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## COMMENT

# THE SEC'S WHISTLEBLOWER PROGRAM AND ITS EFFECT ON INTERNAL COMPLIANCE PROGRAMS

### INTRODUCTION

On January 19, 2010, the FBI and United Kingdom law enforcement orchestrated what is now known as the “Catch 22” sting operation.<sup>1</sup> Undercover FBI agents, posing as members of the Nigerian Defense Ministry, used a confidential informant to conduct a false transaction with an individual suspected of bribing the Nigerian Ministry in a \$15 million arms sale.<sup>2</sup> The sting operation yielded solid evidence against the suspects, and the FBI subsequently arrested twenty-two corporate executives and employees in the military and law enforcement-product industry.<sup>3</sup>

The Catch 22 sting operation may be the most creative example of the recent surge in Securities Exchange Commission (“SEC”) and Department of Justice (“DOJ”) charges against companies and individuals violating the Foreign Corrupt Practices Act of 1977<sup>4</sup>

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<sup>1</sup> *CATCH-22: Lessons from DOJ's Massive Undercover FCPA Sting*, MCGUIRE WOODS LLP (Jan. 22, 2010), <http://www.mcguirewoods.com/news-resources/item.asp?item=4481>; see also *FBI Charges 22 Over Alleged Foreign Bribery*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/8469117.stm> (last updated Jan. 19, 2010, 8:25 PM) (describing an FBI sting operation that resulted in the arrest of 22 individuals suspected of bribing the minister of defense of an African country in violation of the Foreign Corrupt Practices Act).

<sup>2</sup> *FBI Charges 22 Over Alleged Foreign Bribery*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/8469117.stm> (last updated Jan. 19, 2010, 8:25 PM).

<sup>3</sup> *Id.*

<sup>4</sup> 15 U.S.C. §§ 78dd-1-78dd-3 (2006). The FCPA generally makes it unlawful for a

("FCPA") and securities laws.<sup>5</sup> At the end of 2010, thirty-four individuals and companies were awaiting trial on FCPA charges.<sup>6</sup>

In July 2009, the SEC charged two corporate executives for violations of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 30A of the Securities Exchange Act of 1934, and Rules 10b-5, 12b-20, 13a-1 and 13a-13 thereunder.<sup>7</sup> The SEC did not allege that the executives had personal knowledge of, or involvement in, the illegal conduct, yet the executives consented to have final judgments entered against them.<sup>8</sup> Each executive paid \$25,000.<sup>9</sup> Thus, the SEC is aggressively pursuing individuals responsible for corporate corruption, whether or not those individuals had actual knowledge or

company or people acting on its behalf to "offer . . . promise to give, or authoriz[e] . . . the giving of anything of value to" foreign officials in order to obtain or retain business. 15 U.S.C. § 78dd-1(a) (2006).

<sup>5</sup> Since 2008, the number of prosecutions and fines for violations of the FCPA alone have increased dramatically. For example, Siemens AG paid \$800 million to the SEC and Department of Justice in 2008 for systematically bribing foreign officials of various countries to obtain various business opportunities, representing the highest penalty to date. Press Release, SEC, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* <http://sec.gov/news/press/2008/2008-294.htm>. On February 11, 2009, Kellogg Brown & Root LLC ("KBR") admitted to paying Nigerian officials at least \$182 million in bribes in exchange for its multinational energy joint venture, T.K.S.J. Nigeria LTD ("TKSJ") and acquiring contracts to build liquefied natural gas facilities. Together, KBR and its parent company, Halliburton, paid a total of \$579 million in fines and disgorged profits. Press Release, SEC, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-23.htm>. KBR's former CEO, Albert Jackson Stanley, pled guilty to conspiring to violate the FCPA, paid \$10.8 million in restitution, and "face[d] seven years in prison." Press Release, SEC, SEC Charges Former CEO of Kellogg, Brown & Root, Inc. with Foreign Bribery (Sep. 3, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-189.htm>. Many other corporations were involved in TSKJ joint ventures to pay bribes to Nigerian government officials, including BAE Systems PLC, which paid \$400 million in fines for establishing offshore shell companies to receive illegal payments, Press Release, Dep't of Justice Office of Public Affairs, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>; Snamprogetti Netherlands B.V. and its Italian parent company ENI S.p.A., which paid \$365 million in fines and disgorged profits in July 2010, Press Release, SEC, SEC Charges Italian Company & Dutch Subsidiary in Scheme Bribing Nigerian Officials With Carloads of Cash (July 7, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-119.htm>; Technip S.A., which agreed to pay \$338 million in fines and disgorged profits in June 2010, Press Release, SEC, SEC Charges Technip with FCPA Violations (June 28, 2010), *available at* <http://sec.gov/news/press/2010/2010-110.htm>; and JGC Corporation, which paid \$218.8 million in April, 2010, Press Release, Dep't of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation & Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), *available at* <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

<sup>6</sup> *FCPA and Related Enforcement Actions*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html> (last visited Oct. 17, 2011) (listing chronological docket information for enforcement actions).

<sup>7</sup> Nature's Sunshine Products, Inc. Litigation Release No. 21162 (July 30, 2009), *available at* <http://www.sec.gov/litigation/litrelcases/2009/lr21162.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

direct involvement in the violation. On March 18, 2010, the SEC Enforcement Director Robert Khuzami stated that "law enforcement authorities within the U.S. and across the globe are working together to aggressively monitor violators of anti-corruption laws."<sup>10</sup> The Department of Justice recently made FCPA enforcement one of its highest priorities, leading to a significant increase in prosecutions.<sup>11</sup> Assistant Attorney General Lanny Breuer, speaking at the 24th National Conference on the FCPA on November 16, 2010, openly warned of this crackdown on corruption: "I am aware that, for some of you, as we have become more aggressive, you have become more worried. . . . I want to tell you this afternoon that you are right to be more concerned."<sup>12</sup>

In general, corporations caught engaging in criminal conduct have used internal compliance programs that should have prevented their criminal activities.<sup>13</sup> The sting operation, discribed above, and the hundreds of other prosecutions reveal that under the current system, internal compliance programs alone cannot be trusted to effectively discover and eliminate fraudulent corporate conduct. Rather, internal compliance programs seem to require external incentives to ensure their effectiveness.

