Comment

Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of "Greedy," the Eighth Dwarf

I. INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act)[1] is arguably the most sweeping and significant expansion of financial regulatory reform since the Great Depression.[2] The Act, stimulated by Congress's perceived failures of government banking regulations, is intended to promote financial stability in the United States.[3] Amidst the Act's thousands of pages are a handful of sections that significantly enhance the awards and protections available to whistleblowers.[4] Among other things, the Dodd-Frank Act's whistle-

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

2. John L. Ropiequet, Christopher S. Naveja & Jason B. Hirsh, *An Introduction to the Dodd-Frank Act—the New Regulatory Structure for Consumer Finance Emerges*, 29 No. 8 BANKING & FIN. SERVICES POL'Y REP. 1, 1 (2010).

3. 124 Stat. at 1376.

4. *See* §§ 748, 922, 1057, 124 Stat. at 1739-46, 1841-49, 2031-35.

blower bounty provisions and protections gives a hefty award to whistleblowers, strengthens and expands the whistleblower protections of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley),[5] creates an entirely new retaliation-protection regime, and provides for new private rights of action for whistleblowers under the Securities and Exchange Act of 1934 (SEA)[6] and the Commodity Exchange Act of 1936 (CEA)[7] going forward. These whistleblower provisions will have both immediate and long-term effects on employees, companies, lawyers, and federal courts.

This Comment's purpose is threefold. First, this Comment canvasses the history of federal law whistleblower provisions and discusses the financial climate that stimulated the passage of the Dodd-Frank Act. Second, this Comment considers the whistleblower provisions and protections afforded by the Dodd-Frank Act and compares them to prior legislative provisions. Third, this Comment explores the likelihood that the Act's whistleblower provisions will achieve their intended goals and the potential for unintended and undesirable consequences.

II. WHISTLEBLOWER PROTECTION PRIOR TO THE DODD-FRANK ACT

The term "whistleblower" originated from the practice of English constables, or bobbies, who blew their whistles to alert other constables that help was needed.[8] Over time this simple concept has grown into an omnipresent force within government or corporate walls governed by federal statutes to now describe an employee externally reporting fraudulent actions of the employer-company to the federal government.[9] While blowing the whistle on a company affects all parties involved, it is nevertheless an "individual decision" and "[a] corporate employee who discovers ongoing fraudulent conduct (either by accident or through deliberate search) must make an affirmative choice to blow the whistle."[10] Accordingly, this choice has proven to be difficult; however, with the financial incentives and protection that the Dodd-Frank Act provides, the choice will now likely be an easier one to make.[11]

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5. Sarbanex-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.), *amended by* §§ 922, 929A, 124 Stat. at 1842, 1852.

6. 15 U.S.C. ch. 2B (2006 & Supp. 2009), *amended by* § 922, 124 Stat. at 1841.

7. 7 U.S.C. ch. 1 (2006 & Supp. 2008), *amended by* § 748, 124 Stat. at 1739.

8. *Who Qualifies as a SEC Whistleblower?*, SEC Whistleblower Program, http://www.secwhistleblowerprogram.org/SEC-Whistleblower-Qualifications (last visited Apr. 2, 2011).

9. BLACK'S LAW DICTIONARY 1734 (9th ed. 2009).

10. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 111 (2007).

11. *Id.* at 113.

The Dodd-Frank Act is not the only legislation enacted by Congress protecting whistleblowers. Some federal statutes award the whistleblower with a percentage of the monetary sanction imposed on the violating agency.[12] Other federal statutes award successful whistleblower retaliation claims to reinstatement, back pay, injunctive relief, and compensatory damages,[13] and still some provide for punitive damages.[14] This dichotomous protection leads to two main goals of federal whistleblower statutes.[15] First, whistleblower protection should "'serve a truth-advancing function' . . . to encourage . . . employees to share [information] about . . . fraud committed by their respective agencies."[16] And second, whistleblower protection serves a "democracy-advancing function" to make the government "more transparent" and therefore "more responsive to the people."[17]

However, to completely understand the effect of the whistleblower provisions of the Dodd-Frank Act,[18] it should be viewed first in light of the protections that prior statutes afforded whistleblowers. Some of the most notable whistleblower incentives or protections that were existent prior to the Dodd-Frank Act were included within the SEA,[19] the False Claims Act,[20] and Sarbanes-Oxley.[21]

A. *The Securities and Exchange Act of 1934*

The United States Congress created the SEA in order to govern securities transactions on the secondary market.[22] In doing so, the SEA rewarded up to 10% of a monetary sanction levied against a company caught in violation of insider trading to an individual who gave information to the Securities and Exchange Commission (SEC) regarding

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12. *E.g.*, False Claims Act, 31 U.S.C. § 3730(d)(1), (2) (2006).

