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Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later

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**SARBANES-OXLEY'S WHISTLEBLOWER PROVISIONS:
TEN YEARS LATER**

Richard Moberly*

Whistleblower advocates and academics greeted the enactment of the Sarbanes-Oxley Act's whistleblower provisions in 2002 with great acclaim. The Act appeared to provide the strongest encouragement and broadest protections then available for private-sector whistleblowers. It influenced whistleblower law by unleashing a decade of expansive legal protection and formal encouragement for whistleblowers, perhaps indicating societal acceptance of whistleblowers as part of a broader law enforcement strategy. Despite these successes, however, Sarbanes-Oxley's greatest lesson derives from its two most prominent failings. First, over the last decade, the Act did not sufficiently protect whistleblowers who suffered retaliation. Second, despite the massive increase in legal protection available to them, whistleblowers did not play a significant role in uncovering the financial crisis that led to the Great Recession at the end of the decade. These related failures indicate that although whistleblowers had stronger and more prevalent protection than ever before, they had less reason to believe such protection works. This Article examines the developments in whistleblower law during the last decade and concludes that Sarbanes-Oxley's most important lesson is that the usual approach to whistleblowing may not be sufficient. Encouragingly, this Article also evaluates recent developments in light of Sarbanes-Oxley's successes and failures to demonstrate that policymakers may have learned from the Sarbanes-Oxley experience. During the last two years, regulators and legislators have implemented new strategies that may encourage employees to blow the whistle more effectively.

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I. INTRODUCTION

In 2001 and 2002, corporate scandals exploded in the United States as the public learned about massive fraud at large companies such as Enron and WorldCom.¹ The fraud involved complicated accounting schemes that artificially inflated the companies' value, resulting in the largest bankruptcies in U.S. history.² Thousands of people lost jobs and billions of dollars in shareholder value disappeared, seemingly overnight.³

1. See, e.g., Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 357–73 (2003) (discussing the whistleblowers in both scandals); Richard A. Oppel, Jr. & Kurt Eichenwald, *Enron's Collapse: The Overview; Arthur Andersen Fires an Executive for Enron Orders*, N.Y. TIMES, Jan. 16, 2002, at A1 (outlining key events in the Enron scandal and Arthur Andersen's involvement); Simon Romero & Riva D. Atlas, *WorldCom's Collapse: The Overview; WorldCom Files for Bankruptcy; Largest U.S. Case*, N.Y. TIMES, July 22, 2002, at A1 (discussing WorldCom's bankruptcy and future financial outlook).

2. See, e.g., Troy A. Paredes, *Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 495, 503 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) [hereinafter ENRON: CORPORATE FIASCOS] ("In short, Enron's collapse boiled down to massive accounting fraud and irregularities, a principal feature of which was the use of structured finance techniques designed to get debt off Enron's balance sheet and inflate Enron's profits."); Charles J. Tabb, *The Enron Bankruptcy*, in ENRON: CORPORATE FIASCOS, *supra*, at 303, 303 & n.2 ("At the time, Enron was the largest bankruptcy filing in history." However, "[s]ix months later, WorldCom surpassed this record.")

3. See, e.g., Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 2 (2005); Jeffrey D. Van Niel & Nancy B. Rapoport, *Dr. Jekyll & Mr. Skilling: How Enron's Public Image Morphed from the Most Innovative Company in the Fortune 500 to the Most Notorious Company Ever*, in ENRON: CORPORATE FIASCOS, *supra* note 2, at 77, 83 ("Enron seemed to go from 'most admired' status to 'most despised' status in record time, once the revelations about the company's behavior became public."). See generally Oppel & Eichenwald, *supra* note 1 (discussing the Enron collapse); Romero & Atlas, *supra* note 1 (discussing the WorldCom bankruptcy).

In the aftermath, Congress held hearings to investigate how the country's corporate governance system and law enforcement agencies failed to detect the deceptions earlier.⁴ The hearings revealed that, although some employees reported the fraud to company supervisors and officers, many employees who knew about the wrongdoing simply kept quiet.⁵ Encouraging these employees to report corporate misconduct would help address the "corporate code of silence" that Congress determined had contributed to the fraud's concealment.⁶ As a result, when Congress passed the Sarbanes-Oxley Act of 2002⁷ to address the perceived causes of the meltdown, it included among the Act's wide-ranging corporate governance provisions specific sections related to whistleblowers.⁸ At the time, whistleblower advocates and academics greeted Sarbanes-Oxley's enactment with great acclaim, because the Act appeared to provide the strongest encouragement and broadest protections then available for private-sector whistleblowers.⁹ It seemed to be a watershed moment, representing a historic shift in the country's attitude and approach towards whistleblowing.¹⁰

4. At least ten different Congressional committees held over forty-five different hearings related to the Enron collapse. See Library of Congress, *Guide to Law Online: Enron Hearings*, LAW LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/guide/federal/enronhrqs.php> (last updated July 25, 2012) (providing access to hearing transcripts). Congress also investigated WorldCom and other corporate scandals. See, e.g., *Wrong Numbers: The Accounting Problems at WorldCom: Hearing Before the H. Comm. on Fin. Servs.*, 107th Cong. 91–92 (2002) (questioning WorldCom and Arthur Andersen executives about the accounting practices that led to WorldCom's collapse).

5. See Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1117–25 [hereinafter Moberly, *Structural Model*]; Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 74–75 (2007) [hereinafter Moberly, *Unfulfilled Expectations*].

6. See S. REP. NO. 107-146, at 4–5 (2002).

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

8. See 18 U.S.C. § 1514A (2006); see also Moberly, *Unfulfilled Expectations*, *supra* note 5, at 75–76 (noting four separate provisions aimed at encouraging and protecting whistleblowers).

9. See, e.g., S. REP. NO. 107-146, at 10 (2002) (quoting Letter from Jim Moorman, Exec. Dir., Taxpayers Against Fraud & Tom Devine, Legal Dir., Gov't Accountability Project, to Sen. Patrick Leahy, Chair, Senate Judiciary Comm. (Mar. 11, 2002), *reprinted in* 107 CONG. REC. 1791 (2002)) (calling Sarbanes-Oxley "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets"); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005) (calling Sarbanes-Oxley the "gold standard" of whistleblower protection); Vaughn, *supra* note 3, at 105 (asserting that Sarbanes-Oxley is "the most important whistleblower protection law in the world"); see also Moberly, *Unfulfilled Expectations*, *supra* note 5, at 68 (quoting responses from academics, advocates, and the press).

10. See, e.g., *Blowing the Whistle on Corporate Wrongdoing: An Interview with Tom Devine*, 23 MULTINATIONAL MONITOR, No. 10, Oct./Nov. 2002, available at <http://www.multinationalmonitor.org/mm2002/102002/interview-devine.html> (Tom Devine, the legal director for the Government Accountability Project—a whistleblower advocacy group—described the Act as "the promised land" and stated that "the law represents a revolution in corporate freedom of speech [that] far surpasses, indeed laps, the rights available for government workers.").

Now, ten years after the Act's passage, this Article takes a fresh look at its whistleblower provisions to examine its successes and failures. Sarbanes-Oxley has had a substantial impact on whistleblower law, but perhaps in some counterintuitive and maybe even contradictory ways. As an initial matter, Sarbanes-Oxley was enormously successful as a model for subsequent legal measures that encourage and protect whistleblowers. However, despite these successes, the Act's failures in other respects demonstrate that these traditional strategies may not be sufficient to encourage effective whistleblowing.

To reach these conclusions, Part II of this Article describes the passage of the Act and discusses the Act's whistleblower provisions in more detail. Then, in Part III, I demonstrate that Sarbanes-Oxley unleashed a decade of expansive whistleblower provisions. Federal and state governments passed an impressive array of broad antiretaliation statutes. Regulators mandated the widespread use of codes of ethics that explicitly protect whistleblowers and implement whistleblower hotlines. These important developments raised the public profile and importance of whistleblowing as a law enforcement tool.

Despite these successes, however, Sarbanes-Oxley's greatest lesson derives from its two most prominent failings, which I discuss in Part IV. First, over the last decade, the Act simply did not protect whistleblowers who suffered retaliation. Instead, government administrators and adjudicatory decision makers undermined the Act's protections. Second, important whistleblower disclosures in the last decade did not lead to effective efforts to address underlying wrongdoing. The financial crisis in 2008 provides the most vivid case study of this failure, as corporate officers, government regulators, and law enforcement agencies ignored the warnings of employees who tried to report problems in the subprime mortgage industry. These related failures indicate that although whistleblowers have stronger and more prevalent protection than ever before, they have less reason to believe such protection works. After a decade, the Sarbanes-Oxley lesson may be that the usual approach to whistleblowing may not be sufficient.

In Part V, I note that, encouragingly, developments in the last two years demonstrate that policymakers may have learned from the Sarbanes-Oxley experience. In addition to focusing on the substance of various statutory protections, renewed energy has been put toward determining who is involved in administering those protections. As a result, newly appointed whistleblower advocates in key government positions have begun to address the roadblocks previously used to thwart the strong antiretaliation protection Congress initially envisioned for the Act. Moreover, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act¹¹ to address the failings that preceded the most recent financial crisis. This Act applies a radically different model to encourage whistleblowers by using financial rewards in addition to Sarbanes-Oxley's more traditional approach. Ironically, the Act's two greatest

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

failings may provide its most lasting impact, as they prompted policymakers to experiment with additional strategies to more effectively encourage whistleblowers.

II. ENACTING SARBANES-OXLEY

During the Congressional hearings preceding Sarbanes-Oxley's enactment, an internal accountant from Enron named Sherron Watkins gave crucial testimony detailing the way in which the company manipulated its finances to create the illusion of value.¹² She also testified that she informed CEO Ken Lay about the widespread financial improprieties, first through an anonymous letter and then in a personal meeting.¹³ When Andrew Fastow, Watkins's supervisor, found out about the meeting, Fastow tried to fire her.¹⁴ Moreover, the human resources department asked its outside counsel for advice on whether Watkins could be fired after reporting accounting fraud.¹⁵ The advice from outside counsel noted that neither Texas law (where Enron was headquartered) nor federal statutes provided Watkins any protection.¹⁶ Senators became outraged when this letter became public, noting, "after this high level employee at Enron reported improper accounting practices, Enron did not consider firing [Arthur] Andersen [Enron's accountant]; rather, the company sought advice on the legality of discharging the whistleblower."¹⁷

As a result, Congress included expansive whistleblower provisions in the Sarbanes-Oxley Act of 2002. The Senate Report on the legislation noted that "In a variety of instances when corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, . . . they were discouraged at nearly every turn."¹⁸ The Report also noted media accounts of several other

12. See *The Financial Collapse of Enron—Part 3: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 107th Cong. 14–66 (2002) [hereinafter Watkins Testimony] (testimony of Sherron Watkins).

13. See Leslie Griffin, *Whistleblowing in the Business World*, in ENRON: CORPORATE FIASCOS, *supra* note 2, at 209, 209–11; Moberly, *Structural Model*, *supra* note 5, at 1123 n.64.

14. See Watkins Testimony, *supra* note 12, at 18–19.

15. See Email from Carl Jordan, Attorney, Vinson & Elkins L.L.P., to Sharon Butcher, Assistant Gen. Counsel, Enron (Aug 24, 2001, 7:02 PM), available at <http://www.justice.gov/enron/exhibit/03-15/BBC-0001/Images/9810.001.PDF>.

16. See *id.* Ultimately, Watkins requested a transfer and wound up in a job in human resources. See Griffin, *supra* note 13, at 213–14.

17. S. REP. NO. 107-146, at 5 (2002). At the same time, some employees of other companies had more success blowing the whistle on corporate fraud. See Moberly, *Structural Model*, *supra* note 5, at 1117–19. For example, Congressional testimony from WorldCom officers indicated that Cynthia Cooper, an internal investigator, uncovered the fraud of WorldCom's Chief Financial Officer and reported him to the company's Board of Directors. See *Wrong Numbers: The Accounting Problems at WorldCom: Hearing Before the H. Comm. on Fin. Servs.*, *supra* note 4, at 93–94, 129–30 (statements of Reps. Charles A. Gonzalez, Edward R. Royce, & Brad Sherman). WorldCom's Board took a different approach than Enron and fired the wrongdoer rather than the whistleblower. See Moberly, *Structural Model*, *supra* note 5, at 1117.

18. S. REP. NO. 107-146, at 4–5.

instances in which an employee attempted to report corporate misconduct, only to face retaliation:

These examples further expose a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This ‘corporate code of silence’ not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.¹⁹

The Senate concluded that to encourage employees to come forward with evidence of wrongdoing, the law needed to provide more robust protection from retaliation:

[C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to ‘who knew what, and when,’ crucial questions not only in the Enron matter but [also] in all complex securities fraud investigations. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With one in every two Americans investing in public companies, this distinction fails to serve the public good.²⁰

At the time, the Act’s provisions contrasted sharply with the relatively weak whistleblower protections then available to private-sector whistleblowers in the United States.²¹ Federal whistleblower provisions typically covered only employees in specific industries, often those related to health and safety, when they reported violations of a specific statute containing an antiretaliation provision.²² These “silos” of protection aided the enforcement of a particular

19. *Id.* at 5.

20. *Id.* at 10.

21. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 76–78.

22. See *Private Sector Whistleblowers: Are There Sufficient Legal Protections?: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Labor*, 110th Cong. 2–3 (2007), available at <http://law.unl.edu/sites/unl.edu/college-of-law.law/files/facstaff/faculty/resident/docs/moberlystatement.pdf> (statement of Richard E. Moberly, Assistant Professor of Law, Univ. of Neb. College of Law); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 981–83 (2008) [hereinafter Moberly, *Protecting Whistleblowers*].

statute, such as the Clean Air Act²³ or the Surface Transportation Assistance Act,²⁴ but did not address more far-reaching misconduct such as the fraud that led to Enron-like scandals.²⁵ If an employee reported corporate wrongdoing but not the “right” type—wrongdoing covered by a particular statute with a whistleblower provision—then federal law would not protect the employee from retaliation.²⁶

Moreover, less than half of the states had antiretaliation provisions for private-sector employees.²⁷ These provisions obviously varied from state to state, resulting in employees of nation-wide companies receiving different types of protection depending on their location.²⁸ Additionally, almost all states permitted whistleblowers to bring a tort claim for wrongful discharge in violation of public policy.²⁹ However, the breadth of coverage varied dramatically by state, and, because it was judge-made law, employees had difficulty predicting the scope of the tort protection in any particular state ahead of time.³⁰ After examining this landscape, Congress decided it needed to address the “patchwork and vagaries” of state law to provide more consistent and far-reaching protection for whistleblowers.³¹

Sarbanes-Oxley utilizes two different models to encourage whistleblowers. First, and most traditionally, it contains an antiretaliation provision that provides a right of action to employees of publicly traded companies who suffered retaliation because they reported fraud.³² By applying nationwide, Congress meant to address the confusion caused by state-specific provisions and to cover employees of large companies equally, regardless of their location.³³ Further, the Act’s language appears to include a broad range of whistleblower disclosures because it protects reports related to six types of fraud, including violations of the broadly construed federal mail and wire fraud statutes.³⁴ Although it is a

23. Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(a) (2006).

24. Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a) (2006).

25. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 76–77.

26. See Moberly, *Protecting Whistleblowers*, *supra* note 22, at 982, 986.

27. See DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 77–78 (2d ed. 2004) (noting that seventeen states have statutes covering private-sector whistleblowers, not including fair employment statutes similar to Title VII that contain an antiretaliation provision).

28. See Moberly, *Protecting Whistleblowers*, *supra* note 22, at 983.

29. See WESTMAN & MODESITT, *supra* note 27, at 95 (noting that forty jurisdictions permit whistleblowers to bring a tort claim for wrongful discharge in violation of public policy).

30. See Moberly, *Protecting Whistleblowers*, *supra* note 22, at 983–86.

31. See S. REP. NO. 107-146, at 10 (2002).

32. See 18 U.S.C. § 1514A(b)(1) (2006).

33. See S. REP. NO. 107-146, at 10.

34. The statute protects activity related to violations of §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), and 1348 (securities fraud) of Title 18 of the U.S. Code, or “any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.” 18 U.S.C. § 1514A(a)(1), (a)(2). Reports can be made to a broad range of recipients, including Congress, law enforcement agencies, and any person internally who has supervisory authority over the employee. *Id.* § 1514A(a)(1)(A)–(C).

“silo,” because it does not protect all disclosures related to illegality (only the six types of illegal conduct specifically listed in the Act), in 2002, it appeared to be a very large silo. Not only did it protect, for the first time, disclosures related to the types of fraud that led to the scandals, but it also potentially covered a great deal more. Indeed, shortly after the Act’s passage, whistleblower expert Robert Vaughn argued for broadly interpreting the protected activity to include:

disclosures of misconduct as diverse as health and safety violations, the suppression of information regarding product risks, environmental misconduct, consumer fraud, false claims against the government, disregard of statutes requiring the disclosure of information to federal regulatory agencies, violations of federal anti-discrimination laws, violations of statutes and rules protective of labor, conspiracies to break the antitrust laws, bribery of public officials, including foreign officials, and human rights abuses.³⁵

Additionally, because the Act adopted the burden of proof scheme from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,³⁶ also known as AIR21, Sarbanes-Oxley’s burden of proof seemed more employee-friendly than most whistleblower statutes.³⁷ The employee must prove that a protected activity—such as whistleblowing³⁸—was a “contributing factor” in the retaliation suffered by the employee.³⁹ The Department of Labor and academics consider this standard easier for employees to meet than other types of burdens, such as the “but for” causation standard typically required by tort law and the “motivating factor” standard often applied in “mixed-motive” discrimination cases.⁴⁰ If the employee satisfies this burden, the employer’s burden becomes more difficult than normal. An employer can prevail only if it proves, by clear and convincing evidence, that it would have taken the same

35. Vaughn, *supra* note 3, at 23.

36. Pub. L. No. 106-181, § 519(a), 114 Stat. 61, 146–47 (codified in scattered sections of 49 U.S.C.). Sarbanes-Oxley provides that, with few exceptions, whistleblower actions “shall be governed by the legal burdens of proof set forth in § 42121(b) of title 49, United States Code.” 18 U.S.C. § 1514A(b)(2)(C).

37. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 78–80.

38. Protected activities also include assisting in an investigation or a proceeding related to a covered violation or causing information to be provided to a supervisor, law enforcement, or Congress about a covered violation. See 18 U.S.C. § 1514A(a)(1).

39. See 29 C.F.R. § 1980.104(b) (2011).

40. See, e.g., Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52,104, 52,107 (Aug. 24, 2004) (to be codified at 29 C.F.R. pt. 1980) [hereinafter *Sarbanes-Oxley Procedures*] (discussing the causation standard); TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 224–25 (2007) (“Congress’s use of ‘contributing factor’ in Sarbanes-Oxley suggests the same or perhaps even a lower level of causation” than “motivating factor” causation.); Moberly, *Unfulfilled Expectations*, *supra* note 5, at 80 (comparing “contributing factor” causation to “mixed-motive” causation).

adverse employment action even if the employee had not engaged in the protected activity.⁴¹

The Act also utilizes a unique procedural innovation that, in its ideal form, combines the efficiency of an administrative investigation with the safeguards of a federal court trial.⁴² Initially, a whistleblower must file a complaint of retaliation with the Occupational Safety and Health Administration (OSHA), which investigates the claim.⁴³ If OSHA substantiates the claim, then OSHA can order a broad range of remedies, including reinstatement, back pay, and some consequential damages, such as attorneys' fees.⁴⁴ Either party can appeal OSHA's decision to an Administrative Law Judge (ALJ), who would hold a de novo evidentiary hearing.⁴⁵ The ALJ's decision can be appealed to the Administrative Review Board (ARB)⁴⁶ and eventually to the Federal Circuit Court of Appeals.⁴⁷ Unique among whistleblower statutes at the time, Sarbanes-Oxley also permitted a whistleblower to withdraw the claim before the ARB's final decision and to file a case for de novo review in federal district court.⁴⁸

The Act's combination of broad applicability, friendly burdens of proof, and procedural protections led many scholars and advocates at the time to conclude that Sarbanes-Oxley greatly improved whistleblower protections in the United States.⁴⁹ Professor Vaughn called it "the most important whistleblower protection law in the world,"⁵⁰ and Professor Cynthia Estlund labeled it the "gold standard" of whistleblower protection.⁵¹ Taxpayers Against Fraud called

41. See 29 C.F.R. § 1980.104(c).

42. The procedure was unique for whistleblower statutes. Discrimination claims under Title VII of the Civil Rights Act of 1964 utilized a similar procedure by requiring an initial administrative agency investigation before the law permitted a plaintiff to file a federal claim in district court. See 42 U.S.C. § 2000e-4 (2006).

43. See 29 C.F.R. §§ 1980.103(c), .104(b)(1). The Act actually assigns such claims to the Secretary of Labor, who delegated the investigative process to OSHA's Assistant Secretary. See Secretary's Order 5-2002, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65,008, 65,008 (Oct. 22, 2002).

44. See 18 U.S.C. § 1514A(c) (2006); 29 C.F.R. § 1980.105(a)(1), (c).

45. See 29 C.F.R. § 1980.107(a)–(b).

46. See § 1980.110.

47. See § 1980.112(a).

48. See 18 U.S.C. § 1514A(b)(1)(B) (permitting withdrawal and federal court filing if the Secretary of Labor does not issue a final decision within 180 days); see also Vaughn, *supra* note 3, at 87 ("This authorization for a whistleblower to commence a civil action in a federal district court is new with the whistleblower provision and differs in this way from other whistleblower statutes administered by the Department [of Labor]. Its novelty, however, attests to the importance that Congress attached to it.").

49. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 68 & nn.8–9 (quoting responses from academics, advocates, and the press). But see Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1034 (2004) (concluding that Sarbanes-Oxley is a "half-measure and not the true reform our securities laws need to respond to corporate fraud").

50. Vaughn, *supra* note 3, at 105.

51. Estlund, *supra* note 9, at 376.

Sarbanes-Oxley “the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets,”⁵² while Tom Devine of the Government Accountability Project, a whistleblower advocacy group, described the Act as “the promised land. . . . [T]he law represents a revolution in corporate freedom of speech [that] far surpasses, indeed laps, the rights available for government workers.”⁵³ The press fueled expectations as well. For example, in 2002, *Business Week* stated that the Act “gives those who report corporate misconduct sweeping new legal protection [W]histleblowers are going to find life a bit easier.”⁵⁴ In short, in 2002, expectations for the Act were high.

In addition to using the traditional antiretaliation model to protect whistleblowers *after* they report, the Act also includes what I have called a “structural model” to alter corporate practices by “encouraging and supporting whistleblowing *before* any disclosure is made.”⁵⁵ Section 301 of Sarbanes-Oxley⁵⁶ requires the board of directors of every publicly traded corporation to “establish procedures for receiving complaints regarding accounting, internal accounting controls, or auditing matters.”⁵⁷ Additionally, the audit committee of each company’s board of directors must be able to receive anonymous reports from its employees about accounting or auditing matters.⁵⁸ As I noted in 2006, these provisions reflect two innovations. First, the disclosure avenues lead “directly to independent directors on the board’s audit committee—not to corporate executives.”⁵⁹ Second, the Act makes these disclosure channels mandatory.⁶⁰

I predicted that these improvements “may produce more effective disclosures from whistleblowing employees than prior attempts to encourage whistleblowing because [Sarbanes-Oxley’s Structural] Model addresses two significant problems that previously kept employees from consistently functioning as successful corporate monitors: (1) the corporate norm of silence,

52. S. REP. NO. 107-146, at 10 (2002) (quoting letter from Moorman & Devine to Sen. Leahy, *supra* note 9, at 1791).

53. *Blowing the Whistle on Corporate Wrongdoing: An Interview with Tom Devine*, *supra* note 10; see also GREGORY R. WATCHMAN, SARBANES-OXLEY WHISTLEBLOWERS: A NEW CORPORATE EARLY WARNING SYSTEM 1, 8 (2004) (describing the Act as a “major breakthrough in establishing whistleblower rights”).

54. Paula Dwyer & Dan Carney, *Year of the Whistleblower*, BUS. WK., Dec. 16, 2002, at 107, 109; see also *id.* at 110 (“Corporate managers had better brace themselves.”).

55. Moberly, *Structural Model*, *supra* note 5, at 1131; see also *id.* at 1109, 1131–41 (discussing the ineffectiveness of prior versions of the Structural Model and introducing Sarbanes-Oxley’s new model).

56. 15 U.S.C. § 78j-1(m)(4) (2006).

57. See Moberly, *Structural Model*, *supra* note 5, at 1138 (citing 15 U.S.C. § 78j-1(m)(4)(A) (Supp. 2002)).

58. See 15 U.S.C. § 78j-1(m)(4)(B).

59. Moberly, *Structural Model*, *supra* note 5, at 1110.

60. See *id.*

and (2) the corporate tradition of blocking and filtering employee whistleblowing.”⁶¹ In fact, I suggested that the structural model

is more likely than the Antiretaliation Model to reduce the flow-of-information problems that contributed to recent corporate scandals. . . . The Structural Model encourages *more* whistleblowing because it provides incentives to increase employee participation as corporate monitors and reduces various disincentives to employee whistleblowing. Equally important, this direct channel to the board should encourage *effective* whistleblowing by circumventing information blocking and filtering by corporate executives. In this way, Sarbanes-Oxley’s Structural Model minimizes the principal-agent problem that arises when employees provide information about misconduct to mid-level managers and corporate executives who cover-up or ignore the fraud. Furthermore, the model should provide several secondary benefits to corporations and their employees, such as improving corporate decision-making, reducing monitoring costs, and increasing employee voice within the corporation. Such benefits may lead to greater acceptance and implementation than pre-scandal attempts to encourage whistleblowers.⁶²

Finally, the Act requires corporations either to issue a code of ethics applicable to senior financial officers or to explain publicly its failure to do so.⁶³ Although this provision did not attract much attention from the whistleblower community at the time of Sarbanes-Oxley’s enactment, it would ultimately have important consequences, which I detail below.⁶⁴

III. SUCCESSES

In many ways, Sarbanes-Oxley represents a great leap forward for whistleblowers in the United States, and the Act served as the model for subsequent reform. Indeed, in the decade after its enactment, legislatures and regulators unleashed a torrent of formal encouragement for whistleblowers. Federal and state governments passed an impressive array of broad antiretaliation statutes and regulators mandated the widespread use of corporate codes of ethics that explicitly protect whistleblowers and implement whistleblower hotlines. As the most prominent example of reform during this time, Sarbanes-Oxley should receive some credit for these developments.

61. *See id.* at 1109.

62. *Id.* at 1110–11.

63. *See* 15 U.S.C. § 7264(a) (2006).

64. *See infra* notes 114–20 and accompanying text.

At the federal level, Congress passed at least nine new antiretaliation provisions during the last decade.⁶⁵ It also amended several other whistleblower provisions to broaden their applicability.⁶⁶ Many of the new statutes utilize the advanced substantive and procedural protections Sarbanes-Oxley made prominent, such as the employee-friendly burden of proof⁶⁷ and the broad remedies of reinstatement, consequential damages, and attorneys' fees.⁶⁸ Although each of the provisions contains its own "silo" of protected activity, because they only protect certain types of whistleblower disclosures related to the subject matter of the particular statute, the provisions consequently protect a wide-range of behaviors, often including both internal and external reporting⁶⁹ and participation in investigations related to violations of the statute.⁷⁰

65. See FDA Food Safety Modernization Act, Pub. L. No. 111-353, sec. 402, § 1012, 124 Stat. 3885, 3968 (2011) (codified at 21 U.S.C. § 399d (Supp. IV 2010)); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 748, § 23, 124 Stat. 1376, 1744 (2010) (codified at 7 U.S.C. § 26 (Supp. IV 2010)); *id.* sec. 922, § 21F, 124 Stat. at 1841 (codified at 15 U.S.C. § 78u-6 (Supp. IV 2010)); *id.* sec. 1057, 124 Stat. at 2031 (codified at 12 U.S.C. § 5567 (Supp. IV 2010)); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1558, § 18C, 124 Stat. 119, 261 (2010) (codified at 29 U.S.C. § 218C (Supp. IV 2010)); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1533, 123 Stat. 115, 297 (2009) (enacting antiretaliation protection for whistleblowing about misconduct related to stimulus funds); Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, sec. 219, § 40, 122 Stat. 3016, 3062 (2008) (codified at 15 U.S.C. § 2087 (Supp. IV 2010)); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, 121 Stat. 266, 414 (2007) (passing the National Transit Systems Security Act of 2007, which included whistleblower protections) (codified at 6 U.S.C. § 1142 (Supp. IV 2010)); Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, sec. 6, § 60129, 116 Stat. 2985, 2989 (2002) (codified at 49 U.S.C. § 60129 (2006)).

66. See Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 611, 124 Stat. 2905, 2969 (2010) (amending Seamen's Protection Act, 46 U.S.C. § 2114 (Supp. IV 2010)); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (2009) (amending False Claims Act whistleblower provision, 31 U.S.C. § 3730(h) (Supp. IV 2010)); Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 419, 122 Stat. 4848, 4892-93 (2008) (amending the Federal Railroad Safety Act, 49 U.S.C. § 20109 (Supp. IV 2010)); Implementing Recommendations of the 9/11 Commission Act of 2007 sec. 1521, § 20109(a), 121 Stat. at 444-45 (2007) (amending the Federal Railroad Safety Act, 49 U.S.C. § 20109); *id.* § 1536, 121 Stat. at 464-65 (amending the Surface Transportation Assistance Act, 49 U.S.C. § 31105); Energy Policy Act of 2005, Pub. L. No. 109-58, § 629, 119 Stat. 594, 785 (2005) (amending the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a)(2) (2006)).

67. See FDA Food Safety Modernization Act sec. 402, § 1012(b)(2)(C), 124 Stat. at 3969; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057(c)(3), 124 Stat. at 2033; Patient Protection and Affordable Care Act sec. 1558, § 18C(b)(1), 124 Stat. at 261; American Recovery and Reinvestment Act of 2009 § 1533(c)(1), 123 Stat. at 299-300; Consumer Product Safety Improvement Act of 2008 sec. 219, § 40(b)(2)(B), 122 Stat. at 3063-64; Implementing Recommendations of the 9/11 Commission Act of 2007, § 1413(c)(2)(B), 121 Stat. at 416-17; Pipeline Safety Improvement Act of 2002 sec. 6, § 60129(b)(2)(B), 116 Stat. at 2990-91.

68. See sources cited *supra* note 65.

69. See FDA Food Safety Modernization Act sec. 402, § 1012(a), 124 Stat. at 3968; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057(a), 124 Stat. at 2031-32; Patient Protection and Affordable Care Act sec. 1558, § 18C(a), 124 Stat. at 261; American Recovery and Reinvestment Act of 2009 § 1533(a), 123 Stat. at 297; Consumer Product Safety Improvement Act

Many of the new statutes also adopt the procedural innovation of requiring an initial administrative investigation of a retaliation complaint, followed by providing the whistleblower an opportunity for de novo review in federal district court.⁷¹ Indeed, Congress designated the Department of Labor (which subsequently designated OSHA) as the initial administrative investigative agency in eight antiretaliation statutes after Sarbanes-Oxley was passed in 2002,⁷² raising the total number of statutes under OSHA's whistleblower umbrella from thirteen to twenty-one over the last decade.⁷³

In addition to providing for new whistleblower protection, some federal legislation in the last decade fixed older whistleblower provisions that provided less than the best practices popularized by Sarbanes-Oxley. For example, Congress amended the Surface Transportation Assistance Act of 1982⁷⁴ and the Federal Railroad Safety Act⁷⁵ to make their procedures related to burden of proof, remedies, and federal district court de novo review more in line with Sarbanes-Oxley.⁷⁶ Also, the Energy Policy Act of 2005⁷⁷ amended the Energy

of 2008 sec. 219, § 40(a), 122 Stat. at 3062–63; Implementing Recommendations of the 9/11 Commission Act of 2007 § 1413(a), 121 Stat. at 414–15; Pipeline Safety Improvement Act of 2002 sec. 6, § 60129(a), 116 Stat. at 2989–90.

70. See sources cited *supra* note 69; see also Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 748, § 23(h)(1)(A), 124 Stat. at 1744; sec. 922, § 21F(h)(1)(A), 124 Stat. at 1845–46 (“providing information to the Commission” or “assisting in any investigation or judicial or administrative action of the Commission”).

71. See FDA Food Safety Modernization Act sec. 402, § 1012(b)(4)(A), 124 Stat. at 3970; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057(c)(4)(D)(i), 124 Stat. at 2034; Patient Protection and Affordable Care Act sec. 1558, § 18C(b)(1), 124 Stat. at 261; American Recovery and Reinvestment Act of 2009 § 1553(c)(1)(B)(3), 123 Stat. at 300 (the Inspector General conducts the initial investigation); Consumer Product Safety Improvement Act of 2008 § 219(b)(4), 122 Stat. at 3064; Implementing Recommendations of the 9/11 Commission Act of 2007 § 1413(c)(7), at 121 Stat. at 418.

72. FDA Food Safety Modernization Act sec. 402, § 1012(b)(1), 124 Stat. at 3968; Coast Guard Authorization Act of 2010, Pub. L. No. 111-281 § 611, 124 Stat. 2905, 2969–70 (2010) (amending Seamen's Protection Act, 46 U.S.C. § 2114 (Supp. IV 2010)); Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057(c)(2), 124 Stat. at 2032; Patient Protection and Affordable Care Act sec. 1558, § 18C(b)(1), 124 Stat. at 261 (incorporating procedure found at 15 U.S.C. § 2087(b)); Consumer Product Safety Improvement Act of 2008 sec. 219(a), § 40(b)(1), 122 Stat. at 3063; Implementing Recommendations of the 9/11 Commission Act of 2007 sec. 1413(c)(2)(A), 121 Stat. at 416; *id.* sec. 1521, § 20109(c)(1), 121 Stat. at 446 (amending Federal Railroad Safety Act, 49 U.S.C. § 20109 (2006) to require investigation by Secretary of Labor); Pipeline Safety Improvement Act of 2002 sec. 6(a), § 60129(b)(2), 116 Stat. at 2990.

73. See Occupational Safety & Health Admin., *The Whistleblower Protection Program*, http://www.whistleblowers.gov/statutes_page.html (last visited Oct. 5, 2012) (listing statutes under OSHA's jurisdiction).

74. See 49 U.S.C. § 31105 (Supp. IV 2010).

75. See 49 U.S.C. § 20109 (Supp. IV 2010).

76. See Implementing Recommendations of the 9/11 Commission Act of 2007 sec. 1521, § 20109, 121 Stat. at 444; sec. 1536, 121 Stat. at 464–67; Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982, 75 Fed. Reg. 53,544 (Aug. 31, 2010) (codified at 29 C.F.R. pt. 1978); Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the

Reorganization Act of 1974⁷⁸ to permit de novo review by a federal district court if the Department of Labor has not completed review of a whistleblower's complaint within one year.⁷⁹ Finally, Congress expanded the scope of two older whistleblower provisions to specify that they protected independent contractors as well as employees in the same manner as Sarbanes-Oxley.⁸⁰ Although bits and pieces of these reforms may have been found in laws predating Sarbanes-Oxley's enactment in 2002, the Act brought all of them together and set the benchmark for federal whistleblowing law during the decade after its passage.

Some of the statutes take Sarbanes-Oxley as a baseline and improve upon it. The 2009 economic "stimulus bill," for example, gives specific examples of the types of circumstantial evidence that an employee may use to satisfy the "contributing factor" burden of proof, such as demonstrating temporal proximity between the protected activity and the reprisal, or knowledge by the decision maker of the protected activity.⁸¹ Many newer statutes add "refusing to engage in unlawful conduct" as a protected activity.⁸² Several statutes passed in the last decade prohibit pre-dispute arbitration agreements from covering whistleblower claims arising under the statute and also prohibit employees from waiving their

Federal Railroad Safety Act, 75 Fed. Reg. 53,522 (Aug. 31, 2010) (codified at 29 C.F.R. pt. 1982). Interestingly, Congress has not spoken consistently regarding the type of procedure it thinks best for whistleblowers. During the last decade, Congress also amended the Seaman's Protection Act to *remove* the ability of a whistleblower to file a claim in federal district court and to *add* administrative review by the Department of Labor. See Coast Guard Authorization Act § 611(b), 124 Stat. at 2969–70. In the same year, it provided for whistleblowers under two provisions in a different statute to bring a retaliation claims directly in federal court. See Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 748, § 23(h)(1)(B), 124 Stat. at 1744; sec. 922, § 21F(h)(1)(B)(i), 124 Stat. at 1846.

77. Pub. L. No. 109-58, § 629, 119 Stat. 594, 785 (2005).

78. 42 U.S.C. § 5851(b)(4) (2006).

79. Energy Policy Act of 2005 sec. 629(b), § 211(b), 119 Stat. at 785; see also Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended, 76 Fed. Reg. 2808, 2809 (Jan. 18, 2011) (codified at 29 C.F.R. pt. 24) (stating that the August 2005 amendments added the de novo review provision in the event that the Secretary had not issued a final ruling within one year of the complaint being filed).

80. See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4(d), § 3730(h), 123 Stat. 1617, 1624–25 (2009) (amending False Claims Act whistleblower provision, 31 U.S.C. § 3730(h), to apply to contractors and agents); Energy Policy Act of 2005 sec. 629, § 211(a)(2), 119 Stat. at 785; see also Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a) (2006) (applying to the company and "any officer, employee, contractor, subcontractor, or agent of such company").

81. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1533(c)(1)(A)(ii), 123 Stat. 115, 299 (2009).

82. See FDA Food Safety Modernization Act, Pub. L. No. 111-353, sec. 402, § 1012(a)(4), 124 Stat. 3885, 3968 (2011); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 1057(a)(4), 124 Stat. 1376, 2031–32 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1558, § 18C(a)(5), 124 Stat. 119, 261 (2010); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413(a)(2), 121 Stat. 266, 415 (2007); Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, sec. 6, § 60129(a)(1)(B), 116 Stat. 2985, 2989 (2002).

rights under the antiretaliation provision.⁸³ Also, several new whistleblower provisions explicitly provide for jury trials as part of the de novo review in federal court,⁸⁴ something Sarbanes-Oxley's provision originally failed to do.⁸⁵ Similarly, Sarbanes-Oxley did not explicitly authorize federal courts to enforce an OSHA order, an oversight not repeated in later statutes.⁸⁶ Moreover, new statutes make clear that whistleblowers will be protected even if reporting misconduct related to their job duties,⁸⁷ a provision that became prudent after the Supreme Court's 2006 decision in *Garcetti v. Ceballos*⁸⁸ holding that the First Amendment did not protect such "job-duty" whistleblowers.⁸⁹ All of the new statutes provide more time for whistleblowers to file claims than Sarbanes-Oxley's original ninety-day statute of limitations,⁹⁰ and four provide enhanced

83. See Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 748, § 23(n), 124 Stat. at 1746; *id.* sec. 1057(d), 124 Stat. at 2035; American Recovery and Reinvestment Act of 2009 § 1533(d), 123 Stat. at 301. Interestingly, one recent act prohibits employee waiver, but does not mention pre-dispute arbitration agreements. See FDA Food Safety Modernization Act, sec. 402, § 1012(c)(2), 124 Stat. at 3971.

84. See FDA Food Safety Modernization Act sec. 402, § 1012(b)(4)(A), 124 Stat. at 3970; Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 1057(c)(4)(D)(i), 124 Stat. at 2034; Patient Protection and Affordable Care Act sec. 1558, § 18C(b), 124 Stat. at 261; American Recovery and Reinvestment Act of 2009 § 1533(c)(1)(B)(3), 123 Stat. at 300; Consumer Product Safety Improvement Act of 2008 sec. 219, § 40(b)(4), 122 Stat. at 3064; Implementing Recommendations of the 9/11 Commission Act of 2007 § 1413(c)(7), 121 Stat. at 418; *id.* sec. 1521, § 20109(c)(3), 121 Stat. at 446; *id.* § 1536(c), 121 Stat. at 466.

85. See Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 28–29 (2006).

86. See FDA Food Safety Modernization Act sec. 402, § 1012(b)(6), 124 Stat. at 3971; Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 1057(c)(5), 124 Stat. at 2035; Patient Protection and Affordable Care Act sec. 1558, § 18C, 124 Stat. at 261; Consumer Product Safety Improvement Act of 2008 sec. 219, § 40(b)(6), 122 Stat. at 3065; Implementing Recommendations of the 9/11 Commission Act of 2007 § 1413(c)(5), 121 Stat. at 418 (2007); *id.* sec. 1521, § 20109(c)(2)(A)(iii), 121 Stat. at 446.

87. See FDA Food Safety Modernization Act sec. 402, § 1012(a), 124 Stat. at 3968; Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 1057(a), 124 Stat. at 2031; American Recovery and Reinvestment Act of 2009 § 1533(a), 123 Stat. at 297; Consumer Product Safety Improvement Act of 2008 sec. 219(a), § 40(a), 122 Stat. at 3062.

88. 547 U.S. 410 (2006).

89. See *id.* at 426 (holding that the First Amendment did not protect government employees who speak about matters of public concern if the employee's statements were made pursuant to his professional duties).

90. See FDA Food Safety Modernization Act sec. 402, § 1012(b)(1), 124 Stat. at 3968 (180 days); Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 748, § 23(h)(1)(B)(iii), 124 Stat. at 1744 (two years); *id.* sec. 922, § 21F(h)(1)(B)(iii)(I), 124 Stat. at 1846 (up to six years); *id.* sec. 1057(c)(1)(A), 124 Stat. at 2032 (180 days); Patient Protection and Affordable Care Act sec. 1558, § 18C(b), 124 Stat. at 261 (180 days); Consumer Product Safety Improvement Act of 2008 sec. 219(a) § 40(b)(1), 122 Stat. at 3063 (180 days); Implementing Recommendations of the 9/11 Commission Act of 2007 sec. 1413(c)(1), 121 Stat. at 416 (180 days); *id.* sec. 1521, § 20109(c)(2)(A)(ii), 121 Stat. at 446 (180 days); *id.* sec. 1536(b), § 31105(b), 121 Stat. at 465 (180 days); Pipeline Safety Improvement Act of 2002 sec. 6, § 60129(b)(1), 116 Stat. at 2990 (180 days).

remedies, such as double back pay damages⁹¹ or punitive damages.⁹² Further, the Dodd-Frank Act amended the False Claims Act to prohibit associational discrimination as retaliation.⁹³

Finally, in 2010, Congress fixed problems that had become apparent with Sarbanes-Oxley itself. First, Sarbanes-Oxley's statute of limitations of ninety days seemed unreasonably short.⁹⁴ In fact, from 2002 to 2005, OSHA and ALJs dismissed a large percentage of Sarbanes-Oxley whistleblower cases for failure to comply with the statute of limitations.⁹⁵ Some cases missed the deadline by mere days, often because of confusion regarding exactly when the limitations period began to run.⁹⁶ The Dodd-Frank Act changed the limitations period to 180 days and clarified that the period began running "after the date on which the employee became aware" of the retaliation.⁹⁷ Second, ALJs and the ARB had issued confusing decisions regarding whether Sarbanes-Oxley protected employees of private subsidiaries of publicly traded companies.⁹⁸ Dodd-Frank clarified that such employees should be protected from retaliation as whistleblowers.⁹⁹ Third, Dodd-Frank amended Sarbanes-Oxley to prohibit employee waivers and pre-dispute arbitration agreements related to Sarbanes-Oxley's antiretaliation protection.¹⁰⁰ Fourth, Dodd-Frank clarified that de novo

91. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 922(a), § 21F(h)(1)(C)(ii), 124 Stat. at 1846.

92. Implementing Recommendations of the 9/11 Commission Act of 2007 sec. 1413(d)(3), 121 Stat. at 419 (2007); *id.* sec. 1521, § 20109(d)(3), 121 Stat. at 447; *id.* sec. 1536, § 31105(b)(3)(C), 121 Stat. at 466 (all providing for award of up to \$250,000 in punitive damages).

93. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 1079A, § 3301(c), 124 Stat. at 2079.

94. *See* Moberly, *Unfulfilled Expectations*, *supra* note 5, at 132–34.

95. *See id.* at 107–09 (describing results from study that found that 18.8% of OSHA cases and 33.8% of ALJ Sarbanes-Oxley cases during this time period were dismissed for failure to comply with the statute of limitations).

96. *See id.*

97. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 922(c), § 1514A(b)(2), 124 Stat. at 1848.

98. *See* Moberly, *Unfulfilled Expectations*, *supra* note 5, at 109–13. In 2011, the ARB noted that "[s]ignificant conflicts have developed in the case law interpreting pre-amendment Section 806's coverage of subsidiaries. Department of Labor's ARB, its ALJs, and the federal courts have been deeply divided over the subsidiary coverage issue under Section 806. Opinions have ranged from near universal subsidiary coverage to no coverage for subsidiaries." *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, at 10 (Dep't of Labor Mar. 31, 2011), available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/08_032.A.SOXP.PDF (listing various cases).

99. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 929A, § 1514A, 124 Stat. at 1852. Subsequently, the ARB determined that the Dodd-Frank provision, as a "clarifying amendment," should be applied to cases pending on the Act's effective date. *See Johnson*, ARB No. 08-032, at 16.

100. Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 922(c), § 1514A(e), 124 Stat. at 1848.

review of a Sarbanes-Oxley claim in federal district court included the right to a jury trial.¹⁰¹

Political party did not seem to matter during this lawmaking spree, as both Republican and Democratic presidents signed whistleblower laws.¹⁰² Congresses with a variety of political compositions included such provisions in important legislation.¹⁰³ Notably, all of President Obama's signature legislative accomplishments—the economic stimulus bill,¹⁰⁴ health care reform,¹⁰⁵ and the reform of the financial industry¹⁰⁶—contained antiretaliation provisions.¹⁰⁷ Overall, it has been estimated that over sixty-five million employees have received new antiretaliation protection from federal whistleblower provisions passed since 2006.¹⁰⁸

Arguably, Sarbanes-Oxley's influence went beyond federal law. One survey of state law found that, since 2006, forty states have broadened or toughened their whistleblower laws for public employees, while none have weakened them.¹⁰⁹ States have added protections for private employees as well. Since Sarbanes-Oxley passed in 2002, twenty-two states have enacted thirty-five laws that either created new whistleblower protections for private-sector employees or strengthened existing statutory protections.¹¹⁰

101. *Id.*

102. The federal government passed whistleblower provisions during the Presidency of Republican George W. Bush—after the passage of Sarbanes-Oxley in 2002 through January 2009—as well as during the Presidency of Democrat Barack Obama—from January 2009 to the time of this Article's publication. See sources cited *supra* note 65 (providing dates of statutes containing whistleblower provisions).

103. During the last decade, both Democrats and Republicans have, at various times, controlled both the House of Representatives and the Senate. See Kathy E. Gill, *Visual Guide: The Balance of Power Between Congress and the Presidency (1945-2011)*, <http://wiredpen.com/resources/political-commentary-and-analysis/a-visual-guide-balance-of-power-congress-presidency/> (last visited Sept. 16, 2012).

104. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1533, 123 Stat. 115, 297-302 (2009).

105. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1558, § 18C, 124 Stat. 119, 261 (2010).

106. See Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 748, § 23, 124 Stat. at 1739-46 (2010); *id.* sec. 922, § 21F, 124 Stat. at 1841-49; *id.* sec. 1057, 124 Stat. at 2031-35.

107. Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 66 (2012); see also *id.* at 66-71 (detailing the whistleblower protections in each piece of legislation).

108. Maria Chutchian, *Rise in Whistleblower Protections Inspires New Firm Practices*, LAW360 (June 1, 2012, 10:21 PM), <http://www.law360.com/employment/articles/344005/rise-in-whistleblower-protections-inspires-new-firm-practices> (quoting a statement by Government Accountability Project President Louis Clark).

109. Press Release, Public Employees for Environmental Responsibility, States Strengthening Their Whistleblower Laws (Aug. 17, 2011), available at http://www.peer.org/news/news_id.php?row_id=1513.

110. See ALASKA STAT. § 08.68.279 (2010) (enacted 2002); CAL. LAB. CODE § 1102.5 (West 2011) (amended 2003); CAL. HEALTH & SAFETY CODE § 1278.5 (West 2008) (amended 2007); CONN. GEN. STAT. ANN. § 33-1336 (West 2005) (enacted 2003 and amended 2004); DEL. CODE

Additionally, the corporate hotlines required by Sarbanes-Oxley have become commonplace in corporate America. One recent study found that approximately 80% of companies have whistleblower hotlines that employees can use to report misconduct.¹¹¹ In 2010, a KPMG study found that 87% of U.S. companies have in place “whistleblower mechanisms,” such as a hotline or an ombudsman.¹¹² This number increased from 75% in KPMG’s 2008 survey.¹¹³

Finally, Sarbanes-Oxley influenced the development of corporate codes of ethics containing formal whistleblower protection. These code provisions grew out of Sarbanes-Oxley’s mandate that each publicly traded company disclose whether it had a code of ethics applicable to its senior financial officers and, if it did not have one, to publicly explain why it did not.¹¹⁴ As a co-author and I described elsewhere, after Sarbanes-Oxley implemented this code of ethics requirement,

ANN. tit. 19 § 1701 (West 2005) (enacted 2004); 740 ILL. COMP. STAT. § 174/1 (West 2010) (enacted 2003 and amended 2008); 820 ILL. COMP. STAT. § 130/11b (West 2008) (amended 2006); 210 ILL. COMP. STAT. § 86/35 (West 2008) (enacted 2004 and amended 2007); LA. REV. STAT. ANN. § 39:2163 (Supp. 2012) (enacted 2006); MASS. GEN. LAWS ANN. ch. 150A, § 3A (West Supp. 2012) (amended 2011); MINN. STAT. ANN. § 181.932 (West Supp. 2012) (amended 2007); MO. ANN. STAT. § 191.908 (West 2011) (enacted 2007); MO. ANN. STAT. § 198.301 (West 2004) (enacted 2003); N.H. REV. STAT. ANN. §§ 275-E:1–E:3 (LexisNexis 2008) (amended 2008); N.J. STAT. ANN. §§ 34:19-1–19-14 (West 2011) (amended 2006); N.Y. LAB. LAW § 740 (McKinney Supp. 2012) (amended 2006); N.C. GEN. STAT. §§ 95-240–243 (2011) (amended 2009); OHIO REV. CODE ANN. §§ 4113.51–52 (LexisNexis 2007) (amended 2006); OHIO REV. CODE ANN. § 4723.33 (LexisNexis 2006) (amended 2005); OR. REV. STAT. ANN. § 659A.885 (2011) (amended 2011); OR. REV. STAT. ANN. § 654.062 (2011) (amended 2007); S.C. CODE ANN. § 41-15-520 (Supp. 2011) (amended 2011); S.D. CODIFIED LAWS § 60-11-17.1 (Supp. 2012) (amended 2011); S.D. CODIFIED LAWS § 60-12-21 (2011) (amended 2008); TENN. CODE ANN. § 50-1-304 (Supp. 2011) (amended 2011); TEX. LAB. CODE ANN. § 411.081–.082 (West 2006) (amended 2005); TEX. LAB. CODE ANN. § 411.084 (West 2006) (enacted 2005); VT. STAT. ANN. tit. 21 § 495 (2009) (amended 2007); VT. STAT. ANN. tit. 21 § 507–509 (2009) (enacted 2003); VA. CODE ANN. § 40.1-51.2:2 (Supp. 2012) (amended 2005); WASH. REV. CODE ANN. § 49.17.160 (West Supp. 2012) (amended 2010); WASH. REV. CODE ANN. § 49.60.210 (West Supp. 2012) (amended 2011); WASH. REV. CODE ANN. § 49.60.230 (West Supp. 2012) (amended 2008).

111. See ETHICS RES. CTR., 2011 NATIONAL BUSINESS ETHICS SURVEY 48 (2011), *available at* <http://www.ethics.org/nbes/files/FinalNBES-web.pdf>. Another study provided some indication that hotlines were not as prevalent as indicated by the Ethics Resource Center study. Moberly and Wylie examined corporate codes of ethics in 2007 and found that only 47.2% of the codes instructed employees to report misconduct to a hotline. See Richard Moberly & Lindsey E. Wylie, *An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics*, in WHISTLEBLOWING AND DEMOCRATIC VALUES 27, 35 (David Lewis & Wim Vandekerckhove eds., 2011), *available at* [http://whistleblowers.dk/ArkivPDF/whistleblowing_and_democratic_values_3rd_jan\(1\).pdf](http://whistleblowers.dk/ArkivPDF/whistleblowing_and_democratic_values_3rd_jan(1).pdf). However, this statistic may understate the use of hotlines, as companies may use a hotline without mentioning it in their code of ethics. See *id.*

112. KPMG, GLOBAL ANTI-BRIBERY AND CORRUPTION SURVEY 2011, at 11 (2011), *available at* http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Advisory/23816NSS_Global_ABC_Survey.PDF.

113. See *id.*

114. See 15 U.S.C. § 7264(a) (2006).

the Securities and Exchange Commission (SEC) issued regulations under the Act that expanded upon these baseline statutory requirements in three significant ways. First, companies must disclose Codes applying to principal executive officers as well as to senior financial officers. Second, the regulations expanded Sarbanes-Oxley's definition of 'Code of Ethics' to include written standards that promote the 'prompt internal reporting of violations of the code to an appropriate person or persons identified in the code.' Third, companies must provide their Codes of Ethics to the public in one of three ways: as an exhibit to its publicly available annual report, by posting it on its website, or by providing a copy without charge to any person requesting it.

The SEC also asked the U.S. stock exchanges to evaluate their listing standards related to corporate governance. In response, three of the largest stock exchanges issued new listing standards that, among other things, made new requirements of listed companies related to whistleblowing policies and Codes of Ethics

[For example, t]he New York Stock Exchange (NYSE) now requires its listed companies to issue a Code of Ethics that applies to all its directors, officers, and employees—a significant change from Sarbanes-Oxley's application of Codes to senior financial officers. The NYSE also states that corporate Codes should 'encourage' good faith reporting of 'violations of laws, rules, regulations or the code of business conduct' to 'supervisors, managers or other appropriate personnel.' . . . Codes also should encourage reports when an employee is 'in doubt about the best course of action in a particular situation.' With regard to protections for whistleblowers, the NYSE requires that the 'company must ensure that employees know that the company will not allow retaliation.' NYSE companies must make the Code of Ethics available on the company's website or in print to any shareholder who requests it.¹¹⁵

Our empirical study of corporate codes of ethics found that companies comply with these statutory and regulatory requirements by explicitly promising employees that the company will not retaliate against them for reporting misconduct.¹¹⁶ In fact, these codes often provide broader promises to protect their employees from retaliation than provided by statutory provisions or tort

115. Moberly & Wylie, *supra* note 111, at 29–30 (internal citations omitted) (citing 17 C.F.R. § 229.406 (2011); NEW YORK STOCK EXCHANGE, NYSE LISTED COMPANY MANUAL § 303A.10 (amended Nov. 25, 2009), *available at* <http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2F1cm%2Fsections%2FLcm%2Dsections%2F>).

116. *See id.* at 54 tbl.7 (reporting that 91% of company corporate codes in the study promised "no retaliation" against employees or explicitly prohibited retaliation).

claims.¹¹⁷ For example, corporate codes of ethics typically protect employees who report a broad range of wrongdoing, from illegal behavior generally (76.4% of codes include this protection) to violations of the code itself (93.3%) to even “unethical or improper” conduct (52.8%).¹¹⁸ These promises not to retaliate usually apply to all employees in the company, which could provide for more consistent protection than the nuanced whistleblower laws that vary from state to state.¹¹⁹ Importantly, employees should not have difficulty finding these corporate non-retaliation promises: over 85% of the codes in the study could be found on corporate websites.¹²⁰

Sarbanes-Oxley influenced the development of these formal statutory, regulatory, and corporate provisions. I use the term “formal” because they exist for all to see and for whistleblowers to rely upon and enforce.¹²¹ Their presence could encourage employees to blow the whistle, while also protecting employees from retaliation. As formal statements of policy, the provisions also have the symbolic effect of conveying the importance of whistleblowing to society’s law enforcement efforts.¹²² They demonstrate that insiders can, and should, monitor organizations on behalf of the public. Moreover, they communicate that retaliation against whistleblowers should not be tolerated. Organizations and government agencies altered their policies and procedures to comply with Sarbanes-Oxley, and this too sends a message to employees about the importance of reporting misconduct.

At the same time, the Act had significant impact as a symbol of the importance of whistleblowing for organizational governance. The culture around whistleblowing has changed in the last decade, making it more acceptable and formally encouraged.¹²³ It is somewhat unclear what role

117. *See id.* at 32–43.

118. *See id.* at 40.

119. *See id.* at 41–42.

120. *See id.* at 50 tbl.1. Notably, the 2010 KPMG survey found that 100% of U.S. companies distributed their anti-bribery and corruption policies—which often include formal whistleblower provisions—to all employees. *See* KPMG, *supra* note 112, at 12.

121. *See* Moberly, *Protecting Whistleblowers*, *supra* note 22, at 1021–38 (arguing for the enforceability of antiretaliation promises made in corporate codes of ethics).

122. *See, e.g.,* Peter Roberts, *Evaluating Agency Responses: The Comprehensiveness and Impact of Whistleblowing Procedures*, in *WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR* 233, 239 (A.J. Brown ed., 2008), available at http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf (“Whistleblowing legislation appears to do at least one thing for which it was intended: it increases employees’ expectations that they will be taken seriously and will be protected if they blow the whistle.”); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 956–61 (1995) (citations omitted) (discussing the uses and force of social meaning); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2051 (1996) (“There can be no doubt that law, like action in general, has an expressive function.”).

123. *See, e.g.,* Charles Bame-Aldred et al., *An Examination of the Effectiveness of Sarbanes-Oxley Whistle-Blower Protection*, 8 J. FORENSIC ACCT. 105, 109 (2007) (noting that the “high-profile” Enron and WorldCom whistleblowers “may herald a shift in social attitudes regarding the protection of whistle-blowers”); Elletta Sangrey Callahan et al., *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT’L L. 879, 880 (2004)

Sarbanes-Oxley has played in this transformation—did Sarbanes-Oxley bring whistleblowing into public prominence, or is it merely the most prominent marker in whistleblowing's increased prominence over the last decade? In other words, has Sarbanes-Oxley caused the rise or is it merely correlative? Although the answer is probably somewhere in-between those extremes, I argue that, at a minimum, Sarbanes-Oxley paved the way for the law to utilize formal mechanisms that encourage whistleblowing.

As important as these symbolic and communicative effects might be, we should also examine the specific question of whether such formal provisions related to whistleblowers actually work. Unfortunately, although Sarbanes-Oxley spawned a multitude of antiretaliation provisions aimed at assisting whistleblowers, the last ten years of whistleblowing under Sarbanes-Oxley teaches that they do not work as well as we might have hoped. The next section explains why.

IV. FAILURES

Scholars typically ask three questions to evaluate whether a whistleblowing law works. First, does the law encourage employees to report misconduct? Second, does the law protect them from retaliation if they do report? Third, if they do report, are whistleblowers effective at stopping the misconduct—in other words, are whistleblower reports “properly assessed and, where necessary, investigated and actioned”?¹²⁴

To answer these questions definitively, scholars need to conduct more empirical research in the United States.¹²⁵ One model that U.S. scholars could follow, and that was used with great success in Australia, consists of the scholarly examination of whistleblowing and compliance systems in dozens of public-sector agencies from a variety of perspectives.¹²⁶ In Australia, they

(“Today, Congress and state legislatures in the United States embrace whistleblowing as an important tool in the fight against misuse of public funds, abuse of power, and other types of wrongdoing.”); Chutchian, *supra* note 108 (“There’s been a change in the acceptance of whistleblowers that started with [the financial misconduct on] Wall Street.”) (quoting Gordon Schnell of Constantine Cannon).

124. See A.J. Brown et al., *Best-Practice Whistleblowing Legislation for the Public Sector: The Key Principles*, in WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR, *supra* note 122, at 261, 263; cf. MARCIA P. MICELI ET AL., WHISTLE-BLOWING IN ORGANIZATIONS 4 (Arthur P. Brief et al. eds., 2008) (focusing on “evidence of the extensiveness of (a) the wrongdoing whistle-blowers say they have witnessed; (b) whistle-blowing; (c) the retaliation whistle-blowers believe they experience; and (d) the effectiveness of whistle-blowing”).

125. In particular, the question of how to measure a whistleblower’s effectiveness remains difficult to resolve because of issues related to when to measure the whistleblower’s effectiveness and from whose perspective the effectiveness should be measured. See MICELI ET AL., *supra* note 124, at 16–18.

126. See A.J. Brown & Marika Donkin, *Introduction*, in WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR, *supra* note 122, at 1, 4–8 (describing the “Whistling While They Work” project).

surveyed employees, supervisors, and organizational leaders, examined documents related to compliance systems, and also conducted in-depth interviews with dozens of workers and managers.¹²⁷ Nothing completed in the United States private sector matches the analytical depth of the Australian study.¹²⁸ Moreover, the studies that have been completed in the U.S. often offer contradictory and inconsistent results concerning the incidence of whistleblowing in the general employee population, the amount of retaliation that occurs, and the overall effectiveness of whistleblowers at stopping the wrongdoing they report.¹²⁹

However, the empirical evidence that does exist suggests that Sarbanes-Oxley failed to meet at least two of the three key principles outlined above. Although some evidence indicates that employees may report wrongdoing in larger numbers than ever before, I argue below that the Act failed to protect whistleblowers from retaliation and also failed to effectively address the underlying wrongdoing being disclosed.

Moreover, as I explain in more detail below, evidence related to the financial crisis in 2008 may be able to supplement the empirical record. Although a full explanation of the crisis is beyond the scope of this Article,¹³⁰ one aspect of the problem involved banks and other lenders providing subprime mortgages to borrowers with questionable ability to pay them back and then bundling the

127. *See id.*

128. Several studies have been conducted related to public-sector whistleblowing that use similar methods as the Australian study. *See, e.g.*, U.S. MERIT SYS. PROT. BD., *BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS* 4 (1984) (outlining study design); U.S. MERIT SYS. PROT. BD., *WHISTLEBLOWING AND THE FEDERAL EMPLOYEE: BLOWING THE WHISTLE ON FRAUD, WASTE, AND MISMANAGEMENT—WHO DOES IT AND WHAT HAPPENS* 8 (1981) (discussing questionnaire sent to federal employees). Other studies have taken samples from various private-sector organizations, but none of them have matched the depth and comprehensiveness of the Australian study. *See, e.g.*, Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 *WORK AND OCCUPATIONS* 107, 107–28 (1999) (“We needed to survey whistle-blowers from all walks of life and from every region of the country to yield the validity we sought. We needed to interview them in considerable depth so that we would be able to draw richly grained conclusions about the meaning of this phenomenon.”). Moreover, these studies do not cover the post-Sarbanes-Oxley period.

129. *See* MICELI ET AL., *supra* note 124, at 18–32.

130. For good explanations of the complicated back story to the recession beginning in 2007, *see* BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS* (2010); PAUL MUOLO & MATHEW PADILLA, *CHAIN OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS* (2008); ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY’S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* (2008); ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES* (2009); and Steven L. Schwarcz, *Understanding the Subprime Financial Crisis*, 60 *S.C. L. REV.* 549 (2009).

mortgages and selling them as “mortgage-backed securities.”¹³¹ As borrowers began defaulting on these mortgages, the value of these securities—and the companies that invested heavily in them, such as Lehman Brothers, or that guaranteed them, such as AIG—plummeted.¹³² Some companies, like Lehman Brothers, went bankrupt.¹³³ Others, like AIG, received massive federal bailout loans.¹³⁴ Billions of dollars of shareholder value disappeared, and money for loans to businesses and individuals dried up.¹³⁵ Recession quickly followed.¹³⁶

Importantly for this Article, allegations surfaced that lenders who provided the subprime mortgages engaged in massive fraud in order to sell more loans and convince regulators that the borrowers were qualified.¹³⁷ This alleged fraud built up the real estate bubble and then contributed to the recession after the bubble burst. Whistleblowers who detected and reported this fraud provide some insight into whether Sarbanes-Oxley satisfied the three indicia of an effective whistleblowing law.

A. Encouraging Disclosures

Prior to Sarbanes-Oxley’s enactment in 2002, various studies had found substantial variance in the incidence of reporting wrongdoing by employees who had observed it. As three prominent whistleblower scholars summarized in 2008:

In 1992, the most recent systematic survey of federal employees, approximately 48% of observers blew the whistle. In a subsequent survey of federal employees, 1,280 reported being the victim of sexual harassment, but only 67 (about 4%) blew the whistle. In 1997, only 26% of the observers of wrongdoing at a large military base blew the whistle; this sample was composed of about half military and half civilian employees. Among directors of internal auditing—whose job it is to ferret out and report financial wrongdoing internally in their

131. See Vanessa Castellina, Note, *The New Financial Incentives and Expanded Anti-Retaliation Protections for Whistleblowers Created by Section 922 of the Dodd-Frank Act: Actual Progress or Just Politics?*, 6 BROOK. J. CORP. FIN. & COM. L. 187, 197 (2011).

132. See FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT, at xvi (2011).

133. See *id.* at 23.

134. See *id.*

135. See *id.* at 390.

136. See *id.*

137. See Castellina, *supra* note 131, at 198 (“[D]uring this most recent recession, many frauds were revealed.”).

organization—about 90% of those who observed wrongdoing reported it.¹³⁸

None of these studies, however, apply directly to private-sector employees reporting corporate misconduct. Either they examine government or military employees, or they focus on auditors, “whose jobs legitimate and even require whistle-blowing” in a way that typical employee roles do not.¹³⁹

However, some relevant empirical evidence since 2002 does exist. The Ethics Resource Center (ERC) has conducted a survey of private-sector employees regularly since 1994.¹⁴⁰ In 2011, the ERC reported that 65% of the employees who claimed they observed misconduct also asserted that they reported it.¹⁴¹ This result marked the highest disclosure rate in the seventeen-year history of the survey, an increase of twelve percentage points from a record low of 53% in 2005.¹⁴² Interestingly, however, in 2003 the ERC reported that 64% of employees disclosed misconduct they observed, meaning that immediately *after* Sarbanes-Oxley was passed, employees started reporting *less*.¹⁴³ Since 2005, however, the percentage of employees reporting has risen consistently.¹⁴⁴ The ERC assigns some of the credit for this increase in reporting to an increase in “corporate ethics and compliance programs,” which is changing the behavior of employees for the better.¹⁴⁵ As the ERC notes, “in companies with strong ethics programs, more than four out of five employees (83%) who observed misconduct later reported it.”¹⁴⁶ These results would suggest that Sarbanes-Oxley, which clearly enhanced the need for corporate compliance systems, has had some impact on employee willingness to blow the whistle.

Yet, other evidence indicates that Sarbanes-Oxley’s influence may not be as robust. For example, the Association of Certified Fraud Examiners (ACFE) conducted surveys in both 2002 and 2010 regarding the source of fraud detection.¹⁴⁷ Although employees were the largest source of reporting fraud in

138. MICELI ET AL., *supra* note 124, at 22–23 (internal citations omitted) (citing Jeong-Yeon Lee et al., *Blowing the Whistle on Sexual Harassment: Test of a Model of Predictors and Outcomes*, 57 HUM. REL. 297 (2004); Marcia P. Miceli et al., *Can Laws Protect Whistle-Blowers?*, 26 WORK AND OCCUPATIONS 129 (1999); Marcia P. Miceli et al., *Who Blows the Whistle and Why?*, 45 INDUS. & LAB. REL. REV. 113 (1991) [hereinafter Miceli et al., *Who Blows the Whistle*]; Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?*, 14 BUS. ETHICS Q. 219 (2004)).

139. *Id.* at 23.

140. *See* ETHICS RES. CTR., *supra* note 111, at 8.

141. *See id.* at 12.

142. *See id.*

143. *See id.* at 23.

144. *See id.*

145. *See id.*

146. *Id.*

147. *See* ASS’N OF CERTIFIED FRAUD EXAM’RS, REPORT TO NATIONS ON OCCUPATIONAL FRAUD AND ABUSE: 2010 GLOBAL FRAUD STUDY 16 (2010) [hereinafter 2010 REPORT TO

both surveys, their importance relative to other sources (such as government regulators, auditors, or competitors) did not change and actually appeared to decrease over time.¹⁴⁸ A 2011 KPMG survey found a lower number of employees who reported (10%), but also found that anonymous tipsters reported about 14% of all fraud¹⁴⁹—making the overall numbers similar to the ACFE statistics. Another study examined U.S. fraud cases from 1996 to 2004 and found that employees reported the fraud 17% of the time it became public¹⁵⁰—again more than any other source. However, this study compared cases before and after Sarbanes-Oxley was passed. It found that the percentage of employee tips actually *decreased* after Sarbanes-Oxley.¹⁵¹ The authors speculated that

[o]ne possible explanation is that rules that strengthen the protection of the whistleblowers' current jobs offer only a small reward relative to the extensive ostracism whistleblowers face. Additionally, just because jobs are protected does not mean that career advancements in the firm are not impacted by whistleblowing. Another explanation could be that job protection is of no use if the firm goes bankrupt after the revelation of fraud.¹⁵²

Some researchers also have conducted experiments with hypothetical scenarios involving the willingness of financial services professionals to report misconduct, with some participants ignorant of Sarbanes-Oxley's protections and other participants being provided information about potential legal protection.¹⁵³ They found that participants with knowledge of Sarbanes-Oxley's whistleblower protections stated they would report potential accounting fraud far more frequently than those without the information, even if the scenario made retaliation likely.¹⁵⁴ In other words, knowledge of Sarbanes-Oxley's protection affected whether an individual would blow the whistle in the face of retaliation, indicating that the Act could increase an employee's willingness to report misconduct.¹⁵⁵

NATIONS]; ASS'N OF CERTIFIED FRAUD EXAM'RS, 2002 REPORT TO THE NATION ON OCCUPATIONAL FRAUD AND ABUSE 11 (2002) [hereinafter 2002 REPORT TO NATIONS].

148. See 2010 REPORT TO NATIONS, *supra* note 147, at 16–20 (reporting that tips initially detected 37.8% of occupation fraud in the U.S. and that, worldwide, 40.2% of reported fraud was detected by tips, and employees consisted of 49.2% of the tips); 2002 REPORT TO NATIONS, *supra* note 147, at 11 (reporting that employees were the source of a report about fraud 26.3% of the time). In other words, the 2010 report indicated that employees were the source of the fraud disclosure about 20% of the time, down 6% from 2002.

149. See KPMG, WHO IS THE TYPICAL FRAUDSTER? 10 (2011).

150. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2213–14 (2010).

151. See *id.* at 2250–51.

152. *Id.*

153. See Bame-Aldred et al., *supra* note 123, at 110–12.

154. See *id.* at 114–15.

155. See *id.* at 115–16.

Thus, the statistical evidence presents an incomplete and somewhat inconsistent picture. On the one hand, the ERC survey and the hypothetical experiments indicate that Sarbanes-Oxley-influenced compliance systems may be encouraging employees to report misconduct more frequently. On the other hand, employees seemingly have not increased as a source of reporting fraudulent conduct relative to other sources over the last decade. None of these studies provide the precise answer to the question of whether the Act itself encouraged more or less reporting of misconduct. We simply need more empirical evidence to definitively conclude that Sarbanes-Oxley has played a role in encouraging employee reporting behavior.

The financial crisis I mentioned above provides some interesting evidence to consider. Recently, numerous media outlets highlighted employee attempts to report rampant fraud in the subprime mortgage industry prior to 2008. For example, Eileen Foster, a former executive vice president in charge of fraud investigations for Countrywide Financial, and at least thirty other Countrywide employees, claim that they told numerous officers at Countrywide about systemic fraud within the company, which, at the time, was the country's leading mortgage lender.¹⁵⁶ The press also publicized the whistleblowing of Richard Bowen, a former Citigroup vice president, who claims to have informed Citigroup's officers and directors about massive fraud in the mortgage loan division of the company.¹⁵⁷

Employees at other companies involved in the mortgage debacle, like Lehman Brothers,¹⁵⁸ General Electric,¹⁵⁹ Wells Fargo,¹⁶⁰ Ameritrust,¹⁶¹ and

156. See Harry Bradford, *Former Countrywide Whistleblower: Mortgage Fraud 'Systemic,'* HUFFINGTON POST (Dec. 5, 2011, 2:30 PM), http://www.huffingtonpost.com/2011/12/05/countrywide-whistleblower-mortgage-fraud-systemic_n_1129637.html#s516916&title=BofA_Forecloses_On;MichaelHudson,_Countrywide_Protected_Fraudsters_by_Silencing_Whistleblowers,_Say_Former_Employees, CENTER FOR PUB. INTEGRITY (Sept. 22, 2011, 7:30 AM), <http://www.publicintegrity.org/2011/09/22/6687/countrywide-protected-fraudsters-silencing-whistleblowers-say-former-employees>; 60 Minutes: *Prosecuting Wall Street* (CBS television broadcast Dec. 4, 2011) [hereinafter *60 Minutes*], available at http://www.cbsnews.com/8301-18560_162-57336042/prosecuting-wall-street/?tag=currentVideoInfo;videoMetaInfo.

157. See Dave Lieber, *Blowing the Whistle on the Federal Government*, STAR-TELEGRAM, Feb. 9, 2012, <http://www.star-telegram.com/2012/02/09/3724513/blowing-the-whistle-on-the-federal.html#storylink=cpy> (quoting Richard Bowen) ("I sent e-mails. I gave weekly reports. I made presentations. I started yelling. Yet through 2006 and 2007, the volumes [of purchases] increased, and the rate of defective mortgages increased' in his division to as high as 80 percent."); 60 Minutes, *supra* note 156.

158. See M. Thomas Arnold, "It's Déjà Vu All Over Again": Using Bounty Hunters to Leverage Gatekeeper Duties, 45 TULSA L. REV. 419, 448 (2010) (citing Michael Corkery, *Insider Warned About Lehman Accounting*, WALL ST. J., Mar. 13, 2010, <http://online.wsj.com/article/SB10001424052748703447104575118122594094284.html>; Sakthi Prasad, *Lehman Brothers' Whistle Blower Was Ousted: Report*, REUTERS, Mar. 16, 2010, available at <http://www.reuters.com/article/idUSTRE62F0XP20100316>).

159. See Michael Hudson, *Fraud and Folly: The Untold Story of General Electric's Subprime Debacle*, CENTER FOR PUB. INTEGRITY (Jan. 6, 2012, 6:00 AM), <http://www.publicintegrity.org/2012/01/06/7802/fraud-and-folly-untold-story-general-electric-s-subprime-debacle>.

Washington Mutual,¹⁶² also claim to have repeatedly told company officials about massive fraud that ultimately resulted in billions of dollars in losses. In fact, one investigative reporter—an author of a book about the crisis¹⁶³—published an award-winning series of articles describing interviews with whistleblowers he found by scouring administrative records and court filings for retaliation claims against mortgage companies and banks.¹⁶⁴ He located over sixty employees from twenty different financial institutions who tell similar stories about reporting massive mortgage fraud within their companies.¹⁶⁵

Such anecdotes arguably indicate that, at least with regard to the largest example of corporate misconduct since Enron and WorldCom, employees performed the job Sarbanes-Oxley envisioned for them as part of the corporate monitoring system. Broader evidence of whether employees report more frequently after Sarbanes-Oxley is, at best, inconclusive.

B. Protecting Whistleblowers from Retaliation

Unfortunately, even if Sarbanes-Oxley encouraged employees to report more frequently, the Act often failed to protect them from reprisals and failed to compensate them consistently for the retaliation they suffered.

The empirical evidence for these failures derives most immediately from examining the outcomes of Sarbanes-Oxley retaliation cases filed with OSHA, which I detail below. Before discussing this evidence, however, I should explain the existing empirical evidence related to the incidence of retaliation found in more general surveys. Even before 2002, whistleblower scholars noted the wide-ranging estimates of how often retaliation occurs.¹⁶⁶ For example, one 1991 study concluded that only 6% of internal auditors suffered reprisals, while others “indicated that huge majorities” of whistleblowers felt retaliated against.¹⁶⁷ These differences could have resulted from methodological differences in the studies—some were non-random samples of whistleblowers,

160. See Michael Hudson, *Whistleblowers Ignored, Punished by Lenders, Dozens of Former Employees Say*, CENTER FOR PUB. INTEGRITY (Nov. 22, 2011, 6:00 AM), <http://www.publicintegrity.org/2011/11/22/7461/whistleblowers-ignored-punished-lenders-dozens-former-employees-say>.

161. See *id.*

162. See Michael Hudson, *Ex-WaMu Worker Claims He Was Shunned for Refusing to Push Toxic Loans on Borrowers*, CENTER FOR PUB. INTEGRITY (Dec. 22, 2011, 6:00 AM), <http://www.publicintegrity.org/2011/12/22/7751/ex-wamu-worker-claims-he-was-shunned-refusing-push-toxic-loans-borrowers>.

163. See MICHAEL W. HUDSON, *THE MONSTER: HOW A GANG OF PREDATORY LENDERS AND WALL STREET BANKERS FLEECED AMERICA—AND SPAWNED A GLOBAL CRISIS* (2010).

164. See Hudson, *supra* note 160. The series was selected to appear in Columbia University Press’s *Best Business Writing 2012* and also won a “Best-in-Business” Award from the Society of American Business Editors and Writers. *Id.*

165. See *id.*

166. See MICELI ET AL., *supra* note 124, at 23–25 (citations omitted).

167. *Id.* (citing Miceli et al., *Who Blows the Whistle*, *supra* note 138, at 113).

while others were random samples of employees in various workplaces—or from a variance in factors such as organizational norms or legal protections from retaliation.¹⁶⁸

More recent studies mirror these variances. The ERC survey mentioned above found a sharp increase between 2007 and 2011 in the percentage of employees who reported retaliation after they disclosed misconduct, from 12% to an “all-time high” of 22%.¹⁶⁹ By contrast, the study of fraud cases between 1996 and 2004 determined that 82% of the employee whistleblowers suffered retaliation.¹⁷⁰

Given the lack of consistent survey evidence, one way to examine whether Sarbanes-Oxley’s antiretaliation protection worked is to look at how often employees won retaliation claims they filed with OSHA. Of course, the OSHA win rate does not reflect how many employees reported misconduct and did *not* suffer retaliation—these employees would not file claims and we would not know about them.¹⁷¹ A greater problem might be that win rates are notoriously difficult to interpret.¹⁷² After all, what *should* the proper win rate be for a claim? That question might be difficult to answer because the “ideal” win rate depends, in part, upon the number of meritorious claims filed, which is likely impossible to reasonably determine.¹⁷³

However, in this case, examining OSHA win rates does provide some sense of whether Sarbanes-Oxley’s statutory protections appropriately compensated victims of retaliation because the statistics are so skewed against whistleblowers. In 2007, I published an extensive empirical study of OSHA decisions in Sarbanes-Oxley cases.¹⁷⁴ I found that 3.6% of all claimants won after an OSHA investigation—a paltry amount and lower than almost any other comparable statute.¹⁷⁵ To put that in real numbers, by July 13, 2005 (almost exactly three full years after Sarbanes-Oxley’s enactment), OSHA issued 361 Sarbanes-Oxley decisions and thirteen claimants won.¹⁷⁶ While these numbers seem low, the numbers have been even worse for whistleblowers since the study ended. From that point until December 31, 2011, more than six years later, only ten more

168. *See id.* at 25.

169. ETHICS RES. CTR., *supra* note 111, at 15.

170. *See Dyck et al.*, *supra* note 150, at 2240 (noting that these employees were “fired, quit under duress, or had significantly altered responsibilities”).

171. *See Moberly*, *Unfulfilled Expectations*, *supra* note 5, at 99 & n.149.

172. *See Kevin M. Clermont & Theodore Eisenberg*, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588–89 (1998).

173. *See Moberly*, *Unfulfilled Expectations*, *supra* note 5, at 99.

174. *See generally id.* at 83–90 (describing study methodology).

175. *See id.* at 91–95. This win rate did not include cases that settled before OSHA reached a decision. *See id.* at 95.

176. *See id.* at 91.

whistleblowers won a case in front of OSHA.¹⁷⁷ In total, from the Act's effective date until the end of 2011, employees won 1.8% of the 1,260 cases OSHA decided.¹⁷⁸ Remarkably, for three straight years between fiscal years 2006 and 2008, *OSHA did not decide a single case in favor of a Sarbanes-Oxley claimant*.¹⁷⁹ During that time, OSHA found for employers in 488 straight decisions.¹⁸⁰

Two primary factors contributed to the difficulties whistleblowers had winning cases: administrative recalcitrance and adjudicative hamstringing.

1. Administrative Recalcitrance

When I examined OSHA whistleblower decisions in 2007, I found that the low win rate for Sarbanes-Oxley claimants resulted, in part, from OSHA investigators improperly applying Sarbanes-Oxley's favorable burden of proof to the claimant's detriment.¹⁸¹ At the time, the OSHA Whistleblower Investigations Manual did not accurately reflect the Sarbanes-Oxley burden shifting, and I speculated that OSHA's procedures simply had not caught up with the new law.¹⁸² Moreover, I believed that OSHA investigators were overwhelmed with the law because of the influx of hundreds of new cases without a corresponding increase in personnel.¹⁸³ Others questioned whether OSHA had the expertise to investigate Sarbanes-Oxley cases because of the complexity of financial fraud compared with other laws under OSHA's mandate, such as those related to worker safety.¹⁸⁴

In 2009 and 2010, these conclusions received some support from two independent audits of OSHA's whistleblower program by the Government Accountability Office (GAO).¹⁸⁵ These audits found that OSHA lacked

177. See Letter from Sandra M. Dillon, Dir., U.S. Dep't of Labor, Office of the Whistleblower Prot. Program, to author (Apr. 19, 2012) [hereinafter Dillon Letter] (on file with author).

178. Email from Diana Petterson, U.S. Dep't of Labor, Office of Pub. Affairs, to Michael Hudson, Staff Writer, Ctr. for Pub. Integrity (undated) [hereinafter Petterson Email] (on file with author). See generally Dillon Letter, *supra* note 177 (providing statistical data, for fiscal years 2005–2012, on the number of complaints filed under all of the statutes OSHA enforces). Again, these statistics do not include settled cases. During this time period, 318 cases settled before OSHA issued a decision. See Petterson Email, *supra*.

179. See Petterson Email, *supra* note 178.

180. See *id.*

181. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 120–28.

182. See *id.* at 125–26.

183. See *id.* at 124–25.

184. See Sarbanes-Oxley Procedures, *supra* note 40, at 52,104 (noting that some commentators questioned whether OSHA could adequately investigate claims involving “complex matters of corporate securities laws and other financial and accountancy laws and practices”); Cherry, *supra* note 49, at 1083 n.383.

185. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-722, WHISTLEBLOWER PROTECTION: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES (2010) [hereinafter GAO 2010 REPORT], available at <http://www.gao.gov/assets/310/308767.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-106,

resources to investigate whistleblower claims adequately and that OSHA's investigators often lacked training to investigate complex cases.¹⁸⁶ For example, between 2003 and 2009, OSHA did not receive any new resources for whistleblower protection, despite the addition of hundreds of new cases.¹⁸⁷ Moreover, between one-third and one-half of investigators said they did not receive any training on Sarbanes-Oxley,¹⁸⁸ while three-fourths said they needed more training on Sarbanes-Oxley to do their jobs.¹⁸⁹ The GAO found that OSHA has done little "to ensure that all investigators attend [mandatory] training" or "have the necessary tools to do their job."¹⁹⁰ Not surprisingly, OSHA investigators cited Sarbanes-Oxley as the Act they most often needed help understanding because of its complexity, different burden of proof, and the unique types of disclosures the Act protects.¹⁹¹ Ultimately, in 2010, the GAO concluded, "OSHA's lack of focus on training may jeopardize the quality and consistency of investigations."¹⁹²

In 2010, the Department of Labor Inspector General (DOL IG) similarly concluded, "OSHA did not always ensure that complainants received appropriate investigations under the Whistleblower Protection Program."¹⁹³ The audit revealed that approximately 80% of whistleblower investigations under the Occupational Safety and Health (OSH) Act, Sarbanes-Oxley, and the Surface

WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY (2009) [hereinafter GAO 2009 REPORT], available at <http://www.gao.gov/assets/290/285189.pdf>.

186. See GAO 2010 REPORT, *supra* note 185, at 2; GAO 2009 REPORT, *supra* note 185, at 5.

187. See GAO 2009 REPORT, *supra* note 185, at 2–3; see also GAO 2010 REPORT, *supra* note 185, at 16–17 (reporting that the number of OSHA whistleblower investigators remained "relatively flat" from 1978 to 2010, even though the number of statutes for which OSHA is responsible had grown from eight in 1978 to eighteen in 2010).

188. See GAO 2009 REPORT, *supra* note 185, at 6.

189. See *id.* at 19–20.

190. GAO 2010 REPORT, *supra* note 185, at 21–22.

191. See GAO 2009 REPORT, *supra* note 185, at 39. The GAO 2009 REPORT found that: In our interviews, officials and investigators cited Sarbanes-Oxley cases as particularly complex and time-consuming, with different officials equating the work required for one Sarbanes-Oxley case to the work required for two to six cases under the Occupational Safety and Health Act. One official explained that Sarbanes-Oxley cases take the longest to investigate for several reasons: investigators must learn financial terminology; the cases tend to require more detailed, often legal, research with little case precedent; and the employers are often large corporations that engage a larger contingent of attorneys than do employers in other types of whistleblower cases. Attorney involvement and settlement negotiations—which are especially common with Sarbanes-Oxley cases—involve substantial paperwork and processing at various points, such as for requests for extensions to allow attorneys to conduct their own investigations.

Id. at 19–20.

192. See GAO 2010 REPORT, *supra* note 185, at 25.

193. OFFICE OF INSPECTOR GEN.—OFFICE OF AUDIT, U.S. DEP'T OF LABOR, REPORT NO. 02-10-202-10-105, COMPLAINANTS DID NOT ALWAYS RECEIVE APPROPRIATE INVESTIGATIONS UNDER THE WHISTLEBLOWER PROTECTION PROGRAM 3 (2010) [hereinafter DEP'T OF LABOR IG REPORT], available at <http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf>.

Transportation Assistance Act “did not meet one or more of eight elements from the Whistleblower Investigations Manual that were essential to the investigative process.”¹⁹⁴ In 23% of cases, an investigator failed to conduct a formal interview with a complainant, and 44% of the time an investigator did not identify any complainant witnesses, a process the DOL IG believes to be “critical to successfully develop[ing] relevant and sufficient evidence in order to support the complainant’s allegation and reach an appropriate determination of the case.”¹⁹⁵ Even if OSHA identified witnesses, in 37% of the total cases, an investigator did not interview them.¹⁹⁶ Also, OSHA did not provide complainants the opportunity to respond to the employer’s allegations in 38% of the cases.¹⁹⁷

The DOL IG reiterated the GAO conclusion that Sarbanes-Oxley’s complexity created a stumbling block for the investigators. The audit found that “many investigators did not have access to subject matter experts for technical guidance on the [seventeen] statutes they were responsible for enforcing.”¹⁹⁸ Moreover, the Whistleblower Investigations Manual had not been updated since 2003, and, as a result, the investigators did not have any written guidance on how to conduct investigations under the three new statutes that had taken effect since the last update.¹⁹⁹ Also, the DOL IG found that OSHA overworked its investigators because the agency was understaffed.²⁰⁰ Even after OSHA received approval to hire twenty-five new investigators in 2010, the agency only hired, or planned to hire, sixteen.²⁰¹ Furthermore, OSHA did not properly distribute its investigators across the OSHA regions to address caseload disparity.²⁰² Lastly, the DOL IG criticized the program because OSHA’s national office did not review the program consistently, and the office lacked internal controls to measure the program’s performance.²⁰³

In response to these external audits, OSHA conducted its own “top-to-bottom review.”²⁰⁴ OSHA’s own findings reflected the problems revealed by the

194. *Id.* at 2.

195. *Id.* at 4.

196. *Id.*

197. *Id.* at 5.

198. *Id.* at 2. OSHA investigated whistleblower complaints under seventeen statutes at the time of the DOL IG study. Now, OSHA oversees twenty-one whistleblower laws. See Occupational Safety & Health Admin., *The Whistleblower Protection Program*, OSHA (May 15, 2012), http://www.whistleblowers.gov/statutes_page.html (listing statutes under OSHA’s jurisdiction).

199. See DEP’T OF LABOR IG REPORT at 2. As I noted in 2007, even the 2003 Manual inadequately described Sarbanes-Oxley’s burden of proof and complexity. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 125–26.

200. See DEP’T OF LABOR IG REPORT, *supra* note 193, at 8.

201. See *id.*

202. See *id.* at 7.

203. See *id.* at 10.

204. Press Release, Occupational Safety & Health Admin., *U.S. Department of Labor’s OSHA Announces Measures to Improve Whistleblower Protection Program*, OSHA (Aug. 1, 2011)

GAO and the DOL IG. OSHA's report disclosed that 65% of its Whistleblower Protection Program managers believed the program was stressed, while 29% believed it was broken.²⁰⁵ Furthermore, nonmanagement employees believed overwhelmingly that the whistleblower program was not a priority for OSHA.²⁰⁶ The internal review found many of the same problems as the other audits: a lack of training and resources,²⁰⁷ investigators overwhelmed by the complexity of the cases,²⁰⁸ and a failure to complete basic tasks, such as updating the program's Whistleblower Investigations Manual.²⁰⁹

2. *Adjudicatory Hamstringing*

My 2007 empirical study also revealed that ALJs and the ARB issued a series of decisions reading Sarbanes-Oxley's protections narrowly.²¹⁰ For example, ALJs often made it difficult, if not impossible, for the Act to cover employees of privately held subsidiaries of publicly traded companies.²¹¹ ALJs subsequently received support for this narrow interpretation from a 2006 decision in which the ARB found that a publicly traded company could be liable under Sarbanes-Oxley for retaliation by a privately held subsidiary only if an employee specifically demonstrated that the subsidiary acted as an agent of the parent company in committing the retaliation.²¹²

Moreover, ALJs often narrowed the scope of Sarbanes-Oxley's "protected activity" to the detriment of employees.²¹³ The ARB later enshrined the ALJs' restrictive approach by determining that whistleblowers had to "definitively and specifically" connect their disclosure to one of the six listed illegalities.²¹⁴ Additionally, instead of protecting whistleblowers who disclose any of the six

[hereinafter OSHA Press Release], available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20394 (announcing that the agency is taking steps to strengthen the program, and releasing an internal report detailing a review of the program).

205. RITA LUCERO ET AL., U.S. DEP'T OF LABOR, OSHA'S WHISTLEBLOWER PROTECTION PROGRAM REVIEW: FINDINGS AND RECOMMENDATIONS 37 (2010), available at http://www.whistleblowers.gov/top_bottom_report.pdf.

206. *Id.*

207. *See id.* at 37–38, 50.

208. *See id.* at 37.

209. *See id.* at 40 (noting that because the Manual has not been updated since 2003, "the field lacks up to date guidance, especially on new statutes that creates inconsistent results from region to region.").

210. *See Moberly, Unfulfilled Expectations, supra* note 5, at 109–20 (citations omitted).

211. *See id.* at 110–12.

212. *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, at 14 (Dep't of Labor May 31, 2006), available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/04_149.SOXP.PDF.

213. Moberly, *Unfulfilled Expectations, supra* note 5, at 113–20 (citations omitted).

214. *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27, at 17 (Dep't of Labor Sept. 29, 2006) (quoting *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, at 9 (Dep't of Labor Sept. 30, 2003)), available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/04_154.SOXP.PDF.

different types of fraud listed in the statute, the ARB determined that the fraud reported must “relat[e] to fraud against shareholders,”²¹⁵ and be “of a type that would be adverse to investors’ interests.”²¹⁶ Further, the fraud had to be “material,”²¹⁷ as defined by securities laws to mean information “that a reasonable shareholder would consider important in deciding how to vote.”²¹⁸

Although no study has been completed of Sarbanes-Oxley decisions in federal court, some evidence exists that the federal judiciary’s decisions reflect the administrative judges’ narrow rulings. When reviewing ARB decisions, federal appellate courts seem willing to defer to the ARB’s narrow reading of the Act.²¹⁹ Furthermore, when district courts heard cases *de novo* after whistleblowers withdrew the case from OSHA’s jurisdiction, some courts reiterated the administrative perspective. For example, some courts drew the same line between privately held subsidiaries and publicly traded companies as drawn by the ARB.²²⁰ Additionally, at least four circuit courts adopted the standard that a whistleblower’s complaint must “definitively and specifically” relate to one of the six areas of protected disclosures.²²¹ Moreover, courts found that disclosures related to violations of “any rule or regulation of the Securities and Exchange Commission” under the Act refers only to regulations prohibiting fraud—although that limitation does not exist in the Act’s language.²²² Courts also followed the ARB in determining that the fraud disclosed must be fraud directed at shareholders, another limitation not found in the Act itself.²²³ Federal

215. *Id.* at 15 (quoting 18 U.S.C. § 1514A (2006)).

216. *Id.* at 15 (citing Sarbanes-Oxley Act of 2002, Pub L. No. 107–204, 116 Stat. 745 (2002) (preamble stating the purpose of the Act is “[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes”)).

217. *Id.* at 16 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005)).

218. *Id.* at 16 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)).

219. *See, e.g.*, *Gale v. Dep’t of Labor*, 384 F. App’x 926, 928 (11th Cir. 2010) (“Although we review matters of law *de novo*[,] we must apply due deference to the Secretary of Labor’s interpretation of the statutes which he administers.”); *Platone v. U.S. Dep’t of Labor*, 548 F.3d 322, 326 (4th Cir. 2008) (referencing the deference given to the ARB); *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008) (stating that the court would give deference to the ARB’s interpretation of Sarbanes-Oxley under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

220. *See, e.g.*, *Hein v. AT&T Operations, Inc.*, [2010–2011 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,984, at 97,250 (D. Colo. Dec. 16, 2010); *Rao v. Daimler Chrysler Corp.*, 89 Empl. Prac. Dec. (CCH) ¶ 42,814, at 30,071 (E.D. Mich. May 14, 2007). *But see* *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (finding that an employee of a subsidiary is a covered employee when officers of the publicly traded parent company have the authority to affect the employment of the subsidiary’s employees).

221. *See* *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 996–97 (9th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009); *Welch*, 536 F.3d at 275; *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476–77 (5th Cir. 2008).

222. *E.g.*, *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 & n.1 (4th Cir. 2008) (quoting 18 U.S.C. § 1514A (2006)).

223. *See, e.g.*, *Bishop v. PCS Admin. (USA), Inc.*, [2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,882, at 90,578 (N.D. Ill. May 23, 2006). *But see* *O’Mahony v. Accenture Ltd.*, 537 F.

courts mirrored the high standards set forth by the ARB regarding the disclosures about fraud, concluding that the disclosure must “at least approximate the basic elements of a claim of securities fraud”²²⁴ and that the improprieties disclosed be “material” to investors.²²⁵ At least one court even shortsightedly refused to protect disclosures of a violation that could happen in the future because it interpreted the Act to protect only whistleblowers who reported existing violations.²²⁶ Even a whistleblower’s “reasonable belief” of a violation was insufficient: rather than speculating about wrongdoing, whistleblowers would receive protection only for reporting actual illegality.²²⁷ Courts have also denied plaintiffs jury trials,²²⁸ presumably one of the primary reasons a whistleblower might opt for federal court.

These types of decisions may have influenced whistleblowers to withdraw their OSHA claims. Had Sarbanes-Oxley whistleblower claims received better treatment in federal court than in the Department of Labor, withdrawals likely would have risen over the last decade.²²⁹ Instead, the percentage of withdrawals to federal court from the OSHA process has remained steady—between ten and seventeen percent—during the last ten years.²³⁰

Supp. 2d 506, 516–517 (S.D.N.Y. 2008) (rejecting the reasoning in this line of cases); *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382 (M.D. Ga. 2007) (also rejecting the reasoning).

224. *Van Asdale*, 577 F.3d at 1001 (quoting *Day*, 555 F.3d at 55) (internal quotation marks omitted).

225. *See, e.g., Day*, 555 F.3d at 56 (“The employee need not reference a specific statute, or prove actual harm, but he must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss.”); *Livingston*, 520 F.3d at 355 (stating that a statement or omission “must concern a *material fact*” to be actionable).

226. *See Livingston*, 520 F.3d at 352.

227. *See Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031, 1034–36 (E.D. Tenn. 2007).

228. *See, e.g., Skidmore v. ACI Worldwide, Inc.*, No. 8:08CV01, 2010 WL 2900113, at *3 (D. Neb. July 20, 2010) (granting defendant’s motion to strike plaintiff’s jury demand); *Van Asdale v. Int’l Game Tech.*, No. 3:04-CV-703-RAM, 2010 WL 1490349, at *7 (D. Nev. Apr. 13, 2010) (“declin[ing] to exercise its discretion to empanel an advisory jury”); *Schmidt v. Levi Strauss & Co.*, 621 F. Supp. 2d 796, 805–06 (N.D. Cal. 2008) (concluding that plaintiff is not entitled to a jury trial); *Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031, 1034 (E.D. Tenn. 2007) (finding that plaintiff is not entitled to a jury trial); *see also Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111–203, sec. 922(c), § 21F, 124 Stat. 1376, 1848 (codified at 18 U.S.C. § 1514A(b)(2)(E) (Supp. 2006)) (amending Sarbanes-Oxley’s language to specifically permit jury trials for whistleblower claims). For a good discussion of whether Sarbanes-Oxley’s original language should have been interpreted to permit jury trials, *see Gonzalez, supra* note 85, at 28–29.

229. These narrow decisions were not universal, as some courts interpreted Sarbanes-Oxley more broadly. *See, e.g., Schlicksup v. Caterpillar, Inc.*, No. 09-CV-1208, 2010 WL 2774480, at *3–6 (C.D. Ill. July 13, 2010) (finding that a transfer in positions could be an adverse action sufficient to support a claim of retaliation); *O’Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 516–17 (S.D.N.Y. 2008) (holding that fraud disclosed did not need to be related to shareholder fraud in order to be protected conduct); *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382 (M.D. Ga. 2007) (rejecting the position that fraud disclosed needed to relate to shareholder fraud).

230. *See Petterson Email, supra* note 178.

Thus, after ten years, there is some evidence that Sarbanes-Oxley has neither prevented nor remedied retaliation against whistleblowers. Two causes of these failures relate to OSHA's inability to effectively enforce Sarbanes-Oxley's antiretaliation provision and to narrow and restrictive interpretations of the Act.

C. Addressing Misconduct Effectively

Finally, to evaluate Sarbanes-Oxley's whistleblower provisions, we should determine whether they helped increase a whistleblower's effectiveness when disclosing misconduct. One group of prominent scholars defines the effectiveness of whistleblowing as "the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistleblowing and within a reasonable time frame."²³¹ This straightforward definition belies the difficulty of determining whether it has been met in a given situation. For example, when should effectiveness be measured? As these same authors note, "[a] whistle-blower who appeared ineffective at first may have had huge impact on the organization when viewed several years hence."²³² Additionally, effectiveness may differ depending on for whom the effectiveness is measured.²³³ Using Enron as an example, these authors ask, "[w]as whistleblowing effective at Enron because it protected future shareholders who would have unwittingly invested in a firm about to go under? Or ineffective because it did not protect those shareholders who had already invested and therefore lost their nest eggs?"²³⁴ Also, effective whistleblowing within an organization may never be publicized precisely because it was effective and the issue was resolved without incident. Thus, whether a whistleblower disclosure effectively caused an organization or external authorities to address the underlying misconduct presents one of the most difficult empirical issues confronting whistleblower researchers.²³⁵

That said, the 2008 financial crisis suggests that Sarbanes-Oxley did not lead to effective whistleblowing, at least with regard to the most prominent examples of corporate fraud in the post-Sarbanes-Oxley era. For instance, Eileen Foster, the Countrywide executive mentioned above, and other Countrywide employees claim that the company not only failed to address their disclosures about fraud, but also retaliated against the whistleblowers.²³⁶ Eventually the company, as

231. MICELI ET AL., *supra* note 124, at 16 (quoting Janet P. Near & Marcia P. Miceli, *Effective Whistle-Blowing*, 20 ACAD. MGMT. REV. 679, 681 (1995)) (internal quotation marks omitted).

232. *Id.* at 17.

233. *Id.* at 18.

234. *Id.*

235. *Id.* ("In many ways, this is the most difficult variable to measure, of all the variables concerned with whistle-blowing. . . . A satisfactory resolution to these definitional questions awaits future research.").

236. See Bradford, *supra* note 156; Hudson, *supra* note 156; see also Michael Hudson, *Countrywide Loan Underwriter Found Herself in 'Dangerous Territory,'* CENTER FOR PUB. INTEGRITY (Oct. 11, 2011, 6:00 AM), <http://www.publicintegrity.org/2011/10/11/6901/country>

well as Bank of America—which purchased Countrywide in 2008—paid billions of dollars in settlements and penalties arising out of mortgage fraud allegations, but not because of the whistleblower disclosures, and only after the fraud damaged millions of shareholders, taxpayers, and homeowners.²³⁷ Similarly, Richard Bowen of Citigroup claims the company ignored his warnings and also retaliated against him, first by relieving him of his duties and then ultimately by firing him.²³⁸ Numerous other whistleblowers allege that management in their respective companies either ignored or minimized their warnings.²³⁹ One reporter who spoke with many of these whistleblowers concluded that:

These ex-employees' accounts provide evidence that the muzzling of whistleblowers played an important role in allowing corruption to flourish as mortgage lenders and their patrons on Wall Street pumped up loan volume and profits. Codes of silence at many lenders, former employees claim, helped discourage media, regulators and policymakers from taking a hard look at illegal practices that ultimately harmed borrowers, investors and the economy.²⁴⁰

Government investigations also found that financial company officials ignored reports of widespread fraud from employees.²⁴¹

wide-loan-underwriter-found-herself-dangerous-territory (detailing a former Countrywide employee's fraud discoveries and allegations of retaliation against whistleblowers); Michael Hudson, *Inside Countrywide, a 'Counseling Meeting' Then Termination*, CENTER FOR PUB. INTEGRITY (Oct. 18, 2011, 6:00 AM), <http://www.publicintegrity.org/2011/10/18/7103/inside-countrywide-counseling-meeting-then-termination> (detailing multiple former employees experiences in uncovering fraud and facing retaliation).

237. See, e.g., Bradford, *supra* note 156 (“Once America’s largest mortgage lender, the company has agreed to a litany of settlements since 2008, including a \$600 million class-action settlement, an \$108 million settlement with the Federal Trade Commission and the ousting of former CEO Angelo Mozilo, who paid \$67.5 million in penalties to the Securities and Exchange Commission.”); Shira Ovide, *Bank of America-Countrywide: Worst Deal in History?*, WSJ BLOGS (June 29, 2011, 2:25 PM), <http://blogs.wsj.com/deals/2011/06/29/bank-of-america-countrywide-worst-deal-in-history/> (detailing billions of dollars in settlements and penalties paid since 2008); Michael Hudson, *Mortgage Industry Tanks, Fraud Continues at Countrywide*, CENTER FOR PUB. INTEGRITY (Sep. 23, 2011, 7:30 AM), <http://www.publicintegrity.org/2011/09/23/6706/mortgage-industry-tanks-fraud-continues-countrywide> (outlining the background events and noting settlements and penalties paid).

238. See *60 Minutes*, *supra* note 156.

239. See, e.g., Hudson, *supra* note 160 (detailing claims of former employees that whistleblowers were ignored and punished by lenders for either reporting or refusing to commit fraud).

240. *Id.*

241. See PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. SENATE, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 95 (Apr. 13, 2011) [hereinafter SENATE REPORT] (“Perhaps the clearest evidence of WaMu’s shoddy lending practices came when senior management was informed of loans containing fraudulent information, but then did little to stop the fraud.”). The Report also found that:

Not surprisingly, company officials denied the allegation that any retaliation had occurred.²⁴² However, an impressive number of employees have either won retaliation lawsuits against the companies or entered into confidential settlement agreements. For example, OSHA reinstated Eileen Foster and awarded her \$930,000 in back pay after investigating her claim of retaliation under Sarbanes-Oxley.²⁴³ OSHA also awarded over \$1 million to a whistleblower from Washington Mutual who alleged the company retaliated against her for reporting violations of federal lending laws.²⁴⁴ A California jury awarded a Countrywide whistleblower a \$3.8 million verdict.²⁴⁵ The media has reported on several other settlements with financial industry whistleblowers.²⁴⁶ These ex post awards compensated the employees for the retaliation and validated their claims of reporting the misconduct. However, they came too late to stop the billions of dollars in losses resulting from the mortgage crisis.

One reason that whistleblower reports failed to stop the fraud may be that the structural model put in place by Sarbanes-Oxley did not adequately channel whistleblower disclosures to the board of directors. In fact, surveys demonstrate that, despite having access to a hotline, employees typically report initially to supervisors,²⁴⁷ who then have great power to block and filter the reports.²⁴⁸ This

Loans not meeting the bank's credit standards, deliberate risk layering, sales associates manufacturing documents, offices issuing loans in which 58%, 62%, or 83% contained evidence of loan fraud, and selling fraudulent loans to investors are evidence of deep seated problems that existed within WaMu's lending practices. Equally disturbing is evidence that when WaMu senior managers were confronted with evidence of substantial loan fraud, they failed to take corrective action.

Id. at 103.

242. See Hudson, *supra* note 160; 60 Minutes, *supra* note 156 (publicizing letter denying retaliation against Bowen).

243. Hudson, *supra* note 156; Occupational Safety & Health Admin., *U.S. Department of Labor Finds Bank of America in Violation of Sarbanes-Oxley Act Whistleblower Protection Provisions: Bank Ordered to Reinstate Fired Employee and Pay \$930,000*, OSHA (Sept. 14, 2011), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20667. See generally Michael Hudson, *Mortgage Industry Whistleblower Wins Case Against Bank of America*, CENTER FOR PUB. INTEGRITY (Sep. 14, 2011, 7:27 PM), <http://www.publicintegrity.org/2011/09/14/6467/mortgage-industry-whistleblower-wins-case-against-bank-america> (stating that Bank of America plans to appeal the OSHA decision to an ALJ).

244. See Hudson, *supra* note 160.

245. Gretchen Morgenson, *How a Whistle-Blower Conquered Countrywide*, N.Y. TIMES, Feb. 11, 2011, at BU1; Michael Hudson, *Management Gurus Claim They Were Blindsided by Toxic Culture at Countrywide*, CENTER FOR PUB. INTEGRITY (Dec. 13, 2011, 6:00 AM), <http://www.publicintegrity.org/2011/12/13/7606/management-gurus-claim-they-were-blindsided-toxic-culture-countrywide>. Bank of America has appealed the decision, claiming that it was not supported by the evidence. *Id.*

246. See, e.g., Hudson, *supra* note 160 (noting settlements by Citizens Financial Mortgage and Wells Fargo); Bob Ivry, *Woman Who Couldn't Be Intimidated by Citigroup Wins \$31 Million*, Bloomberg (May 31, 2012, 12:01 AM), <http://www.bloomberg.com/news/2012-05-31/woman-who-couldn-t-be-intimidated-by-citigroup-wins-31-million.html> (reporting on whistleblower settlement with Citigroup).

247. See, e.g., ETHICS RES. CTR., *BLOWING THE WHISTLE ON WORKPLACE MISCONDUCT 5* (2010), available at <http://www.ethics.org/files/u5/WhistleblowerWP.pdf> (noting that 46% of

data appears to correspond with a different report examining corporate codes of ethics. This study found that most codes of ethics direct employees to report misconduct to their supervisors.²⁴⁹ Despite Sarbanes-Oxley's requirement that companies have a whistleblower hotline, less than half of corporate codes of ethics identify a hotline for employees to use, and slightly less than half of those provide any contact information for the hotline in the code itself.²⁵⁰ Only 2.2% of the codes gave employees the option of reporting misconduct to an external authority.²⁵¹ Perhaps not surprisingly, according to an Ethics Resource Center survey, only 3% of whistleblowers use company hotlines to report misconduct, while another 4% report the wrongdoing externally.²⁵²

Moreover, a different Ethics Resource Center survey conducted in 2011 found that 42% of employees—the highest percentage since 2000—said that their company has a weak ethical culture.²⁵³ Misconduct can flourish more readily at a company with a weak ethical culture.²⁵⁴ Time after time, whistleblowers in the financial industry complained that their company culture encouraged and fostered the fraudulent behavior that resulted in the 2008 meltdown.²⁵⁵ All of these statistics and evidence suggest that Sarbanes-Oxley, above all else, failed to change corporate culture sufficiently to address misconduct when employees report it.

V. LESSONS LEARNED

Encouragingly, developments in the last two years of the decade demonstrate that policymakers may have learned from the Sarbanes-Oxley experience. First, in addition to focusing on the substance of various whistleblower statutory protections, renewed energy has been put towards determining who is involved in administering those protections. As a result,

whistleblower reports went to an employee's immediate supervisor, while another 29% went to "higher management").

248. See Moberly, *Structural Model*, *supra* note 5, at 1121–25; see also Jennifer A. Johnson, *Recent Cases Cast Doubt on Efficacy of Whistleblower Programs*, PHX. BUS. J. (May 11, 2012, 3:00 AM), <http://www.bizjournals.com/phoenix/print-edition/2012/05/11/recent-cases-cast-doubt-on-efficacy-of.html> (noting that recent cases, including Wal-Mart de Mexico's bribery scandal, involved corporate officials covering up whistleblower complaints instead of investigating and reporting them to regulators).

249. See Moberly & Wylie, *supra* note 111, at 35.

250. See *id.* at 35–36.

251. See *id.* at 36 (noting that only two of the eighty-nine codes examined mentioned an external recipient).

252. ETHICS RES. CTR., *supra* note 247, at 5.

253. ETHICS RES. CTR., *supra* note 111, at 19.

254. See *id.* at 20.

255. See SENATE REPORT, *supra* note 241, at 95–103 (describing lack of internal controls at Washington Mutual leading to pervasive fraud); *id.* at 143 ("WaMu's compensation policies were rooted in the bank culture that put loan sales ahead of loan quality."); Hudson, *supra* note 159; Hudson, *supra* note 245 (describing a "toxic culture" at Countrywide).

newly appointed whistleblower advocates in key government positions have begun to address the roadblocks previously used to thwart the strong antiretaliation protection Congress initially envisioned for the Act. Second, in 2010, Congress passed the Dodd-Frank Act to address the failings that preceded the most recent financial crisis.²⁵⁶ This Act applies a radically different model to encourage whistleblowers by using financial rewards in addition to Sarbanes-Oxley's traditional models.²⁵⁷

A. People Matter as Much as Provisions

As described above, at least two administrative departments undermined Sarbanes-Oxley's antiretaliation protections. OSHA's investigators failed to perform sufficient investigations of Sarbanes-Oxley retaliation claims for a variety of reasons, including lack of resources and inadequate training regarding a new, complex statute.²⁵⁸ Also, the ARB issued a series of decisions dramatically narrowing the scope of Sarbanes-Oxley's protections.²⁵⁹

The composition of both of these agencies changed during the last two years as President Obama's appointments began to reshape the Department of Labor. Interestingly, some recent developments suggest that this change in leadership may breathe new life into Sarbanes-Oxley's previously moribund protections.

1. OSHA

First, President Obama appointed David Michaels as Assistant Secretary of Labor in charge of OSHA.²⁶⁰ After the Senate confirmed Michaels in December 2009,²⁶¹ he quickly issued a "vision statement" in which he highlighted the importance of giving workers "voice" through whistleblower protection.²⁶² In that statement, Michaels singled out the Whistleblower Protection Program (WPP) as an area that needed strengthening because it did not work:

256. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

257. See Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 74-75 (2012) (citing Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 922(a), § 21F(g)(2)(A), 124 Stat. at 1844 (2010)).

258. See *supra* notes 185-209 and accompanying text.

259. See *supra* notes 210-18 and accompanying text.

260. See *Dr. David Michaels Confirmed to Assume Post as Head of OSHA*, QUICK TAKES (OSHA, Washington, D.C.), Dec. 1, 2009, <http://www.osha.gov/as/opa/quicktakes/qt12012009.html>.

261. See *id.*

262. See David Michaels, *OSHA at Forty: New Challenges and New Directions*, OSHA (July 19, 2010), http://www.osha.gov/as/opa/Michaels_vision.html.

We have been given the responsibility to enforce the whistleblower provisions of 17 statutes, with more likely to be added in the very near future.²⁶³ The importance of this work is enormous, as is the challenge of doing it well. OSHA whistleblower personnel strive to obtain justice for aggrieved workers covered under a mosaic of laws with different requirements, in tremendously varied subject areas, while carrying heavy case loads. Even in situations where the injustice is apparent, too often we are unable to protect the worker who has been the object of discrimination or retaliation. This system is clearly not functioning well and we must find ways to improve it. Toward this end, we have begun a comprehensive review of our Whistleblower Protection Program, in order to identify ways to strengthen it.²⁶⁴

Secretary Michaels followed up this statement by commissioning the “top-to-bottom review” of the WPP mentioned above.²⁶⁵ In response to the criticisms from the independent audits by the Department of Labor Inspector General and the Government Accountability Office, and the weaknesses disclosed in this internal review,²⁶⁶ Michaels promised a number of reforms.²⁶⁷ He pledged better training and more resources for the WPP,²⁶⁸ a promise he has tried to fulfill with the administration’s budget request for fiscal year 2013.²⁶⁹ That request made whistleblower protection a priority by asking for \$4.9 million in new funding and thirty-seven additional full-time employees.²⁷⁰ Moreover, he moved the WPP out from under the Directorate of Enforcement to a stand-alone program reporting directly to the Assistant Secretary for OSHA.²⁷¹

Additionally, OSHA issued a newly revised Whistleblower Investigation Manual that greatly improves upon the last manual, released in 2003.²⁷² It discusses all of the recently added statutory protections and also provides a correct summary of Sarbanes-Oxley’s legal requirements.²⁷³ Importantly, it accurately describes Sarbanes-Oxley’s whistleblower-friendly burden of

263. Michaels proved to be prescient: OSHA currently administers twenty-one different whistleblower statutes. See Occupational Safety & Health Admin., *supra* note 198 (listing statutes under OSHA’s jurisdiction).

264. Michaels, *supra* note 262.

265. See OSHA Press Release, *supra* note 204.

266. See *supra* notes 185–203 and accompanying text.

267. See OSHA Press Release, *supra* note 204.

268. See *id.*

269. See Laura Walter, *OSHA FY 2013 Budget Request Includes Whistleblower Funding Increase, Regional Office Consolidation*, EHSTODAY (Feb. 14, 2012), <http://ehstoday.com/standards/news/OSHA-budget-whistleblower-0214/>.

270. See Stephen Lee, *Obama Request for \$565.5 Million for OSHA Would Increase Whistleblower Funding*, 26 LAB. REL. WK. 267, 297 (2012).

271. See OSHA Press Release, *supra* note 204.

272. See OSHA, WHISTLEBLOWER INVESTIGATIONS MANUAL (2011) [hereinafter 2011 MANUAL], available at http://osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

273. See *id.* at 14-1 to -5.

proof,²⁷⁴ which the 2003 Manual failed to acknowledge.²⁷⁵ Also, it requires investigators to attempt to interview the complainant in all cases, which, remarkably, the 2003 Manual did not require as explicitly.²⁷⁶ The new Manual makes clear that OSHA will accept complaints orally as well as in writing, including electronically over the internet.²⁷⁷

Secretary Michaels' leadership may be having an effect, as OSHA recently issued a number of orders in favor of Sarbanes-Oxley whistleblowers. In March 2010, OSHA ordered reinstatement of two separate whistleblowers along with payment of over \$600,000 to one²⁷⁸ and more than \$1 million to the other.²⁷⁹ In June 2010, OSHA ordered U.S. Bank to reinstate a whistleblower and pay back wages.²⁸⁰ In September 2011, OSHA ordered a company and its former CEO to pay a whistleblower approximately \$500,000 in back pay.²⁸¹ As mentioned above, also in September 2011, OSHA ordered Bank of America to reinstate whistleblower Eileen Foster and pay her approximately \$930,000 in back wages, interest, and compensatory damages.²⁸² Finally, in August 2012, OSHA determined that Deutsche Telekom AG and subsidiary T-Mobile USA Inc. retaliated against a whistleblower who reported that the companies potentially charged customers millions of dollars in fraudulent roaming charges; OSHA

274. See *id.* at 3-7 (noting that Sarbanes-Oxley and other statutes "require a lower standard to establish causation and a higher standard of proof in order to establish a respondent's affirmative defense").

275. See OSHA, WHISTLEBLOWER INVESTIGATIONS MANUAL 3-2, 3-3, 14-1 to -11 (2003) [hereinafter 2003 MANUAL], available at http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf.

276. See 2011 MANUAL, *supra* note 272, at iv, 3-15 (noting changes to the 2003 MANUAL).

277. See *id.* at 2-1.

278. See Press Release, Occupational Safety & Health Admin., *US Department of Labor's OSHA Orders e-Smart Technologies Inc. to Pay Whistleblower Back Wages and \$600,000 in Compensatory Damages*, OSHA (March 3, 2010), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17214.

279. See Press Release, Occupational Safety & Health Admin., *US Labor Department Orders Tennessee Commerce Bank to Reinstate Whistleblower and Pay More Than \$1 Million in Back Wages and Other Relief*, OSHA (March 18, 2010), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17283.

280. See Press Release, Occupational Safety & Health Admin., *US Bank in Seattle Ordered to Pay Back Wages, Reinstate Former Manager Terminated in Violation of Sarbanes-Oxley Act Whistleblower Provisions*, OSHA (June 1, 2010), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17853.

281. See Press Release, Occupational Safety & Health Admin., *US Department of Labor Finds Nutritional Beverage Company, Former CEO in Violation of Sarbanes-Oxley Act Whistleblower Protection Provisions*, OSHA (Sept. 15, 2011), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20676.

282. See Press Release, Occupational Safety & Health Admin., *US Department of Labor Finds Bank of America in Violation of Sarbanes-Oxley Act Whistleblower Protection Provisions*, OSHA (Sept. 14, 2011), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20667.

subsequently ordered reinstatement and payment of \$345,972 to the employee.²⁸³ Given that during the three-year period between fiscal years 2006 and 2008 OSHA did not find in favor of a single whistleblower,²⁸⁴ these victories with substantial financial awards may mark a new beginning for the statute's antiretaliation provision.

2. ARB

Second, recent appointments to the ARB reconfigured its political makeup and, apparently, its outlook towards the Sarbanes-Oxley whistleblower provision. In 2010 and 2011, President Obama's Secretary of Labor, Hilda Solis, appointed five new members to the ARB's five-member panel.²⁸⁵ As two whistleblower advocates claimed at the time, "[t]ogether they have the most experience, subject matter expertise, and demonstrated commitments to the board's mission of any members in its history."²⁸⁶ Perhaps as a result of this new makeup, the new ARB found in favor of whistleblowers more often than its predecessors.²⁸⁷ During a six-month period in 2010, after the appointment of four of these new members, whistleblowers won six out of sixteen cases (37.5%) before the ARB on the merits, as opposed to 19.75% (eight out of forty-one cases) in 2009.²⁸⁸

As important, the new ARB also reversed the Board's restrictive interpretations of Sarbanes-Oxley and significantly expanded the scope of the Act's whistleblower protection.²⁸⁹ In 2011, the Board held that a whistleblower's protected activity no longer had to relate to shareholders' interest, nor did the fraud disclosed have to be "material."²⁹⁰ Moreover, it

283. See Press Release, Occupational Safety & Health Admin., *US Department of Labor Orders T-Mobile and Deutsche Telekom to Pay Whistleblower Nearly \$346,000 in Back Wages, Damages*, OSHA (Aug. 9, 2012), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=22830.

284. See Petterson Email, *supra* note 178.

285. See *ARB Board Members*, U.S. DEP'T OF LABOR, <http://www.dol.gov/arb/members.htm> (last visited Sept. 16, 2012).

286. TOM DEVINE & TAREK F. MAASSARANI, *THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE* 183 (2011) (citing *ARB Board Members*, *supra* note 285).

287. See *id.*

288. *Id.*

289. See Moberly, *supra* note 107, at 62–66 (citations omitted) (discussing the ARB's 2011 decisions).

290. See *Funke v. Fed. Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043, at 8 (Dep't of Labor July 8, 2011) (shareholders' interest); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039 & 2007-SOX-042, at 22 (Dep't of Labor May 25, 2011) (materiality); *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, at 9 (Dep't of Labor Feb. 28, 2011) (citing *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, at 17 (Dep't of Labor May 31, 2006)) (shareholders' interest). The Board arguably went even further and found that a whistleblower's protected disclosure did not have to disclose fraudulent conduct at all, as long as it could be seen as "in the furtherance of a 'scheme or artifice to defraud.'" *Brown*, ARB No. 10-050, at 9 (quoting *Brown v. Lockheed Martin Corp.*, No. 2008-

dispensed with the need for a whistleblower to “definitively and specifically” identify a securities fraud violation as part of a disclosure of misconduct.²⁹¹ The Board also determined that the Dodd-Frank Act “clarified” that Sarbanes-Oxley applied to privately held subsidiaries of publicly traded companies—a decision that overturned prior ARB decisions regarding this issue.²⁹²

When confronting new questions, the revamped ARB interpreted Sarbanes-Oxley broadly rather than narrowly.²⁹³ In *Funke v. Federal Express Corp.*,²⁹⁴ for example, the ARB held that a whistleblower could make a disclosure to local or state law enforcement, despite ambiguity in Sarbanes-Oxley’s language about whether the Act protects such reports.²⁹⁵ Similarly, the new ARB expanded the definition of “adverse action” under Sarbanes-Oxley to include reprisals that are “more than trivial,”²⁹⁶ a standard that likely would cover a broader range of retaliatory actions than the Supreme Court previously found actionable for Title VII claims in *Burlington Northern & Santa Fe Railway Co. v. White*.²⁹⁷ The ARB used this new standard to find an adverse action when a company merely released the name of the whistleblower to its employees as part of its internal investigation into the employee’s complaint.²⁹⁸

SOX-00049, ALJ’s Recommended Decision & Order (Dep’t of Labor Jan. 15, 2010)). The Board did leave open the possibility that a complaint may concern “such a trivial matter” that there is no protected activity. *Sylvester*, ARB No. 07-123, at 22.

291. See *Sylvester*, ARB No. 07-123, at 18.

292. See *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, at 16 (Dep’t of Labor Mar. 31, 2011); see also Moberly, *Unfulfilled Expectations*, *supra* note 5, at 134–37 (discussing clarification of the term “covered employer”).

293. See Moberly, *supra* note 107, at 62–64 (citations omitted).

294. ARB No. 09-004, ALJ No. 2007-SOX-043 (Dep’t of Labor July 8, 2011).

295. *Id.* at 16 (quoting 18 U.S.C. § 1514A (2006)). Sarbanes-Oxley’s language states that, in order to receive protection, a whistleblower must report misconduct to “(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).” 18 U.S.C. § 1514A(a)(1). The ambiguity results because it is unclear whether the term “Federal” in subsection A modifies “law enforcement agency” as well as “regulatory.” The ARB in *Funke* concluded that only protecting reports to federal law enforcement would result in a “hypertechnical distinction” that would be inconsistent with the goal of the statute to promote disclosures. *Funke*, ARB No. 09-004, at 16.

296. *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002 & 09-003, ALJ No. 2007-SOX-005, at 17 (Dep’t of Labor Sept. 13, 2011) (quoting *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, at 13 (Dep’t of Labor Dec. 29, 2010)).

297. 548 U.S. 53 (2006). The ARB distinguished *Burlington Northern* and found that the case helped determine the scope of prohibited actions, but was not dispositive because Sarbanes-Oxley clearly prohibits “a very broad spectrum” of retaliatory activity, including non-tangible adverse actions. See *Menendez*, ARB Nos. 09-002 & 09-003, at 15–16 (citing *Hendrix v. American Airlines, Inc.*, ALJ Case Nos. 2004-AIR-00010 & 2004-SOX-00023, at 14 n.10 (Dep’t of Labor Dec. 9, 2004)).

298. See *Menendez*, ARB Nos. 09-002 & 09-003, at 22–26. The ARB supported this conclusion by noting that this breach of confidentiality violated Sarbanes-Oxley § 301’s requirement that companies provide a confidential, anonymous reporting channel for whistleblowers to report misconduct. See *id.*

In addition to broadening Sarbanes-Oxley's reach, the new ARB restricted employer defenses. In *Vannoy v. Celanese Corp.*,²⁹⁹ the ARB seemed to undermine an employer's ability to fire an employee for taking confidential documents, if the employee uses the documents as part of the whistleblowing process.³⁰⁰ In doing so, the ARB noted that "[t]here is a clear tension between a company's legitimate business policies protecting confidential information and the whistleblower bounty programs created by Congress to encourage whistleblowers to disclose confidential company information in furtherance of enforcement of tax and securities laws."³⁰¹ The ARB remanded the case because it determined that the ALJ did not sufficiently consider the employee's need for company documents in order to provide original information to government regulators.³⁰²

3. *Internal Disclosure Channels*

In addition to these administrative changes, the conclusion about the important role of people applies to internal company policies as much as statutory whistleblower protections. Sarbanes-Oxley's structural model and codes of ethics are not enough. Numerous studies suggest that a strong ethical culture encourages employees to report,³⁰³ and that people—not necessarily policies and codes—create and perpetuate that culture.³⁰⁴ For example, in the landmark Australian study of public-sector whistleblowing, the authors concluded that managers had the most impact on whether employees felt comfortable reporting misconduct.³⁰⁵ The Ethics Resource Center study

299. ARB No. 09-118, ALJ No. 2008-SOX-064 (Dep't of Labor Sept. 28, 2011).

300. *See id.* at 15–17.

301. *Id.* at 16.

302. *See id.* at 17.

303. *See, e.g.,* MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 158–60, 297 (1992) (citations omitted) (discussing organization climate and culture in relation to whistleblowing); MICELI ET AL., *supra* note 124, at 186–88 (citations omitted) (suggesting actions managers can take); Linda Klebe Treviño et al., *Managing to Be Ethical: Debunking Five Business Ethics Myths*, 18 ACAD. MGMT. EXECUTIVE 69, 73 (2004) (citations omitted) (explaining that adults “look outside themselves for guidance in ethical-dilemma situations”); Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 333 (1999) (concluding that employee perceptions of ethics program orientation are important).

304. *See* ETHICS RES. CTR., *supra* note 111, at 21; MICELI & NEAR, *supra* note 303, at 161, 167–68, 287 (citations omitted); MICELI ET AL., *supra* note 124, at 187 (“In general, the results . . . of prior empirical research support the notion that top managers should create a culture for encouraging good performance that is ethical.”); Treviño et al., *supra* note 303, at 73–74 (citations omitted); Gary R. Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 ACAD. MGMT. J. 41, 54 (1999).

305. *See* Rodney Smith & A.J. Brown, *The Good, the Bad, and the Ugly: Whistleblowing Outcomes*, in WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR, *supra* note 122, at 109, 110–11, 121–22, 125–26, 135.

similarly demonstrated that companies with a strong ethics program had less wrongdoing, more reporting, and less retaliation.³⁰⁶ Importantly, the study found that individuals—specifically senior executives and supervisors—drove and influenced the culture more than anything else.³⁰⁷

Thus, the experience with Sarbanes-Oxley over the last decade teaches that individual players in the system, such as organizational supervisors, government administrators, and adjudicatory decision makers, impact whistleblowers as much as, if not more than, any formal legal provisions. This impact can undermine the protections the formal provisions appear to provide. In other words, formal whistleblower mechanisms, while necessary, do not sufficiently protect and encourage whistleblowers by themselves. People interpret and enforce them, indicating that perhaps we ought to spend as much effort determining *who* is involved in whistleblower protection as we do deciding *what* those protections should formally entail.

The problem with this lesson, of course, is that it is not very satisfactory. We should be uneasy that the actions of whoever is in power could so easily determine the success or failure of a whistleblowing system. Perhaps the United States should begin thinking about how systems and machinery to support whistleblowers can be put in place to survive the inevitable transition of power.³⁰⁸ Such structures could focus more on disclosure and transparency regarding the results of whistleblowing so that outside agencies and academics can more easily track successes and failures. Additional and overlapping independent oversight of whistleblower programs also could help bring accountability to whistleblowing systems so as to provide consistency across different administrations.³⁰⁹

B. Applying a New Model

In response to the financial crisis in 2008, Congress passed the Dodd-Frank Act,³¹⁰ which (among numerous other reforms) attempted to encourage more whistleblowing from private-sector employees.³¹¹ As noted above, Dodd-Frank contains its own strongly worded antiretaliation provision and amends Sarbanes-Oxley's antiretaliation protections to fix weaknesses that had become

306. ETHICS RES. CTR., *supra* note 111, at 35.

307. *Id.* at 21.

308. *Cf.* Whistleblower Protection Programs for Entities, Australian Standard, AS 8004-2003 (2004) (recommending certain whistleblowing procedures); Brown et al., *supra* note 124, at 267–71 (describing organizational structures that support whistleblowing); Roberts, *supra* note 122, at 235 (discussing the importance of whistleblowing procedures and structures).

309. *Cf.* Brown et al., *supra* note 124, at 269–71, 284–85 (recommending agency oversight of public-sector whistleblowing).

310. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

311. *See id.* secs. 748, 922, 1057.

apparent.³¹² In addition, it utilizes the “bounty model” of encouraging whistleblowing—a radically different approach to whistleblowing than the traditional antiretaliation and structural models typically employed in the private sector.³¹³

The bounty model financially rewards whistleblowers with a percentage of the fines or penalties collected as a result of the misconduct reported by the whistleblower.³¹⁴ Before Dodd-Frank, the False Claims Act (FCA) presented the most prominent example of the model.³¹⁵ Under the FCA, a whistleblower who reports fraud against the federal government may collect between fifteen and thirty percent of the amount recovered from the wrongdoer.³¹⁶ Scholars and policymakers generally regard the FCA as the most successful whistleblower law in the United States.³¹⁷ Indeed, since Congress strengthened the law in 1986, the federal government has recovered more than \$30 billion under the law.³¹⁸ Recently, the government has increased its use of the law such that, during the Obama presidency alone, the Department of Justice has collected over 25% of that total (\$8.7 billion).³¹⁹ Thirty states have adopted similar provisions with equivalent success.³²⁰ Federal law also permits the Internal Revenue Service to pay rewards to whistleblowers who report tax evasion.³²¹

312. See *supra* notes 94–101 and accompanying text (noting that, among other things, Dodd-Frank lengthened Sarbanes-Oxley’s statute of limitations from 90 to 180 days and clarified that the Act applied to privately held subsidiaries of publicly traded companies).

313. See Rapp, *supra* note 257, at 74–75 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

314. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 278–82 (1992) (citations omitted) (describing examples of federal and state statutory rewards for whistleblowers); Jarod S. Gonzalez, *A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing*, 14 EMP. RTS. & EMP. POL’Y J. 325, 337–38 (2010) (citations omitted) (providing examples of the bounty model).

315. See Callahan & Dworkin, *supra* note 314, at 281 (citing 31 U.S.C. §§ 3729–3733 (1988)).

316. See 31 U.S.C. § 3730(d) (2006).

317. See, e.g., Rapp, *supra* note 257, at 76 (citing 31 U.S.C. §§ 3729–3733 (2006)) (describing the FCA as the “gold-standard” of whistleblower protection and bounty rewards”); Elizabeth I. Winston, *The Flawed Nature of the False Marking Statute*, 77 TENN. L. REV. 111, 140 (2009) (citing 31 U.S.C. §§ 3729–3733 (2006)) (calling the FCA “the most vibrant and dominant of all qui tam actions available in the United States today”).

318. See Press Release, Office of Sen. Chuck Grassley, *Grassley Law Recovers Another \$2.8 Billion of Taxpayer Money Otherwise Lost to Fraud*, U.S. Senate (Dec. 19, 2011), available at http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=38341.

319. See Press Release, Office of Pub. Affairs, *Justice Department Recovers \$3 Billion in False Claims Act Cases in Fiscal Year 2011*, U.S. Dep’t of Just. (Dec. 19, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html>.

320. See False Claims Act Legal Ctr., *State False Claims Acts*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://www.taf.org/states-false-claims-acts> (last visited Sept. 16, 2012).

321. See 26 U.S.C. § 7623(b) (2006).

Dodd-Frank expanded the use of the model to include whistleblowers who report fraud against companies, as opposed to the government.³²² To receive a reward, whistleblowers report securities fraud to the Securities and Exchange Commission (SEC), which will then investigate.³²³ If the SEC imposes a fine or penalty above \$1 million, then the whistleblower may receive between ten and thirty percent of the penalty after filing a claim with the SEC.³²⁴ Unlike the FCA, however, Dodd-Frank does not permit a whistleblower to file a claim on behalf of the United States should the SEC decide not to pursue the allegation.³²⁵

In one sense, although they approach it differently, both the antiretaliation model and the bounty model have the same goal: encouraging an employee to disclose wrongdoing. The antiretaliation model attempts to reduce the fear of retaliation that might keep a person from reporting, while the bounty model attempts to affirmatively reward the person for disclosing.³²⁶ Despite a similar goal, however, they differ sharply in how they address the underlying wrongdoing reported by a whistleblower. Antiretaliation provisions address ex post retaliation but fail to correct the underlying misconduct disclosed. The bounty model, by contrast, corrects, or at least punishes and provides a remedy for, the initial wrongdoing. The reward paid to a whistleblower derives directly from damages caused by the misconduct.³²⁷

In this way, the bounty model may address the primary weakness the recent financial crisis exposed about Sarbanes-Oxley: the Act did not lead to effective whistleblowing that would remedy wrongdoing. By focusing on the underlying misconduct, the bounty model encourages effective resolution of the problems reported by whistleblowers, which the antiretaliation model simply ignores. In

322. See Rapp, *supra* note 257, at 74–75.

323. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, sec. 922, § 21F, 124 Stat. at 1841–42 (2010) (codified as amended at 15 U.S.C. § 78u-6). Dodd-Frank has parallel bounty provisions for reports made to the Commodity Futures Trading Commission. See *id.* sec. 748, § 23, 124 Stat. at 1739–40 (codified as amended at 7 U.S.C. § 26).

324. 15 U.S.C. § 78u-6 (Supp. IV 2010). This section outlines Dodd-Frank’s general parameters, but is not meant to be a comprehensive overview of the statute and its detailed regulations. See *id.*; Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249). Numerous academics and practitioners have written excellent summaries and analyses of the Act’s whistleblower provisions. See, e.g., Rapp, *supra* note 257, at 85–87 (citations omitted) (discussing the core features of the Act); Marc S. Raspanti & Bryan S. Neft, *Dodd-Frank Opens Doors on Whistleblower Claims for Securities Law Violations*, 13 LAW. J. 4 (2011), available at <http://www.acba.org/ACBA/pdf/TLJ/TLJv13-10-052011.pdf> (analyzing Dodd-Frank’s whistleblower provisions).

325. See Rapp, *supra* note 257, at 76–77.

326. See Callahan & Dworkin, *supra* note 314, at 296–301 (citations omitted) (noting that “social-psychological literature supports the assumption that financial incentives will motivate new whistleblowers to come forward,” but that this conclusion is subject to numerous limitations depending upon the context). But see Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1194–1202 (2010) (questioning the effectiveness of financial reward programs in motivating whistleblowers).

327. See Pub. L. No. 111–203, sec. 922, § 21F(b), 124 Stat. at 1841–42.

other words, rather than attempting to compensate victims of retaliation, it forces companies to pay for the damages caused by the misconduct disclosed by the whistleblower. A good example of the difference between the two models can be found with Citigroup's different reactions to whistleblowing related to the mortgage crisis.³²⁸ Above, I mentioned Richard Bowen, who reported the widespread mortgage fraud internally, but whose whistleblowing did not alter the company's practices nor prompt the company to change its certification to the government that the company's financial status was secure.³²⁹ In fact, Citigroup asserted "the issues raised by Mr. Bowen had no impact on the integrity or propriety of Citi's financial statements or the accuracy of the certifications signed in connection with Citi's year-end and quarterly public filings."³³⁰

In contrast, in August 2011, a Citi quality assurance manager filed a *qui tam* whistleblower suit under the False Claims Act, alleging that Citigroup misled the federal government, which insured mortgage loans that the company knew did not meet appropriate standards for such insurance.³³¹ Many of the allegations concerned conduct occurring as late as 2011—nearly three years after the explosion of the crisis—that required Citigroup to accept government bailout money and that cost their shareholder's 94% of the value of their stock.³³² In short order after the government joined the lawsuit, Citigroup settled the claim for \$158.3 million and admitted to falsely certifying mortgage loans for insurance and to not complying with disclosure rules.³³³ The whistleblower recently claimed that compliance at Citigroup has now changed: "The reporting structure of the quality assurance function has changed, and I do believe the attitude of upper management is 'we're going to do this right.'"³³⁴ In March 2012, two other FCA *qui tam* whistleblower suits were unsealed, both of which allege that substantial fraud occurred at Countrywide and Bank of America.³³⁵ Additionally, the United States government settled claims with five lenders related to mortgage fraud and abuse for \$25 billion, which includes \$227 million

328. Compare Lieber, *supra* note 157 (describing Richard Bowen's whistleblowing efforts to Citigroup), with Jonathan Stewart, *Citigroup Whistleblower: I Have No Regrets; Problems Persist, Even After Crisis*, REUTERS (Feb. 17, 2012, 9:09 AM), <http://www.reuters.com/article/2012/02/17/us-citigroup-whistleblower-idUSTRE81G06Y20120217> (describing Citigroup's reaction to a 2011 whistleblower suit).

329. See *supra* note 157 and accompanying text.

330. Lieber, *supra* note 157 (quoting Letter from Edward Skyler, Citigroup, to James H. Jacoby, Producer, 60 Minutes (Dec. 1, 2011), available at <http://blog.citigroup.com/2011/12/citis-response-to-december-4-60-minutes-story.shtml>) (internal quotation marks omitted).

331. See Stewart, *supra* note 328.

332. See *id.*

333. See *id.*

334. *Id.* (quoting whistleblower Sherry Hunt).

335. See Amy Biegelsen & Emma Schwartz, *New Whistleblower Cases Allege Continued Bank Fraud*, CENTER FOR PUB. INTEGRITY (Mar. 9, 2012, 10:34 AM), <http://www.publicintegrity.org/2012/03/09/8359/new-whistleblower-cases-allege-continued-bank-fraud>.

for whistleblowers who brought FCA qui tam cases.³³⁶ In contrast to Bowen's whistleblowing, which failed to change the alleged fraud occurring at Citigroup, the whistleblowers seeking bounties have forced companies to take responsibility for their wrongdoing.³³⁷

Moreover, the bounty model serves as more substantial encouragement for whistleblowers than the antiretaliation model. First, social science studies demonstrate that employees blow the whistle because they hope the problem they disclose will be resolved.³³⁸ The bounty model dovetails with this motivation by addressing the underlying misconduct. Second, the model sufficiently compensates whistleblowers for their risk.³³⁹ The antiretaliation model, at best, provides remedies to whistleblowers that simply return them to the ex ante position they would have maintained had they not blown the whistle—hardly a positive inducement to risk the retaliation that often accompanies whistleblowing.³⁴⁰ The bounty model potentially puts the whistleblower in a better place as a result of whistleblowing.³⁴¹

Finally, the Dodd-Frank version of the bounty model directs whistleblowers to external regulators in the SEC,³⁴² which addresses another problem exposed by the financial crisis: Sarbanes-Oxley did not change the manner in which

336. Rick Rothacker, *Whistleblowers Reap Millions in U.S. Mortgage Suits*, REUTERS (Mar. 14, 2012, 7:11 PM), <http://www.reuters.com/article/2012/03/14/us-settlement-whistleblowers-idUSBRE82D1G620120314>.

337. See *id.*; Stewart, *supra* note 328.

338. See Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 SOC. INQUIRY 322, 333–37 (1994) (citations omitted) (providing survey results demonstrating that a primary reason employees do not disclose misconduct is because the employee believes that nothing will be done to correct the problem); see also MICELI & NEAR, *supra* note 303, at 65–66 (citations omitted); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 302 (1991) (citing U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS 31, 34 (1984)) (“The perceived ability to bring about change is more likely to encourage whistleblowing than is reducing the fear of retaliation.”); Karen L. Hooks et al., *Enhancing Communication to Assist in Fraud Prevention and Detection*, 13 AUDITING: J. PRAC. & THEORY 86, 93 (1994) (describing employees’ motives for whistleblowing).

339. See Callahan & Dworkin, *supra* note 314, at 296–301 (citations omitted); Dyck et al., *supra* note 150, at 2214–15; Gonzalez, *supra* note 314, at 339 (citing Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603, 675 (2004)); Rapp, *supra* note 257, at 119.

340. See Stewart J. Schwab, *Wrongful Discharge and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1953 (1996) (noting that damages from a wrongful discharge tort claim puts an employee “at best . . . in the same position had he not” acted in the public interest); see also Dyck et al., *supra* note 150, at 2250–51 (analyzing the repercussions of whistleblowing).

341. See S. REP. NO. 111-176, at 111 (2010) (recognizing that whistleblowers must be “amply” rewarded because they have to choose between “telling the truth and the risk of committing ‘career suicide’”); Rapp, *supra* note 257, at 118–20 (citations omitted).

342. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 922(a), § 21F(a)(6), 124 Stat. 1376, 1842 (2010) (codified as amended at 15 U.S.C. § 78u-6) (defining “whistleblower” as an individual or individuals who provide “information relating to a violation of the securities laws” to the SEC).

employees reported wrongdoing. As I noted above, and in contrast to my prediction that Sarbanes-Oxley's structural model would lead to more reports to independent audit committees,³⁴³ employees continued to disclose problems most often to their supervisor, who could block and filter those reports before they reached people who could address the problem.³⁴⁴ By encouraging external reports directly to government regulators, Dodd-Frank may help solve this problem.³⁴⁵

However, reporting to outside regulators will work only if the SEC actually responds to the reports. Although it is too early to examine the agency's willingness to take these reports seriously, one might be skeptical about the program given recent history with another government bounty program related to taxes. In 2006, Congress strengthened the tax bounty whistleblower program, which provides rewards for individuals who report tax evasion and fraud.³⁴⁶ Yet, despite receiving over 1,300 whistleblower reports since then, the Internal Revenue Service has approved, at most, a "small" number of awards.³⁴⁷ A GAO report in 2011 criticized the IRS's administration of the system, concluding that the IRS takes too long to process claims, lacks effective internal control on the review process, and fails to communicate with whistleblowers and with

343. See Moberly, *Structural Model*, *supra* note 5, at 1141–49 (citations omitted).

344. See ETHICS RES. CTR., *supra* note 247, at 5; Moberly, *Structural Model*, *supra* note 5, at 1121–25 (citations omitted) (describing executive blocking and filtering of whistleblower disclosures).

345. Despite heavy pressure from corporate interests, the SEC regulations to implement the Dodd-Frank whistleblower bounty program do not require internal reporting before reporting to the SEC. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,301 (June 13, 2011) (noting that "[c]ommenters were sharply divided on . . . this topic"); Edward Wyatt, *Overcoming Dissenters, S.E.C. Adopts Revised Whistle-Blower Rules*, N.Y. TIMES, May 26, 2011, at B3 (noting opposition by the United States Chamber of Commerce and other business interests); Peter J. Henning, *A Greater Incentive for Whistle-Blowers*, N.Y. TIMES (May 26, 2011), <http://dealbook.nytimes.com/2011/05/26/dealing-with-the-s-e-c-s-new-whistle-blower-program/> (asserting that the internal reporting rules were the focus of a "lobbying battle"). However, the regulations include incentives for internal reporting. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,325; 17 C.F.R. § 240.21F-4(c)(3). For example, if the whistleblower reports internally and the company self-reports to the SEC, the whistleblower will be eligible for any financial reward. See *id.*

346. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, tit. IV, § 406, 120 Stat. 2922, 2923 (Dec. 20, 2006) (codified as amended at 26 U.S.C. § 7623(b) (2006)); see also U.S. GOV'T ACCOUNTABILITY OFFICE, TAX WHISTLEBLOWERS: INCOMPLETE DATA HINDERS IRS'S ABILITY TO MANAGE CLAIM PROCESSING TIME AND ENHANCE EXTERNAL COMMUNICATION 3–4 (2011) (describing 2006 changes).

347. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 346, at 1. The IRS refuses to release publicly the number of awards because of privacy concerns. See *id.* at 1–2. Journalists have reported that the IRS has made only one award that has become known publicly. See Laura Saunders, *IRS Whistleblower Program Faulted*, WALL ST. J., Sept. 10–11, 2011, at B9; Michael Hudson, *IRS Red Tape, Old Guard Slow Whistleblowing on Corporate Tax Cheats*, CENTER FOR PUB. INTEGRITY (June 22, 2011), <http://www.publicintegrity.org/2011/06/22/4979/irs-red-tape-old-guard-slow-whistleblowing-corporate-tax-cheats>.

Congress.³⁴⁸ Whistleblower advocates assert that cumbersome regulations, delays, and lack of support from high-ranking administrators in the IRS and the Treasury Department have created a dysfunctional system.³⁴⁹ Similar to the dysfunction with OSHA's administration of Sarbanes-Oxley's antiretaliation protections, administrative recalcitrance can undermine the bounty model as well.

Moreover, the SEC specifically has a checkered past when dealing with whistleblowers.³⁵⁰ Although the SEC received copies of every Sarbanes-Oxley whistleblower complaint filed with OSHA over the last decade,³⁵¹ the agency admitted that it never followed up on these complaints even though they often included evidence of corporate securities misconduct.³⁵² The SEC already administers a whistleblower bounty program under the Insider Trading and Securities Enforcement Act of 1988,³⁵³ and had issued rewards under that program totaling less than \$200,000 as of the middle of 2010.³⁵⁴ The SEC's Office of Inspector General evaluated the program and concluded it has been minimally successful, in part because the SEC failed to track crucial information or adequately follow up on tips.³⁵⁵ Furthermore, and perhaps most damning, the agency and the Department of Justice ignored specific whistleblower tips regarding numerous problems before the financial crisis.³⁵⁶ For example, years

348. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 346, at 8–20 (citations omitted).

349. See Hudson, *supra* note 347; Erika Kelton, *Whistle-Blowers Get No Respect from IRS*, MSN MONEY (Mar. 5, 2012, 8:37 PM), <http://money.msn.com/tax-tips/post.aspx?post=69c70e40-b475-4257-8b9c-ecf8c37727d8>; Jesse Drucker & Peter S. Green, *IRS Resists Whistle-Blowers Despite Wide U.S. Tax Gap*, BLOOMBERG.COM (June 19, 2012 5:00 AM), <http://www.bloomberg.com/news/2012-06-19/irs-resists-whistleblowers-despite-wide-u-s-tax-gap.html> (“The IRS whistle-blower program . . . has become the place where allegations of tax avoidance go to die.”).

350. See Rapp, *supra* note 257, at 136–39 (citations omitted) (detailing reasons “why the SEC is likely to remain a roadblock to whistleblowers seeking bounties” under Dodd-Frank).

351. See 29 C.F.R. § 1980.104(a) (2006).

352. See Moberly, *Unfulfilled Expectations*, *supra* note 5, at 148–49; see also Rapp, *supra* note 257, at 126–29 (citations omitted) (detailing cases in which SEC failed to utilize Sarbanes-Oxley whistleblower tips).

353. See 15 U.S.C. § 78u-1 (1988).

354. Dave Ebersole, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 125 (2011) (citing OFFICE OF INSPECTOR GEN.—OFFICE OF AUDITS, U.S. SEC. & EXCH. COMM’N, ASSESSMENT OF THE SEC’S BOUNTY PROGRAM 5 (Mar. 29, 2010) [hereinafter SEC IG BOUNTY ASSESSMENT], available at <http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf>). In late July 2010, the SEC announced that it awarded \$1 million to a whistleblower whose disclosures led to a \$28 million settlement with the hedge fund Pequot Capital Management. See Castellina, *supra* note 131, at 193 & n.49.

355. See SEC IG BOUNTY ASSESSMENT, *supra* note 354, at 4.

356. See, e.g., Arnold, *supra* note 158, at 441–42 (quoting OFFICE OF INVESTIGATIONS, U.S. SEC. & EXCH. COMM’N, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF’S PONZI SCHEME—PUBLIC VERSION 20–21 (Aug. 31, 2009), available at <http://www.sec.gov/news/studies/2009/oig-509.pdf>) (describing the SEC’s failure to act upon information received regarding Bernie Madoff’s Ponzi scheme).

before Bernard Madoff's ponzi scheme fell apart publicly, a whistleblower repeatedly warned the SEC that Madoff's investment fund engaged in fraud.³⁵⁷

That said, perhaps Dodd-Frank will change the SEC's approach to whistleblowers, because the statute institutionalized whistleblowing in the agency by creating an Office of the Whistleblower.³⁵⁸ Before Dodd-Frank, the SEC did not have an organized and efficient system in place to handle tips;³⁵⁹ now the SEC's Office of the Whistleblower includes a Chief, a Deputy Chief, five attorneys, and a paralegal whose jobs are to investigate those claims.³⁶⁰ The Office operates a fund of more than \$450 million that will be used to pay whistleblower rewards.³⁶¹ During the first seven weeks the program operated, it received 334 reports,³⁶² the quality of which was "remarkably high," according to a former SEC official.³⁶³ In its first year after its August 2011 effective date, the program received nearly 3,000 tips, but has issued just one reward: a \$50,000 payment to an unidentified whistleblower who received 30% of the \$150,000 collected in a fraud case.³⁶⁴

Additionally, Dodd-Frank may support the structural model by reinvigorating corporate internal reporting systems. Corporate interests

357. See, e.g., *Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 102 (2009) (statement of Harry Markopolus, Chartered Fin. Analyst) (stating that "[a]s early as May 2000, I provided evidence to the SEC's Boston Regional Office that should have caused an investigation of Madoff. I re-submitted this evidence with additional support several times between 2000–2008, a period of nine years. Yet nothing was done."); Castellina, *supra* note 131, at 202 ("[T]he failure to catch these frauds did not lie with the lack of tips received by the SEC, but rather with the SEC itself."); Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernie Madoff*, 2009 MICH. ST. L. REV. 947, 954–55 & n.45.

358. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 924(d), 124 Stat. 1376, 1850 (2010) (codified as amended at 15 U.S.C. § 78u-7 (2010)); *Welcome to the Office of the Whistleblower*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/whistleblower> (last visited Sept. 16, 2012).

359. See Castellina, *supra* note 131, at 203.

360. See U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM: FISCAL YEAR 2011, at 3 (2011).

361. See *id.* at 9. The fund also finances the operations of the SEC Inspector General's internal suggestion program. See *id.* As of July 2012, the fund had amassed \$452 million to be used for whistleblower payouts. Paul Tharp, *SEC Set to Hand Out up to \$452M to Fraud Busters*, N.Y. POST, July 7, 2012, at 24.

362. U.S. SEC. & EXCH. COMM'N, *supra* note 360, at 5.

363. Samuel Rubinfeld, *SEC Receives 334 Tips in First Seven Weeks of Whistleblower Program*, WSJ BLOGS (Nov. 16, 2011, 3:21 PM), <http://blogs.wsj.com/corruption-currents/2011/11/16/sec-receives-334-tips-in-first-seven-weeks-of-whistleblower-program/>; see also Tharp, *supra* note 361 (quoting a securities lawyer who asserted that the SEC receives "two to three tips every day that are worth pursuing").

364. See Samuel Rubinfeld, *SEC Whistleblower Office Gets Nearly 3,000 Tips*, WSJ BLOGS (Oct. 18, 2012, 2:10 PM), <http://blogs.wsj.com/corruption-currents/2012/10/18/sec-whistleblower-office-gets-nearly-3000-tips/>. The case imposed multimillion-dollar fines, so the whistleblower may receive more if the SEC collects more from the defendant. See Samuel Rubinfeld, *SEC Issues First Dodd-Frank Whistleblower Award*, WSJ BLOGS (Aug. 21, 2012, 2:00 PM), <http://blogs.wsj.com/corruption-currents/2012/08/21/sec-issues-first-dodd-frank-whistleblower-award/>.

predicted the opposite result when the SEC promulgated its regulations for Dodd-Frank because the agency rebuffed corporate efforts to require whistleblowers to report internally before reporting to the SEC.³⁶⁵ However, some early evidence indicates that corporations have strengthened their internal systems out of fear that the Act's financial rewards will entice employees to report to the SEC.³⁶⁶ One recent survey found that employees internally reported fraud at an "all-time high" rate during the fourth quarter of 2011.³⁶⁷ This quarter was the third straight quarter of "new all-time highs," and the CEO of the company responsible for the survey speculated that companies responded to Dodd-Frank by reemphasizing antiretaliation policies and communicating more effectively with employees.³⁶⁸

The application of the bounty model to the private sector will be important to evaluate over the coming years. If successful, it might be worth exploring whether it can be applied more broadly. For example, one scholar proposed using the model for safety and health whistleblowers.³⁶⁹ Such proposals, as well as Dodd-Frank itself, result directly from Sarbanes-Oxley because Sarbanes-Oxley opened the door to more creative thinking about using whistleblowers as part of the nation's law enforcement strategy. Moreover, Sarbanes-Oxley raised our consciousness of the important role that whistleblowers can play in detecting misconduct. The Act's grand failures led to even further experimentation and a move away from relying almost exclusively on the antiretaliation model.³⁷⁰ In particular, Sarbanes-Oxley's failure to prevent the subprime mortgage crisis paved the way for Dodd-Frank's remarkable use of the bounty model to encourage whistleblowers more effectively.

VI. CONCLUSION

Sarbanes-Oxley initiated a decade of impressive growth in the development of formal whistleblower provisions, such as including whistleblower protection in significant federal legislation and mandating the widespread use of codes of ethics and whistleblower hotlines. Despite these successes, Sarbanes-Oxley's failures may teach the Act's most significant lesson: that the antiretaliation and structural whistleblower models, while necessary, do not sufficiently protect and encourage whistleblowers. The Act failed to protect victims of retaliation adequately, and it did not prevent or remedy the underlying misconduct disclosed by whistleblowers. The experience with Sarbanes-Oxley over the last decade teaches that individual players in the system, such as organizational

365. See sources cited *supra* note 345.

366. See, e.g., Yin Wilczek, *Employees' Internal Fraud Reports Rise Even in Wake of SEC Whistleblower Program*, 69 DAILY LAB. REP., A-8 (Apr. 10, 2012).

367. *Id.* at A-9.

368. *Id.*

369. See Gonzalez, *supra* note 314, at 347, 349.

370. See Castellina, *supra* note 131, at 194–200 (citations omitted).

supervisors, government administrators, and adjudicatory decisionmakers, impact whistleblowers as much as, if not more than, any formal legal provisions, and can undermine the protections they appear to provide. Moreover, the failure of whistleblowers to prevent the recent financial crisis exposed the limitations of the antiretaliation and structural models.

These conclusions indicate that perhaps we ought to spend as much effort determining *who* is involved in whistleblower protection as we do deciding *what* those protections should formally entail. If new leadership at OSHA and on the ARB can change the approach of those institutions to whistleblower protection, then it would confirm that choosing the right people to lead whistleblower protection efforts could be as important as having the right whistleblower provisions.

Moreover, because of Sarbanes-Oxley's national prominence, its failings provided the opportunity to strengthen and improve encouragement for whistleblowing. Thus, the Dodd-Frank Act included a more direct incentive for whistleblowers: bounty payments.³⁷¹ In other words, Sarbanes-Oxley made possible the evolutionary leap from the Act's antiretaliation protection and structural encouragement to Dodd-Frank's bounty payments. If Dodd-Frank permits more effective whistleblowing by addressing the underlying wrongdoing, then its bounty model may come to be seen as an essential part of a comprehensive legislative approach to supplement the conventional use of statutory antiretaliation protection and whistleblower hotlines.

If these changes make a difference in the future, then Sarbanes-Oxley's failings could demonstrate that policymakers should think more broadly than simply protecting whistleblowers from retaliation and providing a structural disclosure channel and code of ethics. A decade from now, we may look back on Sarbanes-Oxley's whistleblower provisions with more generous eyes. Rather than focus on their failings, we may view them as important first steps toward a more comprehensive whistleblower strategy.

371. See *supra* notes 310–27 and accompanying text.