On May 25, 2011, the Securities and Exchange Commission (the "SEC") adopted final rules to implement the requirements of Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),<sup>14</sup> which created a whistleblower reward program.<sup>15</sup> These rules reward individuals who provide the SEC with high-quality tips that lead to successful enforcement actions against

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<sup>10</sup> Press Release, SEC, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials (Mar. 18, 2010), available at <http://www.sec.gov/news/press/2010/2010-40.htm> (internal quotations omitted).

<sup>11</sup> See Gary G. Grindler, Acting Deputy Attorney General, Dep't of Justice, Acting Deputy Attorney General Gary G. Grindler Speaks at a World Bank International Meeting. (Dec. 8, 2010), available at <http://www.justice.gov/iso/opa/dag/speeches/2010/dag-speech-101208.html> ("[T]he United States has made combating bribery through the rule of law a top priority.").

<sup>12</sup> Lanny A. Bruer, Assistant Attorney General, Dep't of Justice, Assistant Attorney General Lanny A. Bruer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act, Dep't of Justice (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

<sup>13</sup> The Sarbanes-Oxley Act of 2002 requires corporations to file an internal control report with their annual and interim reports detailing the establishment and maintenance of internal control programs, financial reports and an assessment of their effectiveness. Pub. L. No. 107-204, 116 Stat. 745 § 404 (codified as amended in scattered sections of 15 and 18 U.S.C.).

<sup>14</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1841 (2010).

<sup>15</sup> SEC, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2011), available at <http://www.sec.gov/news/press/2011/2011-116.htm>.

companies that violate the federal securities laws.<sup>16</sup> Whistleblowers are eligible for a reward of ten to thirty percent of any monetary sanctions resulting from the SEC enforcement action or any related action.<sup>17</sup> The bounty program coupled with the unprecedented undercover sting operation<sup>18</sup> exemplify the SEC's and DOJ's aggressive stance on prosecuting and collecting fines from violators of securities laws. Additionally, the successful extradition of foreign nationals to the United States to face FCPA charges<sup>19</sup> suggest that the whistleblower program will play a key role in further identifying and prosecuting violators of the FCPA and securities law.

But many critics argue that it will do so at a price: the whistleblower program may incentivize whistleblowers to report out rather than in, thwarting internal compliance programs that have spent years building and maintaining.<sup>20</sup> Encouraging employees to report violations directly to the SEC rather than internally diminishes the "culture of compliance and integrity" that is essential to the maintenance of effective internal compliance programs.<sup>21</sup> This argument begs the question: are companies' current internal compliance programs really worth fighting for?

This Comment argues that the current trend in aggressive FCPA and securities law prosecutions coupled with the new whistleblower program will likely interfere with already established internal compliance programs in the short term, but will encourage more

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<sup>16</sup> *Id.* ("The new SEC whistleblower program, implemented under Section 922 of the Dodd-Frank Act, is primarily intended to reward individuals who act early to expose violations and who provide significant evidence that helps the SEC bring successful cases.").

<sup>17</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1741, 1842 (2010).

<sup>18</sup> See *supra* notes 1-3 and accompanying text.

<sup>19</sup> See Howard W. Goldstein & Lisa Bebchick, *U.K. Extraditions Facilitate Corruptions Prosecutions*, N.Y. LAW J., May 6, 2010.

<sup>20</sup> See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249) ("The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 ('Dodd-Frank'), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the Federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the Commission with information about possible securities violations.").

<sup>21</sup> *Recent Legislation: Corporate Law – Securities Regulations – Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1834 (2011) (citing Letter from Alexander M. Cutler, Chairman and CEO of Eaton Corp., to Elizabeth M. Murphy, Sec'y, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-142.pdf>) (quotation marks omitted); see also Ben Protess, *Former SEC Chief Says Dodd-Frank Misses Goals*, N.Y. TIMES DEALBOOK (July 12 2011, 7:26 PM) ("This provision threatens to undermine corporate governance, internal compliance and the confidence of public investors in our heavily regulated capital markets.") (quoting Harvey Pitt, former SEC Chief).

robust and effective internal compliance programs in the long run. The 2007–10 surge in FCPA charges is a clear example that the SEC and DOJ are right not to leave it up to companies' compliance programs to find and report violations of U.S. laws. Rather, company employees are in the best position to uncover and prevent these violations. And as companies face the possibility of harsh penalties and more frequent whistleblowing, they may be encouraged to create stronger mechanisms for compliance.

This Comment first examines the whistleblower provisions that preceded the SEC's final rules. It then describes the provisions of the SEC regulations on whistleblower bounty and the incentives that the rules provide for employees to report out rather than in. Next, this Comment addresses the potential negative and positive consequences of these incentives to internal compliance programs. It concludes by arguing that an aggressive stance on FCPA and securities violations will help businesses formulate legal and profitable ways to do business and will bolster current internal compliance programs that have been ineffective to date.

### I. A BRIEF HISTORY OF WHISTLEBLOWER STATUTES

The United States has enacted a variety of statutes designed to encourage employees to blow the whistle on fraudulent conduct.<sup>22</sup> Many of the whistleblower statutes are enacted in response to financial scandals. For instance, Congress enacted the Insider Trading and Securities Fraud Enforcement Act in reaction to insider trading scandals like the Drexel Burnham Lambert, Inc. scandal. Likewise, after the Enron and Worldcom debacles, Congress enacted the Sarbanes-Oxley Act.<sup>23</sup> The effectiveness of these statutes however has varied tremendously. This section discusses the most notable of these statutes and compares them to the SEC's Dodd-Frank whistleblower provisions.<sup>24</sup>

"[T]he first statutory cause of action protecting whistleblowers from employer retaliation" was the Civil Service Reform Act of

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<sup>22</sup> See, e.g., Lucienne M. Hartman, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of "Greedy," the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1280 (2011) (citing Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 111 (2007)) (detailing protections for whistleblowers that existed prior to the Dodd-Frank Act).

<sup>23</sup> Dave Ebersole, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPREN. BUS. L.J. 123, 125 n.17 (2011) (citation omitted).

<sup>24</sup> See Hartman, *supra* note 22, at 1280–86 (discussing the three notable whistleblower statutes prior to the Dodd-Frank Act and comparing them to the Dodd-Frank Act's whistleblower protections).

1978.<sup>25</sup> The Civil Service Reform Act only protected federal employees, however,<sup>26</sup> and, overall, it “had little impact.”<sup>27</sup> Congress later expanded the whistleblower protections by enacting the Whistleblower Protections Act of 1989.<sup>28</sup> This Act modified prior whistleblower protections by establishing a separate agency to litigate claims,<sup>29</sup> permitting whistleblowers to file claims without government support under certain circumstances<sup>30</sup> and allowing courts to shift attorneys’ fees from whistleblower plaintiffs to defendants.<sup>31</sup>

Alternatively, the Securities and Exchange Act of 1934<sup>32</sup> provided a financial reward to whistleblowers. Under the 1934 Act, the SEC rewards a whistleblower with up to ten percent of a monetary sanction collected from a company for violating insider-trading laws.<sup>33</sup> However, the whistleblower’s reward is not guaranteed: the SEC reserves absolute discretion in determining whether to grant an award and, if so, its amount.<sup>34</sup> Because whistleblowers are unable to rely on this statute, and because the award is unsubstantial, the statute is an ineffective incentive for potential whistleblowers.<sup>35</sup> Thus far, only five people have received awards in the twenty years the statute has been in effect, totaling a mere \$159,537.<sup>36</sup>

The False Claims Act,<sup>37</sup> however, has been more effective than the 1934 Exchange Act. Congress enacted the False Claims Act in 1863, and has amended it several times<sup>38</sup> to produce the government’s “primary vehicle . . . for recouping losses suffered through fraud.”<sup>39</sup>

<sup>25</sup> Ebersole, *supra* note 23, at 125; *see also* S. REP. NO. 100-413, at 2 (1988) (the Civil Service Reform Act of 1978 “prohibited . . . personnel action against an employee in reprisal for a disclosure of government wrongdoing or fraud, i.e., ‘whistleblowing’”).

<sup>26</sup> Ebersole, *supra* note 23, at 125.

<sup>27</sup> *Id.* The percentage of federal employees reporting known fraud did not change following the act’s passage, while an increased number of employees failed to report illegal activity. *Id.* at 125 n.20 (citing S. REP. NO. 100-413, at 2 (1988)).

<sup>28</sup> Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989).

<sup>29</sup> Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 1221, 103 Stat. 16, 29 (1989).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 1221(g)(1).

<sup>32</sup> 15 U.S.C. § 78a (2006 & Supp. 2009).

<sup>33</sup> 15 U.S.C. § 78u-1(c) (2006).

<sup>34</sup> *Id.*

<sup>35</sup> *See* Robert R. Stauffer & Andrew D. Kennedy, *Dodd-Frank Act Promises Large Bounties for Whistleblowers*, LAW.COM (Aug. 23, 2010), <http://www.law.com/jsp/law/article.jsp?id=1202470880915>.

<sup>36</sup> *See* Hartman, *supra* note 22, at 1282-83 (discussing the merits of the whistleblower provisions in the Securities and Exchange Act of 1934).

<sup>37</sup> 31 U.S.C. §§ 3729-3733 (2006 & Supp. 2009).

<sup>38</sup> The False Claims Act was amended in 1943, 1986, and 2009. Hartman, *supra* note 22, at 1282 (citing Act of 1943, Pub. L. No. 78-213, 57 Stat. 608 (1943); False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009)).

<sup>39</sup> Hartman, *supra* note 22, at 1282 (quoting Dan L. Hargrove, *Soldiers of Qui Tam*

The Act provides two ways a whistleblower can receive an award for reporting fraud: (1) the Attorney General can bring a civil action against a violator, in which case the whistleblower would receive 15 to 25 percent of any penalty the government collects from the investigation,<sup>40</sup> or (2) any individual “may pursue the claim, *qui tam*, if the government chooses not to pursue the claim within sixty days of filing the claim.”<sup>41</sup> Either way, the False Claims Act guarantees both the whistleblower’s award<sup>42</sup> and retaliation protection.<sup>43</sup> The False Claims Act has been successful— “[i]n the 2010 fiscal year,” for example, “the Department of Justice recovered \$3 billion in False Claims Act cases, with whistleblower awards totaling \$385 million.”<sup>44</sup>

More recently, the Sarbanes-Oxley Act<sup>45</sup> provides antiretaliation protection for whistleblowers who report securities-related violations.<sup>46</sup> The provisions prohibit employers from taking retaliatory action against a whistleblower and entitle victims of retaliation to reinstatement, back pay, and legal fees.<sup>47</sup> Sarbanes-Oxley requires that corporations create internal compliance programs that “provide employees with a standardized channel to report organizational misconduct internally within the corporation.”<sup>48</sup>

The Dodd-Frank Act, enacted in 2010, amended significant portions of the Sarbanes-Oxley Act. For instance, it (1) broadened the scope of protected disclosures,<sup>49</sup> (2) removed the requirement that

*Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 47 (2004) (quotation marks omitted).

<sup>40</sup> 31 U.S.C. § 3730(a)–(d)(1) (2006).

<sup>41</sup> Hartman, *supra* note 22, at 1283 (citing 31 U.S.C. § 3730(b) (2006)).

<sup>42</sup> 31 U.S.C. § 3730(d)(1)–(2).

<sup>43</sup> *Id.* § 3730(h).

<sup>44</sup> See Hartman, *supra* note 22, at 1284 (citing *False Claims Act Update & Alert: DoJ Recovers \$3 Billion in FY 2010 False Claims Act Cases*, TAXPAYERS AGAINST FRAUD EDUCATION FUND (Nov. 22, 2010), <http://www.taf.org/whistle299.htm>).

<sup>45</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified as amended in Titles 15 and 18 of the United States Code).

<sup>46</sup> *Id.* § 806(a) (codified at 18 U.S.C. § 1514A(a) (2006) (amended 2010)).

<sup>47</sup> *Id.* (codified at 18 U.S.C. § 1514A(a)–(c) (2006) (amended 2010)).

<sup>48</sup> Hartman, *supra* note 22, at 1285 (quoting Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 115 (2007)).

<sup>49</sup> Compare Sarbanes-Oxley Act § 806(a) (providing protection for employees who disclose information about violations of 18 U.S.C. §§ 1341, 1343, 1344, and 1348; “any rule or regulation of the SEC; or any provision of federal law relating to fraud against shareholders”), with Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, §922, 124 Stat. 1376, 1846 (2010) (to be codified at 15 U.S.C. § 78u–6(h)(1)(A)) (protecting all disclosures protected by Sarbanes-Oxley, and, additionally, any disclosures under the Security Exchange Act of 1934, 18 U.S.C. § 1513(c), “and any other law, rule, or regulation subject to the jurisdiction of the [SEC]”).

claimants first exhaust all administrative remedies with the Department of Labor before bringing an action in federal district court,<sup>50</sup> and (3) provided more expansive remedies such as granting a whistleblower who succeeds in a retaliation claim two times the amount of back pay including interest in addition to reasonable attorneys fees and costs of litigation.<sup>51</sup>

In addition, the Supreme Court's jurisprudence has been supportive of the notion that whistleblower employees are key to enforcement and must be protected from retaliation. Jurisprudence on whistleblower statutes runs on the "Antiretaliation Principle,"<sup>52</sup> which recognizes "that employees must be protected from retaliation in order to further the enforcement of society's civil and criminal laws."<sup>53</sup> The Supreme Court generally assumes that "employees are in the best position to know about illegal conduct by their employer[,] . . . employees will report this information if the law protects them from employer retaliation[,] . . . [and] employee reports about misconduct will improve law enforcement."<sup>54</sup> The Court's fifty-year jurisprudence sends a "clear message: employees play an important role in enforcing statutory laws and the Court will provide employees broad protection from retaliation in order to enhance enforcement of those laws."<sup>55</sup>

Based on the array of statutes available to whistleblowers and the Supreme Court's supportive interpretations, some commentators assert that the legal system sufficiently supports whistleblowers.<sup>56</sup> However, as others contend, higher complexity in American financial

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<sup>50</sup> Compare Sarbanes-Oxley Act § 806(a) (codified at 18 U.S.C. § 1514A(b)(1)) (requiring that a complaint be filed with the Secretary of Labor before permitting de novo review by a district court), with Dodd-Frank Act §§ 748, 922 (permitting an antiretaliation civil action to be brought directly in federal district court).

<sup>51</sup> Compare Sarbanes-Oxley Act § 806(a) (codified at 18 U.S.C. § 1514A(c)(2)) (authorizing relief for an individual prevailing in an antiretaliation action to include reinstatement with the same seniority status, back pay with interest, and compensation for litigation costs, expert witness fees, and reasonable attorney fees), with Dodd-Frank Act § 922 (to be codified at 15 U.S.C. § 78u-6(h)(1)(C)) (providing for double back pay with interest in addition to reinstatement and compensation for litigation costs and fees).

<sup>52</sup> The "'Antiretaliation Principle' allows the [Supreme] Court to examine antiretaliation protection as a law-enforcement tool that benefits society, rather than simply as extra protection for employees provided at a cost to employers." Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 380 (2010).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 380–81. The Court even interpreted explicit antiretaliation provisions in statutes that contained no specific provision granting such rights. *Id.* at 383 (discussing the Court's treatment of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1958), as interpreted in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960)).

<sup>55</sup> *Id.* at 392.

<sup>56</sup> Ebersole, *supra* note 23, at 126 ("[W]histleblowers enjoyed a broad array of federal protection to incentivize securities fraud reporting prior to Dodd-Frank.").

institutions, technology, and communications only increases the need for whistleblowers' reports.<sup>57</sup> This Comment asserts that precisely because of these complexities public regulation, now more than ever, needs inside sources that can provide information typically "hidden from public view."<sup>58</sup>

## II. THE SEC FINAL RULES

On July 21, 2010, in response to the financial crisis that began in 2008,<sup>59</sup> President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>60</sup> which governs a wide variety of financial institutions ranging from credit card companies<sup>61</sup> to mortgage lenders.<sup>62</sup> One provision in particular is under scrutiny for its potential effect on internal compliance programs.<sup>63</sup> Section 922 of the Dodd-Frank Act amended the Securities and Exchange Act of 1934<sup>64</sup> by adding section 21F, "Securities Whistleblower Incentives and Protection."<sup>65</sup> This section expanded the incentives for employees to blow the whistle by (1) requiring the SEC to provide substantial bounties to whistleblowers who provide useful information to the

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<sup>57</sup> Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 917 (2002) (discussing the increased need for "private justice" in modern society and the necessity of fostering private justice by encouraging whistleblower reporting).

<sup>58</sup> *Id.* at 916.

<sup>59</sup> *Times Topics: Financial Regulatory Reform*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit\\_crisis/financial\\_regulatory\\_reform/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html) (last updated Sept. 20, 2011).

<sup>60</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the United States Code). The Dodd-Frank Act addresses a number of key issues including (1) consolidating regulatory agencies and establishing committees to oversee specific high risk institutions; (2) highly regulating financial markets, especially highly risky transactions; (3) instituting consumer protection reforms; and (4) addressing the necessary institutional mechanisms such as "FDIC authority to allow for the orderly winding down of bankrupt firms, and a proposal that the Federal Reserve receive from the U.S. Treasury Department extensions of credit in exigent circumstances." Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011, 9:20 AM), <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>.

<sup>61</sup> See Dodd-Frank Act § 920 (to be codified at 15 U.S.C. § 1693o-2) (imposing various limitations on "payment card networks," including credit card networks).

<sup>62</sup> See *id.* §§ 1400-98 (to be codified in scattered sections of 12, 15, and 42 U.S.C.) (designating Title XIV of Dodd-Frank as the "Mortgage Reform and Anti-Predatory Lending Act" and imposing regulations on the mortgage industry).

<sup>63</sup> See, e.g., *supra* note 21, 1831-32 (2011) (noting that, as a potential drafting error, Dodd-Frank affords antiretaliation protection only to employees who report externally); Nathan Koppel, *Dodd-Frank Detractors May Be Headed to a Courthouse Near You*, WALL ST. J. LAW BLOG (July 29, 2011, 10:49 AM), <http://blogs.wsj.com/law/2011/07/29/dodd-frank-detractors-may-be-headed-to-a-courthouse-near-you/> (commenting on the "litigation storm clouds" surrounding Dodd-Frank, including the whistleblower provision).

<sup>64</sup> 15 U.S.C.A. §§ 78a-78pp (West 2009 & Supp. 2011).

<sup>65</sup> Dodd-Frank Act § 922(a) (to be codified at 15 U.S.C. § 78u-6).

SEC regarding securities law violations,<sup>66</sup> and (2) providing enhanced retaliation protections where the whistleblower can receive stronger protection if he or she reports directly to the SEC but weaker protections if he or she reports to the company via the internal compliance programs.<sup>67</sup>

The SEC's final rules were adopted to implement the Dodd-Frank Act requirements. The rules define a "whistleblower" as an individual, not a company or entity, who provides the SEC with information that relates to a "possible violation" of federal securities laws, the FCPA, or commodities laws that has occurred, is ongoing, or is about to occur.<sup>68</sup> The whistleblower may remain anonymous when reporting possible violations, but, to do so, must report through an attorney.<sup>69</sup> If whistleblowers provide information before a request, inquiry, or demand is directed to the whistleblower personally by the SEC or other government authorities, the whistleblower's report is considered "voluntary."<sup>70</sup> However, a submission will not be considered voluntary if the whistleblower has a preexisting legal duty to report such information to the SEC arising from a contract with the SEC or another law enforcement agency, or arising under any judicial or administrative order.<sup>71</sup>

A whistleblower is eligible for an award only if the incriminating information is (1) based upon the whistleblower's independent knowledge or analysis not already known to the SEC, (2) not exclusively derived from an allegation made in a judicial or administrative hearing, government report, or the news media, unless the whistleblower is the source of that information, and (3) first provided to the SEC on or after July 21, 2010.<sup>72</sup> The whistleblower will only receive an award if the information is "sufficiently specific, credible and timely to cause" the commencement or reopening of an investigation resulting in successful enforcement action.<sup>73</sup> If the reported violation was already under investigation, the SEC will consider whether the new information "significantly contributed" to the success of the action.<sup>74</sup> While certain exclusions apply,<sup>75</sup> the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,363 (June 13, 2011) (to be codified at 17 C.F.R. 240.21F-2(a)).

<sup>69</sup> *Id.* at 34,367 (to be codified at 17 C.F.R. § 240.21F-7).

<sup>70</sup> *Id.* at 34,364 (to be codified at 17 C.F.R. § 240.21F-4(a)).

<sup>71</sup> *Id.* (to be codified at 17 C.F.R. § 240.21F-4(a)(3)).

<sup>72</sup> *Id.* (to be codified at 17 C.F.R. § 240.21F-4(b)(1)).

<sup>73</sup> *Id.* at 34,365 (to be codified at 17 C.F.R. § 240.21F-4(c)(1)).

<sup>74</sup> *Id.* (to be codified at 17 C.F.R. § 240.21F-4(c)(2)).

<sup>75</sup> *Id.* at 34,364-65 (to be codified at 17 C.F.R. § 240.21F-4(b)(4)(i)-(vi)).

whistleblower will receive an award that is “at least 10 [percent] and no more than 30 [percent] of the total monetary sanctions” collected in successful actions.<sup>76</sup>

The final rules incorporated by reference the provisions of the Exchange Act that protect individuals who report information to the SEC with a reasonable belief<sup>77</sup> that such information relates to a possible securities violation, regardless of whether the individual satisfies the requirements to receive an award.<sup>78</sup> A whistleblower has antiretaliation protection if he reports information in a manner described in section 21F(h)(1)(A). Thus, the rules provide incentives for whistleblowers to report violations either internally or externally.

### III. INCENTIVES TO REPORT INTERNALLY

The final rules incentivize, but do not require, a whistleblower to report first through his or her company's internal compliance program. The rules provide three primary incentives. First, whistleblowers can obtain the same award when they report through their companies' internal compliance programs and the company informs the SEC of the violation.<sup>79</sup> If the company does not have an internal compliance program, reporting to legal counsel, senior management, or a director still renders the whistleblower eligible for the reward.<sup>80</sup> Second, the final rules provide that a whistleblower's voluntary participation in a company's internal compliance program is a factor that can increase the amount of an award while interference

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<sup>76</sup> *Id.* at 34,366 (to be codified at 17 C.F.R. § 240.21F-5).

<sup>77</sup> To satisfy the reasonable belief requirement, the individual must “hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that the belief is one that a similarly situated employee might reasonably possess.” *Id.* at 34,303. This approach is consistent with the approach followed by various courts that have construed the antiretaliation provisions of other federal statutes, including the False Claims Act. *See, e.g.,* *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) (holding that, in a Title VII retaliation case, “[t]he employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate a good faith, reasonable belief that the challenged practice violates Title VII”); *Hindsman v. Delta Airlines*, Admin. Rev. Bd. Case No. 09-023 at 5 (Dep’t of Labor June 30, 2010), *available at* [http://www.oalj.dol.gov/public/ARB/DECISIONS/ARB\\_DECISIONS/AIR/09\\_023.AIRP.PDF](http://www.oalj.dol.gov/public/ARB/DECISIONS/ARB_DECISIONS/AIR/09_023.AIRP.PDF) (interpreting the antiretaliation provisions of the Wendell H. Ford Aviation Investment and Reform Act, which explicitly excludes frivolous complaints and those brought in bad faith, as requiring a “reasonable belief” by the whistleblower that the violation of the statute has occurred).

<sup>78</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,363 (June 13, 2011) (to be codified at 17 C.F.R. 240.21F-2(b)(1)).

<sup>79</sup> *Id.* at 34,365 (to be codified at 17 C.F.R. 240.21F-4(c)(3)).

<sup>80</sup> *Id.* at 34,325 n.224 (suggesting that, because of the need for proof that the whistleblower provided original information, employees in this situation “generate, obtain and retain” appropriate documentation).

with such a program is a factor that has the reverse effect.<sup>81</sup> Third, the rules create a 120-day “look-back” period, under which an individual can qualify for an award if he or she first reported the possible violations to the company under the company’s internal compliance program, and then submitted the same information to the SEC within 120 days.<sup>82</sup>

The rules’ effect on internal compliance programs was a significant issue commentators discussed in the rules’ Proposing Release.<sup>83</sup> Comments were sharply divided between supporting a requirement for internal reporting and opposing such a requirement. Supporters note that internal reporting would allow companies to take appropriate actions to remedy improper conduct earlier,<sup>84</sup> allow companies to self-report,<sup>85</sup> avoid undermining internal compliance programs that companies have designed to deter, identify and correct violations,<sup>86</sup> preserve the SEC’s scant resources<sup>87</sup> and promote working relationships between the SEC and the companies,<sup>88</sup> among others. Requiring internal reporting to the opposing side meant “prohibit[ing] whistleblowers from reporting fraud directly and immediately to the [SEC],”<sup>89</sup> “creat[ing] unnecessary and improper hurdles for whistleblowers,”<sup>90</sup> “result[ing] in whistleblowers deciding

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<sup>81</sup> *Id.* at 34,366–67 (to be codified at 17 C.F.R. § 240.21F–6).

<sup>82</sup> *Id.* at 34,365 (to be codified at 17 C.F.R. § 240.21F–4(b)(7)).

<sup>83</sup> *Id.* at 34,300.

<sup>84</sup> *Id.* at 34,325 (citing Letter from Chamber of Commerce et al., to Elizabeth Murphy, Sec’y, SEC, (Dec. 7, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-110.pdf>).

<sup>85</sup> *Id.* at 34,324 (citing letter from Gary M. Brown, Baker, Donelson, Bearman, Caldwell & Berkowitz PC, to Elizabeth M. Murphy, Sec’y, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-140.pdf>).

<sup>86</sup> *Id.* (citing Letter from Gary M. Brown, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, to Elizabeth Murphy, Sec’y, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-140.pdf>; E-mail from Americans for Ltd. Gov’t et al., to Elizabeth Murphy, Sec’y, SEC (Dec. 7, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-110.pdf>; Letter from Michelle Davies, Acting Gen. Counsel, Foster Wheeler AG, to Elizabeth Murphy, Sec’y, SEC (Dec. 13, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-111.pdf>; E-mail from Apache Corp. et al., to Elizabeth Murphy, Sec’y, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-150.pdf>; Letter from Donna Dabney, Vice President, Sec’y, & Corp. Gen. Counsel, Alcoa Inc. et al., to Elizabeth Murphy, Sec’y, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-182.pdf>; E-mail from Allstate Ins. Co. et al., to Elizabeth Murphy, Sec’y, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-189.pdf>).

<sup>87</sup> *Id.* (citing E-mail from Americans for Ltd. Gov’t, *supra* note 86).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (citing Letter from Stephen M. Kohn, Excc. Dir., Nat’l Whistleblowers Ctr., to Mary L. Schapiro, Chairman, SEC (May 17, 2011), available at <http://www.sec.gov/comments/s7-33-10/s73310-314.pdf>).

<sup>90</sup> *Id.* (citing Letter from Cleveland Lawrence, III, Acting Executive Director, Taxpayers Against Fraud, to Troy A. Paredes, Comm’r, SEC (Dec. 17, 2010), available at <http://www.sec.gov/comments/s7-33-10/s73310-228.pdf>).

not to report misconduct”<sup>91</sup> (perhaps because of a “risk of retaliation”<sup>92</sup>), and “eliminat[ing] incentives for companies to improve their internal compliance programs.”<sup>93</sup> The SEC decided it would not require mandatory internal reporting, noting that, while important, internal compliance programs are “not substitutes for rigorous law enforcement.”<sup>94</sup>

The SEC commented that the objective of these provisions, namely the “look-back” provision, was to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns to the company officials, and simultaneously preserving their rights under the Commission’s whistleblower program.<sup>95</sup> Internal compliance programs are “essential sources of information for companies about misconduct.”<sup>96</sup> However, these provisions seek to “strike a balance” between relying on internal programs and receiving the best information possible in reports.<sup>97</sup> Although some companies may have “well-documented, thorough, and robust” compliance programs, others do not.<sup>98</sup> Leaving it up to the whistleblower to assess whether to report potential securities violations internal or externally is therefore well supported.

#### IV. INCENTIVES TO REPORT EXTERNALLY

Despite its three incentives for using internal compliance procedures, the Dodd-Frank Act has been criticized as setting employees against their companies by primarily encouraging external reporting. Critics focused on a “two-tiered” structure of protections that benefits whistleblowers who report externally versus internally.<sup>99</sup> The SEC’s whistleblower rules provide greater antiretaliation protections than the Sarbanes-Oxley Act of 2002, which was “the first comprehensive statute of national scope” that provided protections to corporate whistleblowers.<sup>100</sup> For reported information and employees

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<sup>91</sup> *Id.* (citing E-mail from Julie Grohovsky, Wu, Grohovsky & Whipple et al, to Elizabeth Murphy, Sec’y, SEC (Dec. 16, 2010), *available at* <http://www.sec.gov/comments/s7-33-10/s73310-136.pdf>; E-mail from Danielle Brian, Exec. Dir., Project on Gov’t Oversight, to Elizabeth Murphy, Sec’y, SEC (Dec. 17, 2010), *available at* <http://www.sec.gov/comments/s7-33-10/s73310-163.pdf>).

<sup>92</sup> *Id.* (citing Letter from Cleveland Lawrence III, *supra* note 90; Letter from Julie Grohovsky, *supra* note 91; Letter from Danielle Brian, *supra* note 91).

<sup>93</sup> *Id.* (citing Letter from Danielle Brian, *supra* note 91).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 34, 323.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 34, 317 n.154.

<sup>98</sup> *Id.* at 34, 323.

<sup>99</sup> See Recent Legislation, *supra* note 21, at 1834.

<sup>100</sup> Robert G. Vaughn, *America’s First Comprehensive Statute Protecting Corporate*

not covered by Sarbanes-Oxley,<sup>101</sup> employees can receive Dodd-Frank protections by reporting externally, but they receive no protection if they report internally.<sup>102</sup> If the reported information or the employee is covered by Sarbanes-Oxley, the employee will receive Dodd-Frank protections by reporting externally, but will receive only the weaker Sarbanes-Oxley protection by reporting internally.<sup>103</sup>

Other commentators are concerned that Dodd-Frank protects whistleblowers without requiring the whistleblower to hold a “reasonable belief” that a breach of securities law occurred.<sup>104</sup> The SEC addressed some of these concerns in the final rules by implementing the “reasonable belief” requirement while at the same time retaining the two-tiered system that distinguishes between internal and external reporters. The rules also addressed concerns that employees are encouraged to report out, rather than in, by providing whistleblowers the same bounty for reporting internally under certain circumstances.<sup>105</sup> However, it is doubtful whether the law’s retaliation policy actually influences a whistleblower’s decision to report.

#### V. THE FINAL RULES’ EFFECT ON INTERNAL COMPLIANCE PROGRAMS

The final rules are indeed likely to increase whistleblower reports, but they are also likely to prompt companies “to run to the SEC before one of its employees gets there first.”<sup>106</sup> Former SEC enforcement attorney Paul Huey-Burns thinks the “thumb is on the scale on the side of self-reporting”<sup>107</sup> and companies will, now more than ever, hire lawyers and forensic accountants to strengthen their compliance systems to prevent future violations. Critics worry that

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*Whistleblowers*, 57 ADMIN. L. REV. 1, 4 (2005).

<sup>101</sup> Sarbanes-Oxley provides protection for information the whistleblower believes constitutes a violation of any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 § 806(a)(1) (codified as amended in scattered sections of 15 and 18 U.S.C.).

<sup>102</sup> See Recent Legislation, *supra* note 21, at 1834.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1833 (citing Dodd-Frank Act, Pub. L. No. 111–203, § 922(a), 124 Stat. 1376, 1841–42, 1845 (2010) (describing what constitutes “original information” and discussing the prohibition on retaliations against employees who provide “original information.”)).

<sup>105</sup> See *supra* notes 79–81 and accompanying text (discussing potential awards for whistleblowers who report matters internally).

<sup>106</sup> Daniel Fisher, *SEC Whistleblower Rule Means More Work for Lawyers*, FORBES (May 26, 2011, 3:33 PM), <http://blogs.forbes.com/danielfisher/2011/05/26/sec-whistleblower-rule-means-more-work-for-lawyers/>.

<sup>107</sup> *Id.* (quotations omitted).

the rules pit the companies' Chief Compliance Officers against the employees, rather than encourage them to work together.<sup>108</sup> The common complaint is that internal compliance programs that have taken years to build will be pushed to the wayside as whistleblowers greedily seek their bounty. Critics claim that, because companies investigate 75 percent of internal reports and that 40 percent of internal investigations led to company action in 2009, the internal compliance programs are sufficient to capture corporate legal violations.<sup>109</sup>

The real concern of companies may be quite different than the one expressed. Companies may not be as worried about the new rules foiling their internal compliance programs as they are concerned about the cost of complying with securities laws. The ingredients for a sound internal compliance program are no longer limited to simply providing a forum where whistleblowers may report violations. Rather, companies now have to cultivate a trustworthy and reliable program that promises not to retaliate or ignore whistleblowers' complaints. Companies are worried that investing in attorneys and forensics accountants will rack up expenses on their already tight budgets.<sup>110</sup> But these resisting companies may be ignoring the importance of *effective* internal compliance programs and what it can do for their bottom line.

The final rules seem to already be achieving their goal of promoting stronger internal compliance programs. Companies are beginning to support the internal compliance programs by providing employees with incentives to use the programs, including provisions in employee contracts that require internal complaints, and may even offer their own bounties to compete with the SEC.<sup>111</sup> Even the critics acknowledge that the Dodd-Frank Act provisions "may require management training to avoid whistleblower retaliation, and all businesses may need new policies to encourage internal reporting."<sup>112</sup> While Sarbanes-Oxley requires all public companies to have whistleblower mechanisms in place, the old mechanisms have not proved effective.<sup>113</sup> In fact, an empirical study of the False Claims

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<sup>108</sup> Ebersole, *supra* note 23, at 137 (arguing that the Dodd-Frank Act undermines the effective internal compliance programs which more adequately address securities violations).

<sup>109</sup> *Id.* (citation omitted).

<sup>110</sup> *Id.* at 139 n.138.

<sup>111</sup> Emily Chasan, *CFO Report: Companies Adjust to Looming Whistleblower Rule*, WALL ST. JOURNAL (July 29, 2011, 3:59 PM), <http://blogs.wsj.com/cfo/2011/07/29/companies-adjust-to-looming-whistleblower-rule/?KEYWORDS=whistleblower+sec+final+rules>.

<sup>112</sup> Ebersole, *supra* note 23, at 139.

<sup>113</sup> See *supra* note 35 and accompanying text (discussing the ineffectiveness of the Securities and Exchange Act of 1934).

Act, which requires no mandatory internal reporting, stated that “the overwhelming majority of employees voluntarily utilized internal reporting processes, despite the fact that they were potentially eligible for a large reward under the [Act].”<sup>114</sup> One study found that the SEC is more likely to sanction companies who are proactive about self-reporting, but also more likely to issue a lower penalty.<sup>115</sup>

The risks associated with ineffective and unenforceable fraud and corruption regulations are far worse to society than the expenses a company may incur to bolster their internal compliance systems. What if the Enron debacle was avoided by insiders revealing their concerns to public regulators? The company may not have gone from the seventh largest American company to the largest bankruptcy in American history; its stocks may not have plunged from \$86 per share to \$0.27 per share; and it may not have ended up with \$13.12 billion in debt.<sup>116</sup> The few whistleblowers that did report Enron’s wrongdoing did so only internally, through mechanisms many argue are effective and should be preserved.<sup>117</sup>

Moreover, the recent surge in FCPA prosecutions, described above, uncovers yet another failing of internal compliance programs.<sup>118</sup> Such corruption “erode[s] society from the inside.”<sup>119</sup> Illegal economic activity in America costs hundreds of billions of dollars and negatively impacts lower and middle class Americans disproportionately.<sup>120</sup> Corruption and fraud have important social

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<sup>114</sup> *Impact of Qui Tam Laws on Internal Compliance: A Report to the SEC*, NAT’L WHISTLEBLOWERS CTR., AT 4 (2010), <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreporttosecfinal.pdf>. The study found that 89.7 percent of employees who eventually filed False Claims Act cases had made an internal report, despite the absence of a legal requirement to do so. *Id.* The False Claims Act, however, does contain higher barriers to participation than does the Whistleblower program, such as the requirement of filing a federal court complaint alleging fraud with specificity as required by Rule 9(b) of the Federal Rules of Civil Procedure, while the Whistleblower program only requires whistleblowers to fill out a Form TCR sworn under penalty of perjury. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,327 n.232 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249).

<sup>115</sup> Rebecca Files, *SEC Enforcement: Does Forthright Disclosure and Cooperation Really Matter?* (Social Science Research Network Working Paper Series), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1640064](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640064).

<sup>116</sup> See Bucy, *supra* note 57, at 942 (citations omitted).

<sup>117</sup> *Id.* at 943 (citations omitted).

<sup>118</sup> See *supra* note 114 and accompanying text (discussing the different requirements for filing claims under the False Claims Act and the Whistleblower program).

<sup>119</sup> See Bucy, *supra* note 57, at 929 (quoting EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION XIII (1983) (citation and quotation omitted)).

<sup>120</sup> See STEPHEN M. ROSOFF ET AL., PROFIT WITHOUT HONOR: WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA 28 (2010) (discussing how personal frauds and antitrust violations could cost Americans approximately \$250 billion dollars a year.).

costs too: weakened respect for the law and unstable political and financial institutions.<sup>121</sup>

The United States government recognizes what companies choose to ignore: employees are essential sources of information. A 2008 study by the Association of Certified Fraud Examiners examined 959 cases of fraud in United States companies found that forty-six percent of instances of fraud were uncovered by whistleblowers, more than those found by audits or internal controls.<sup>122</sup> Employees only reported outside when their complaints were ignored, or when they were punished for speaking up. A 2010 National Whistleblowers Center study found that approximately ninety percent of employees who filed False Claims Act lawsuits initially reported violations internally to their supervisors or compliance officers.<sup>123</sup> Rather than using the valuable information to promote compliance through an effective internal compliance program, companies are instead punishing their loyal employees<sup>124</sup> and causing them to report elsewhere, where their valuable information will be appreciated. If the companies continue to undervalue whistleblower information, whistleblowers will indeed turn outside of the company to make their reports.

Fortunately, the SEC explicitly leaves it up to the whistleblower to decide the most appropriate forum for reporting.<sup>125</sup> Complex economic wrongdoing, such as securities and FCPA violations, require those who are intimately familiar with it for proper detection and deterrence.<sup>126</sup> Congress and the Supreme Court consistently provide whistleblowers with rewards and protections because, as government officials have stated, “whistleblowers are essential to our operation. Without them, we wouldn’t have cases.”<sup>127</sup>

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<sup>121</sup> See Bucy, *supra* note 57, at 934–40 (detailing the social harms that can occur as a result of economic corruption and crimes).

<sup>122</sup> 2008 Report to the Nation on Occupational Fraud & Abuse, ASSOC. OF CERTIFIED FRAUD EXAM’RS, at 18 (2008), <http://www.acfe.com/documents/2008-rttn.pdf>.

<sup>123</sup> NAT’L WHISTLEBLOWERS CTR., IMPACT OF QUI TAM LAWS ON INTERNAL COMPLIANCE: A REPORT TO THE SEC 4 (2010) available at <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreporttoscefinal.pdf>.

<sup>124</sup> See Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud*, 65 J. FIN. 2213, 2216 (2010) (discussing how a 2007 study by the nonpartisan National Bureau of Economic Research found that in eighty-two percent of cases where whistleblower identities were revealed, the employees were fired, quit under duress, or lost significant job responsibilities.).

<sup>125</sup> Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,323 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249) (“Ultimately, we believe that whistleblowers are in the best position to assess whether reporting potential securities violations through their companies’ internal compliance and reporting systems would be effective.”).

<sup>126</sup> Bucy, *supra* note 57, at 940 (noting that “[c]omplex economic activity usually is buried in paper trails and electronic messages and hidden within an organization.”).

<sup>127</sup> *Id.* at 941 (citations and quotations omitted).

## CONCLUSION

The spike in FCPA and securities law prosecutions combined with the new whistleblower program has instilled fear in the corporate world that the result of the trend for enforcement will only be costly for the companies and for the market as a whole. However, the numerous studies and the even greater number of recently prosecuted violations indicate that the problem is not the whistleblower; it is the companies' own failed internal compliance programs. Each corporation that the SEC and DOJ prosecuted had its own internal compliance programs and each of those programs failed to prevent and uncover violations. Those cases evidence the shortcomings of the internal compliance programs and stress the need for incentives to encourage companies to make appropriate changes. While the DOJ and SEC will continue to aggressively prosecute violations, the whistleblower program encourages companies to provide an internal resource that will render the SEC's whistleblower program futile.

ISKRA MIRALEM<sup>†</sup>

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<sup>†</sup> J.D. Candidate, 2012, Case Western Reserve University School of Law.