13. *E.g.,* Energy Reorganization Act, 42 U.S.C. § 5851(b)(2)(B) (2006).

14. *E.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622(d) (2006); Energy Reorganization Act, 42 U.S.C. § 5851(d) (2006); Clean Air Act, 42 U.S.C. § 7622(d) (2010).

15. Jon Knight, *Patrolling the Unfriendly Skies: Protecting Whistleblowers Through Expanded Jurisdiction*, 20 FED. CIR. B.J. 281, 284 (2010).

16. *Id*. (quoting Jocelyn Patricia Bond, Note, *Efficiency Considerations and the Use of Taxpayer Resources: An Analysis of Proposed Whistleblower Protection Act Revisions*, 19 FED. CIR. B.J. 107, 111 (2009)).

17. *Id*. at 284-85.

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

19. 15 U.S.C. ch. 2B (2006 & Supp. 2009).

20. 31 U.S.C. § 3729-3733 (2006 & Supp. 2009).

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

22. 15 U.S.C. § 78b (2006).

the violation.[23] However, this provision does not *require* that a whistleblower receive a portion of the monetary sanction recovered.[24] Rather, the SEC has complete discretionary authority over whether to provide the whistleblower with an award, if at all.[25] The relatively small financial reward combined with the discretionary authority of the SEC to reward the whistleblower has caused the statute to be ineffective.[26] During the twenty years that this provision has been enacted, only five individuals have received awards under the program, "totaling a mere $159,537."[27] Therefore, while the SEA provides a recourse for whistleblowers, it does not provide an incentive.

B. The False Claims Act

The False Claims Act, however, does provide a stronger incentive to individuals who report fraud.[28] Originally enacted in 1863,[29] the False Claims Act has been substantially amended on three occasions—1943,[30] 1986,[31] and 2009.[32] In 1986 Congress created the modern-day False Claims Act by specifically amending the statute to "encourage more private enforcement suits."[33] The False Claims Act, with its reliance on qui tam[34] actions, is "used as the primary vehicle by the Government for recouping losses suffered through fraud" and, in 2004, was "the Government's most successful weapon in its legal arsenal to combat fraud."[35]

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23. 15 U.S.C. § 78u-1(e) (2006).
24. *Id*.
25. *Id*.
26. Robert R. Stauffer & Andrew D. Kennedy, *Dodd-Frank Act Promises Large Bounties for Whistleblowers*, LAW.COM (Aug. 23, 2010), http://www.law.com/jsp/article.jsp?id=1202470880915.
27. *Id*.
28. *See* 31 U.S.C. § 3730.
29. False Claims Act of 1863, ch. 67, 12 Stat. 696.
30. Act of 1943, ch. 377, 57 Stat. 608 (amending the qui tam provisions of the False Claims Act).
31. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).
32. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.
33. S. REP. NO. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89.
34. Qui tam, the abbreviation of the Latin phrase "'qui tam pro domino rege quam pro se ipso in hac parte sequitur' . . . means 'who pursues this action on our Lord the King's behalf as well as his own.'" Rockwell Int'l Corp. v. United States, 549 U.S. 457, 463 n.2 (2007) (emphasis omitted).
35. Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 47 (2004) (internal quotation marks omitted).

A False Claims Act cause of action may be pursued in two ways. First, "the Attorney General may bring a civil action" against a person who defrauds the government.[36] The amount of the award given to the whistleblower, based upon the value of the information received by the government and determined as part of a settlement or allocated by the court, is between 15%-25% of any award the government may receive for pursuing the claim.[37] Second, any individual (relator)[38] may pursue the claim on his or her own, qui tam, if the government chooses not to pursue the claim after sixty days of filing the claim.[39] In this case, the relator is entitled to 25%-30% of the monetary sanctions, plus attorney fees and costs.[40] It is important to note that the award to whistleblowers under the False Claims Act is not discretionary, but mandatory.[41] Finally, the False Claim Act provides the relator protection against retaliation.[42]

The False Claims Act award is given to those whistleblowers who are an "original source."[43] Congress has defined "original source" under the False Claims Act as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."[44] This narrow definition has been held to include an employee who learns of and witnesses illegal inducements by a pharmaceutical company to physicians and pharmacists,[45] but not a past employee who merely predicts a fraudulent activity because the employee lacks "direct and independent knowledge of the information upon which [the] allegations [are] based."[46]

The False Claims Act was largely unchanged between 1986 and 2009.[47] However, in 2009 the Fraud Enforcement and Recovery Act,

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36. 31 U.S.C. § 3730(a) (2006).
37. *Id*. § 3730(d)(1) (2006).
38. Matthew Titolo, *Retroactivity and the Fraud Enforement and Recovery Act of 2009*, 86 IND. L.J. 257, 265 (2011); *see also* 31 U.S.C. § 3730(b) (2006).
39. 31 U.S.C. § 3730(b)(2).
40. *Id*. § 3730(d)(2) (2006).
41. *Id*. § 3730(d)(1), (2).
42. *Id*. § 3730(h) (2006 & Supp. 2009).
43. *Id*. § 3730(e)(4)(A), (B) (2006).
44. *Id*. § 3730(e)(4)(B).
45. *In re* Pharm. Indus. Average Wholesale Price Litig., 538 F. Supp. 2d 367, 384-85 (D. Mass. 2008).
46. *Rockwell Int'l Corp.*, 549 U.S. at 476.
47. Justin P. Tschoepe, *A Fraud Against One is Apparently A Fraud Against All: The Fraud Enforcement and Recovery Act's Unprecedented Expansion of Liability Under the False Claims Act*, 47 HOUS. L. REV. 741, 753 (2010).

among other things,[48] amended the definition of "claim"; the amendment now clarifies "that liability can arise from the submission of a false claim to anyone who is eventually reimbursed with federal funds, regardless of the distance between the defendant and the federal government."[49] Prior to the amendment, the Supreme Court of the United States had interpreted the definition of "claim" to not include attenuated circumstances when a subcontractor makes "a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment."[50] Accordingly, this new definition, as amended by the Fraud Enforcement and Recovery Act, broadens the scope of the False Claims Act.[51]

The Fraud Enforcement and Recovery Act also amended the anti-retaliation provisions afforded to a relator who brings a qui tam claim.[52] This amendment broadens the provision by providing individual liability, as well as including contractors and agents within the scope of the False Claims Act retaliation coverage.[53]

The False Claims Act has awarded whistleblowers with large monetary awards sometimes worth billions of dollars.[54] With the potential to receive a large monetary award, the False Claim Act has incentivized employees to report fraudulent violations and, if needed, pursue them on their own.[55] Indeed, the False Claims Act has remained largely successful. In the 2010 fiscal year, the Department of Justice recovered $3 billion in False Claims Act cases, with whistleblowers being awarded a total of $385 million dollars.[56]

C. The Sarbanes-Oxley Act

Unlike the False Claims Act and the SEA, the Sarbanes-Oxley Act does provide protection for whistleblowers who suffer employment retaliation.[57] In 2002 Congress enacted Sarbanes-Oxley in the wake of "emerging corporate scandals" such as the WorldCom collapse, and the

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48. *Id.* at 759-60.
49. *Id.*; *see also* 123 Stat. at 1622-23.
50. Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662, 672 (2008).
51. Tschoepe, *supra* note 47, at 760.
52. § 4(d), 123 Stat. at 1624-25.
53. *Id.*
54. *See* Stauffer & Kennedy, *supra* note 26.
55. *See id.*
56. *False Claims Act Update & Alert: DOJ Recovers $3 Billion in FY 2010 False Claims Act Cases*, TAXPAYERS AGAINST FRAUD EDUCATION FUND (Nov. 22, 2010), http://www.taf.org/whistle299.htm.
57. § 806(a), 116 Stat. 745, 802 (codified at 18 U.S.C. § 1514A(a) (2006)).

"collapse of the 'dot-com bubble,'"[58] which American leaders were afraid would "cause the complete collapse of the American financial system."[59] This act, as part of a financial "'emergency' measure prompt[ed] much criticism of the legislative process behind its adoption."[60]

Pursuant to the enactment, Sarbanes-Oxley provided specific whistleblower protection against employer retaliation based on the reporting of securities-related violations.[61] This anti-retaliation provision prohibits employers from taking any retaliatory action against the whistleblowing employee.[62] In addition to prohibiting companies from retaliating, Sarbanes-Oxley also entitles an employee who has been subjected to retaliation to reinstatement, back pay, and legal fees.[63] Further, Sarbanes-Oxley signifies a respect for a corporation's internal reporting mechanisms by requiring that "corporations provide employees with a standardized channel to report organizational misconduct internally within the corporation."[64] However, prior to the Dodd-Frank Act, the Sarbanes-Oxley Act did not provide any true incentives to employees to provide information to outside authorities.[65] Without providing incentives to potential whistleblowers, Sarbanes-Oxley only "'seal[ed] cracks in the doctrine'" and did "not offer radical reform."[66]

Significant to the discussion of Sarbanes-Oxley, is the scope of which the whistleblower retaliation protection of Sarbanes-Oxley applies, specifically the scope of the statute's phrase "publicly traded companies."[67] This provision has been interpreted differently by administrative law judges, mainly dividing on whether "contractor, subcontractor,

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58. Rapp, *supra* note 10, at 107. The "Dotcom Bubble" is a "rapid rise in equity markets fueled by investments in internet-based companies." *Dotcom Bubble*, INVESTOPEDIA.COM, http://www.investopedia.com/terms/d/dotcom-bubble.asp (last visited May 1, 2011).

59. Rapp, *supra* note 10, at 107.

60. *Id.* Most scholars view "[t]he WorldCom collapse as the 'tipping point' at which congressional action became inevitable." *Id*. at 107 n.88. Furthermore, the Enron situation played a substantial role. *Id*. at 107 n.90.

61. 18 U.S.C. § 1514A(a) (2006).

62. *Id*.

63. *Id*. § 1514A(c).

64. Rapp, *supra* note 10, at 115 (internal quotation marks omitted).

65. *Id.* at 113-14 (suggesting that "[o]nly a strong whistleblower law aimed at generating incentives for corporate insiders to expose fraud can optimize the quantity of insider information brought into the public domain.").

66. *Id.*

67. 18 U.S.C. § 1514(A)(a); *see also* Brent B. Nicholson, *The Perils of Parenthood and Other Dangerous Relationships Under the Whistleblower Protection Provision of the Sarbanes-Oxley Act of 2002*, 2 ENTREPRENEURIAL BUS. L.J. 415, 432 (2007).

or agent" is included within the scope of Sarbanes-Oxley.[68] Accordingly, this difference in interpretation has led to several differing conclusions and admitted confusion of Sarbanes-Oxley applicability.[69] However, for the most part, "publically traded compan[y]" has been interpreted in the plain text meaning, thus creating a perceived loophole of liability for all subsidiaries and affiliates of publically traded companies.[70]

The Dodd-Frank Act did not completely amend the SEA, the False Claims Act, or Sarbanes-Oxley. Rather, the Dodd-Frank Act amended the SEA, the False Claims Act, and Sarbanes-Oxley, only *in part*, and provided alternate forms of action that coincide with portions of the SEA, the False Claims Act, and Sarbanes-Oxley.

III. THE DODD-FRANK ACT

It is not unusual for Congress to create and pass an act in the wake of a national concern or trend. For example, the Whistleblower Protection Act of 1989[71] was created in response to an employment retaliation action taken against Roger Boisjoly, an engineer involved in building the Challenger Space Shuttle.[72] When Boisjoly testified before Congress that he had expressed concerns regarding the design of the shuttle fuel tanks hours before the deadly launch, he almost immediately suffered employment retaliation.[73] Unlike the Whistleblower Protection Act, the Dodd-Frank Act[74] was not prompted by one single event, but the culmination of major economic crises, leading to the 2008 economic recession.[75]

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68. *Compare In re Gonzalez*, No. 2004-SOX-39, 2004 WL 5840274, at *3 (Dep't of Labor Aug. 20, 2004) (holding that "Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies"), *with In re Goodman*, No. 2006-SOX-000111, 2006 WL 3246820, at *5 (Dep't of Labor Jan. 10, 2006) (holding that Sarbanes-Oxley only applied to employees of publicly traded companies).

69. *Compare In re Gonzalez*, 2004 WL 5840274, at *3 (holding that "Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies"), *with In re Goodman*, 2006 WL 3246820, at *5 (holding that Sarbanes-Oxley only applied to employees of publicly traded companies).

70. R. Scott Oswald & Jason Zuckerman, *Whistleblower Provisions of the Dodd-Frank Act*, EMP. L. GROUP (July 20, 2010), http://employmentlawgroup.com/Articles/ROswald/DoddFrankWhistleblowerProvisions.html.

71. 5 U.S.C. §§ 1201-22 (2006).

72. Knight, *supra* note 15, at 286.

73. *Id*.

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

75. SEN. REP. NO. 111-176, at 1 (2010).

Since 2007 the United States and most of the global economy has suffered, resulting in the collapse of major financial institutions.[76] Most prominently, the insurance giant, American International Group, Inc. (AIG), sought a total of $182 billion from the Federal Reserve making it the biggest federal bailout in United States history.[77] In addition, the securities firm of Merrill Lynch sold itself to Bank of America, and the securities firm of Lehman Brothers filed for bankruptcy protection.[78] In response to these and other economic crises, Congress passed the Dodd-Frank Act in order "[t]o promote the financial stability . . . by improving accountability and transparency in the financial system."[79] Congress recognized the assistance that whistleblowers provide in uncovering fraud schemes in public companies and thus created a system to encourage and protect employees.[80] The Act's whistleblower provisions are intended to amend, supplement, and, at times, fix aspects of previous statutory provisions by encouraging employees to report fraudulent behavior and to protect those employees who divulge information to the government.[81]

The Dodd-Frank Act includes two primary whistleblower provisions: 1) monetary incentives for whistleblowers[82] and 2) retaliation protection against the employer.[83] Additionally, the Dodd-Frank Act has amended provisions within Sarbanes-Oxley,[84] the SEA,[85] and the CEA.[86] The

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76. Chris Isidore, *It's Official: Recession Since Dec. '07*, CNN MONEY (Dec. 1, 2008), http://money.cnn.com/2008/12/01/news/economy/recession/index.htm; *see also* BUSINESS CYCLE DATING COMMITTEE, NAT'L BUREAU OF ECON. RESEARCH, DETERMINATION OF THE DECEMBER 2007 PEAK IN ECONOMIC ACTIVITY, 1, *available at* http://wwwdev.nber.org/dec2008.pdf.

77. *American International Group Inc. Overview*, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/american_international_group/index.html?inline=nyt-org (last visited May 1, 2011).

78. Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill is Sold*, N.Y. TIMES (Sept. 14, 2008), http://www.nytimes.com/2008/09/15/business/15lehman.html?pagewanted=all.

79. 124 Stat. at 1376.

80. S. Rep. No. 111-176, at 96 (noting that "54.1% of uncovered fraud schemes in public companies" were done by whistleblowers).

81. *See* S. REP. NO. 111-176, at 96.

82. § 922, 124 Stat. at 1842-43.

83. § 922, 124 Stat. at 1845-47.

84. Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.), *amended by* §§ 922, 929A, 124 Stat. at 1842, 1852 (amending scattered sections of 18 U.S.C.).

85. 15 U.S.C. ch. 2B (2006 & Supp. 2009), *amended by* § 922, 124 Stat. at 1841-49 (amending scattered sections of 15 U.S.C.).

86. 7 U.S.C. ch. 1 (2006 & Supp.), *amended by* § 748, 124 Stat. at 1739-46 (amending scattered sections of 7 U.S.C.).

amendments to the SEA are substantially similar to the amendments made to the CEA. Therefore, only the areas where the Dodd-Frank Act amendments will affect the SEC and the United States Commodity Futures Trading Commission (CFTC) will be noted.

A. