> (1) exercise due diligence to prevent and detect criminal conduct; and
>
> (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

Id. § 8B2.1(a). The Sentencing Guidelines allow for a reduction of up to three points in the calculation of a corporation's penalties as credit for an effective compliance program. *See id.* § 8C2.5(f). The Sentencing Guidelines also state that requiring a compliance and ethics program is an appropriate condition of a corporation's probation. *Id.* § 8D1.4(b)(1).

155. As the Sentencing Guidelines state: "Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following: The organization shall establish standards and procedures to prevent and detect criminal conduct." *Id.* § 8B2.1(b)(1). "For purposes of this guideline: *'Standards and procedures' means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.*" *Id.* § 8B2.1 cmt. n.1.

156. *See, e.g.*, APPLE INC., APPLE SUPPLIER CODE OF CONDUCT 5-6 (2012), *available at* http://images.apple.com/supplierresponsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf; VERIZON, YOUR CODE OF CONDUCT 8-11 (2012), *available at* https://www22.verizon.com/about/careers/pdfs/CodeOfConduct.pdf; YAHOO!, WINNING WITH INTEGRITY: YAHOO!'S CODE OF ETHICS (2011), *available at* http://files.shareholder.com/downloads/YHOO/660619262x0x239565/4f32ddd0-82e5-47c2-ac71-75403ebbb404/YahooCodeOfEthics_Ext_1008.pdf.

compensation structures that discourage noncompliance, and rewards for compliant conduct, such as bounties for disclosing malfeasance.[157]

(2) Strong Board-of-Director Participation in Compliance Matters. A culture that encourages reporting starts with the tone at the top. The board of directors (the "Board") needs to be knowledgeable about the compliance program and oversee its implementation and effectiveness.[158] Often, a Board will enlist the audit committee or deploy a compliance committee to assist with these responsibilities.[159] Both the audit and compliance committees, as applicable, should meet regularly and welcome empirical and anecdotal reports of detection efforts and the fruit they bear. Members of the committees must be qualified, curious, and accessible to company management. Resources independent of management must be made available to the committees to follow up on suspected wrongdoing by management.

(3) Executive Leadership. Compliance responsibilities cannot be delegated exclusively to counsel or compliance personnel. The chief executive officer (the "CEO") and other members of the senior management team must be involved in integrating compliance policies and procedures into business operations.[160]

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157. The Sentencing Guidelines state:

> (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6). According to the Application Notes of this provision: "*Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.*" *Id.* § 8B2.1 cmt. n.5.

158. As the Sentencing Guidelines state: "The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program." *Id.* § 8B2.1(b)(2)(A). "*'Governing authority' means . . . (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.*" *Id.* § 8B2.1 cmt. n.1.

159. *See, e.g.*, APPLE INC., *supra* note 156, at 6; VERIZON, *supra* note 156, at 2; YAHOO!, *supra* note 156, at 1, 43.

160. The Sentencing Guidelines provide that "[h]igh-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program." U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(B). The Application Notes provide: "*'High-level personnel of the organization' and 'substantial authority personnel' have the meaning given those terms in the Commentary to § 8A1.2 (Application Instructions - Organizations).*" *Id.* § 8B2.1 cmt. n.1. The Application Notes of Section 8A1.2 of the Sentencing Guidelines contain the following definitions:

(4) A Chief Compliance Officer. The chief compliance officer (the "CCO") should report directly to the Board and/or its appropriate committee(s), both on a regular basis and immediately upon becoming aware of a serious compliance matter.[161] The CCO should also have

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> *(B) "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. "High-level personnel of a unit of the organization" is defined in the Commentary to § 8C2.5 (Culpability Score).*
>
> *(C) "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.*

Id. § 8A1.2 cmt. n.1. In applying Section 8B2.1, the Sentencing Guidelines provide:

> *High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.*

Id. § 8B2.1 cmt. n.3. Furthermore, the Sentencing Guidelines state that "[t]he organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." *Id.* § 8B2.1(b)(3). In applying this provision, the Sentencing Guidelines state the following:

> *(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.*
>
> *(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.*

Id. § 8B2.1 cmt. n.4.

161. According to the Sentencing Guidelines:

> (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with

direct access to the CEO. Reports from the CCO should not be filtered by the general counsel, the chief financial officer, or anyone else. The CCO should be afforded the resources necessary to build a compliance team and program suitable to the size and complexity of the corporation.[162]

> operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

Id. § 8B2.1(b)(2)(C). In applying this provision, the Sentencing Guidelines state:

> *If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.*

Id. § 8B2.1 cmt. n.3.

162. The following are factors to consider in meeting requirements of Section 8B2.1 of the Sentencing Guidelines:

> *(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.*
>
> *(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.*
>
> *(C) The Size of the Organization.—*
>
> *(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.*
>
> *(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.*
>
> *(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.*
>
> *Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's*

(5) Hotline. A hotline is one of the least expensive yet most effective ways for corporations to encourage internal whistleblowing and discover possible wrongdoing. As early as 2005, the American Institute of Certified Public Accountants found that "[a] key defense against management override of internal controls is a process for anonymous submission of suspected wrongdoing . . . . [V]arious forms of fraud are detected 40 percent of the time by tips, which [makes] this the leading method for detecting fraud."[163] According to a survey published by the Association of Certified Fraud Examiners, frauds detected by hotline reporting mechanisms are shown to reduce the median loss to the company by more than fifty percent.[164] Key elements of a meaningful hotline are as follows:

(a) **Widespread Promotion.** Hotlines should be widely publicized internally and externally, since whistleblowers can now be anyone (employees, contractors, vendors, and suppliers)[165]—even, in certain cases, individuals with a preexisting duty to report malfeasance.[166] Company communications should clearly state that this hotline is a resource to be used at will to ask questions and report suspicious conduct whenever the need arises.

(b) **Anonymity.** Reporters to the hotline must have the credible option of remaining anonymous. Despite strong company policies against retaliation, internal whistleblowers often fear

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> *compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.*
>
> *(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subparagraph, "similar misconduct" has the meaning given that term in the Commentary to § 8A1.2 (Application Instructions - Organizations).*

Id. § 8B2.1 cmt. n.2.

163. AICPA Antifraud Programs & Controls Task Force, *Anonymous Submission of Suspected Wrongdoing (Whistleblowers)—Issues for Audit Committees to Consider*, GLOBAL COMPLIANCE, 1 (2005), *available at* http://www.globalcompliance.com/pdf/AICPA_whistleblower.pdf.

164. ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE: 2010 GLOBAL FRAUD STUDY 42-43 (2010), *available at* http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf.

165. *See id.* at 17.

166. *See, e.g.*, Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,364-65 (June 13, 2011) (to be at codified at 17 C.F.R. pts. 240, 249) (outlining that an individual whose responsibilities include compliance and audit functions can receive a whistleblower award if the individual meets certain criteria).

retribution from their co-workers or supervisors.[167] Anonymity dramatically reduces the perceived threat of retaliation.[168]

(c) **Accessibility.** The hotline should be both a phone line and a web-based resource so that it is available 24/7 for inquiries. The hotline should be capable of receiving reports in various relevant languages.

(d) **Independence.** Employees, especially those who are reporting on their superiors or who fear retaliation, need evidence that they are reporting to a hotline that will give their allegations a fair and unbiased review. Independence can be established either by engaging a third-party vendor to provide hotline services or by building a credible internal investigations unit.

(e) **Dialogue.** Two-way communication is perhaps the most important element of a hotline that allows for anonymous reports. If the allegations prove to be reliable, the investigator will likely need additional information from the reporter. Hotline administrators should ask for the identity of the reporter. Hotlines should be staffed with well-trained intake personnel capable of asking appropriate follow-up questions. Lastly, hotline staff should inform the anonymous reporter of the means by which the reporter can communicate additional information at a later date while still preserving anonymity.

(6) Systems to Detect Wrongdoing.[169] These systems include independent internal audit functions, investigations, and automated monitoring systems.

(a) **An Independent Internal Audit Function.** Appropriately conducted, resourced, and reported internal audits can bring problems to the attention of the Board or management before they are found by external audits or governmental authorities.

(b) **Internal Investigations.** To protect the interests of the company from both internal risks, such as embezzlement and self-dealing, and external risks, such as previously unknown whistleblowers, companies should build sophisticated internal

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167. *See* ASS'N OF CERTIFIED FRAUD EXAM'RS, *supra* note 164, at 17.

168. The Sentencing Guidelines state that "[t]he organization shall take reasonable steps . . . to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (2011).

169. The Sentencing Guidelines state that "[t]he organization shall take reasonable steps to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct." *Id.* § 8B2.1(b)(5)(A).

investigations units. Quality investigations units will include:

i. an experienced investigations team with expertise in the company's core business, law enforcement, and regulatory investigations;
ii. sufficient resources to deal with the company's volume of investigations;
iii. an intake process capable of quickly responding to reports of malfeasance;
iv. a triage procedure that focuses on the worst alleged activity first—the triage procedure should immediately escalate allegations against senior management to the audit or compliance committee of the Board;
v. a committee made up of compliance and business representatives to decide on corrective action;[170]

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170. The Sentencing Guidelines state that "[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." *Id.* § 8B2.1(b)(7). The Sentencing Guidelines clarify that "[i]n implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process." *Id.* § 8B2.1(c). In applying Section 8B2.1(b)(7), the Sentencing Guidelines state that the provision has "two aspects":

> *First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.*
>
> *Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.*

Id. § 8B2.1 cmt. n.6. To meet the requirements of Section 8B2.1(c), the Sentencing Guidelines state that an organization shall:

> *(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:*
>
> *(i) The nature and seriousness of such criminal conduct.*
>
> *(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and*

vi. a system for reporting on investigations and outcomes to the Board; and

vii. appropriate utilization, or significant inclusion, of outside/independent counsel or auditors to conduct the investigation.

(c) **Technologically Advanced, Risk-Based Monitoring System.** According to the 2010 global fraud study published by the Association of Certified Fraud Examiners, fraud schemes proceed undetected for a median of eighteen months.[171] While fraud or other malfeasance goes undetected, the company's exposure to corrupt practices, falsified books and records, and disgorgement risk grows as infractions and tainted sales continue undetected.

Companies should police the activities most likely to spawn malfeasance through the deployment of risk-based monitoring tools, utilizing the most technologically advanced methods available. Such automated monitoring assesses electronic information to detect events and transactions that exhibit potential breaches of internal controls, company policy, regulations, or laws. The best monitoring programs are frequent and target areas most susceptible to abuse. They are automated, capable of generating notifications of exemptions, and able to track any remedial activity. Automated monitoring

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procedures designed to prevent and detect fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subparagraph (A) of this note as most serious, and most likely, to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subparagraph (A) of this note as most serious, and most likely, to occur.

Id. § 8B2.1 cmt. n.7. Additionally, the Sentencing Guidelines explain:

Background. This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

Id. § 8A1.2 cmt. background.

171. ASS'N OF CERTIFIED FRAUD EXAM'RS, *supra* note 164, at 14.

systems can be based on key phrases, empirical data, or the nature of key transactions.

(7) Training. Even the best policies and procedures are ineffective if only the compliance department is aware of them. Effective compliance training is: (i) current, (ii) interactive, (iii) a mix of live, recorded, and online formats, (iv) position-specific, (v) inclusive of testing elements, and (vi) periodically measured for effectiveness. Compliance training needs to be provided at every level of the corporation, from the Board to field operations.[172]

(8) Well-Thought-Out Privilege Policy. Highly sensitive investigations should be conducted and supervised either by in-house or external attorneys who take appropriate steps to ensure that the findings are covered by the attorney-client and work-product privileges.

(9) Periodic, Independent Assessment of Compliance Program. In addition to ongoing efforts to assess the effectiveness of specific elements of the compliance program, corporations benefit from periodic, independent assessments of the comprehensive compliance program.[173]

(10) Consideration of Self-Reporting. Corporate management's decision concerning whether to self-report discovered wrongdoing is an extraordinarily complex matter well beyond the scope of this Article. However, practitioners should be aware of the requirements contained in

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172. The Sentencing Guidelines state:

> (4)(A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
>
> (B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(4)(A)–(B).

173. The Sentencing Guidelines state that "[t]he organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program." *Id.* § 8B2.1(b)(5)(B).

the Sentencing Guidelines[174] to earn credit for self-reporting and acceptance of responsibility.

B. *Changing the Culture May Be the Most Difficult Change*

Internal whistleblowing should be greatly favored by corporations over external whistleblowing for the simple reasons that (i) wrongdoing will be detected earlier and be less costly for the company to remedy and (ii) the company will be more likely to avoid government intervention. The Sarbanes-Oxley Act explicitly requires public companies to create a procedure to intake and deal with reports from employee whistleblowers.[175] The statute provides civil damages[176] and criminal penalties for retaliation against whistleblowers alleging securities fraud.[177] Under the Sarbanes-Oxley Act, the audit committee must be provided with the necessary resources to retain outside/independent investigators and advisors it feels are necessary to conduct appropriate investigations.[178] Section 201 of the Sarbanes-Oxley Act prohibits the

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174. The Sentencing Guidelines provide:

> [T]he organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Id. § 8B2.1 cmt. n.6. The Sentencing Guidelines provide that one of the ways that a corporation can earn credit for its compliance and ethics program is to, among other things, promptly report the malfeasance: *"the organization promptly reported the offense to appropriate governmental authorities." Id.* § 8C2.5(f)(3)(C)(iii). The calculation of a company's "culpability score" takes into account self-reporting:

> (g) Self-Reporting, Cooperation, and Acceptance of Responsibility
>
> If more than one applies, use the greatest:
>
> > (1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points; or
> >
> > (2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 2 points; or
> >
> > (3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 1 point.

Id. § 8C2.5(g).

175. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 301, § 10A(m)(4), 116 Stat. 745, 776 (codified as amended at 15 U.S.C. § 78j-1(m)(4) (2006)).

176. 18 U.S.C. § 1514A (2006 & Supp. IV 2011).

177. *Id.* § 1513(e).

178. Securities Exchange Act of 1934, 15 U.S.C. § 78j-1(m)(4)–(5).

use of a company's regular auditors to perform non-audit functions such as investigations.[179]

Companies that want to avoid whistleblowers directing tips to the government must fundamentally reform how internal whistleblowers have been treated. Too often, whistleblowers have been viewed as problem employees at best. Whistleblowers have often faced alienation, isolation, and hostility.[180] Whistleblowers, even internal, have been treated as snitches who are disloyal to the employer for personal gain.[181] Thus, the cultural shift that must occur is substantial.

Corporations must move from treating whistleblowers as pariah to valuing them as information-gatherers who warn corporate leadership of possible wrongdoing. Corporate cultures that embrace internal whistleblowers will gain the advantages of detecting wrongdoing in its earliest stages and reducing the likelihood of external whistleblowing.

Ending the threat of retaliation is the first step toward changing the culture. Retaliation can take the obvious forms of firing, failing to promote, and reducing compensation. Internal whistleblowers also have faced more subtle forms of retaliation such as isolation, being shunned by co-workers, intense supervision, or general alienation.[182] Successful cultural changes work to end all forms of retaliation.

C. Steps for Creating a Whistleblowing Culture

(1) Establish a Clearly Articulated Whistleblower Policy. Changing the culture begins with, but certainly does not end with, changing policies. Companies that are effective in encouraging whistleblowers to come forward internally will create a culture where raising issues is welcomed. Internal whistleblowers need to be encouraged and rewarded. Elements of a robust whistleblower policy include:

(a) a non-retaliation policy with teeth;
(b) a clear path for reporting wrongdoing that includes both the ability to report to immediate managers and to avoid the chain of command entirely and anonymously;
(c) communication of steps taken as a result of whistleblower information; and
(d) meaningful rewards to those who report wrongdoing.

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179. *Id.* § 78j-1(g).

180. *See, e.g.*, Lilanthi Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, SANTA CLARA UNIV., http://scu.edu/ethics/publications/submitted/whistleblowing.html (last visited Apr. 20, 2012).

181. *Id.*

182. *Id.*

(2) Communicate Endorsement of Top Management. From the CEO down to line managers, communications must demonstrate a strong commitment to encouraging whistleblowing. These communications need to be regular and delivered at every level—in memoranda, newsletters, and speeches reiterating management's commitment to ethical behavior. Public acknowledgment and monetary rewards for employees who discover and disclose wrongdoing send a message that resonates loudly. Training on and periodic reminders of this commitment are especially critical to its implementation.

(3) Follow Up. The surest way to chill enthusiasm for bringing problems to management's attention is for management to do nothing with the information. If employees believe that they have a serious responsibility to assist in discovering and reporting wrongdoing, they will take the risk of making disclosures if they believe that management has an equally strong commitment to taking all necessary corrective action.

(4) Assess the Effectiveness of the Whistleblowing System. Companies should regularly examine employees' understanding of how the whistleblowing system functions as well as employee attitudes regarding the system. Empirical data should also be examined. For example, how does the number of calls to the hotline or the number of investigations compare to such data in similarly sized corporations?

(5) Monitor Potential Retaliatory Actions. Like any other malfeasance, retaliation will be avoided only if deterred and detected when it happens. Monitoring for potential retaliation requires that compliance departments have direct access to human resources ("HR") systems recording employee information. Monitoring systems will track the reporting employee's HR records post-disclosure for (i) changes in performance appraisals, (ii) terminations, (iii) work, performance, or training improvement plans specific to the reporting employee, (iv) job or task reassignment, and (v) more frequent absences from work. In addition to these objective criteria, compliance personnel should observe the reporter closely enough to discover changes in behavior, social patterns, and attitude, which may signal that more subtle retaliation is taking place. Finally, follow-up interviews of the reporter should be conducted to confirm that no retaliation is taking place.

VI. CONCLUSION

Congressional approval of the use of corporate whistleblowers, as most recently evidenced by the Dodd-Frank Act's whistleblower provisions encouraging and protecting private citizens who come forward with information concerning possible federal securities law violations,[183] has raised the stakes for companies across America to implement compliance systems and controls which are effective in preventing, detecting, and deterring wrongdoing. The highly-publicized, financially successful federal enforcement of the FCA[184] has lead us to a private citizen informant-for-hire model which necessarily prompts companies carefully to examine existing compliance structures so as to (i) properly motivate individuals with knowledge or suspicion of corporate malfeasance to direct their information as soon as possible to internal sources and (ii) ensure that companies have adequate resources to execute speedy investigations and, if need be, to remedy any substantiated wrongdoing.

183. *See supra* Part III.
184. *See supra* Part IV.

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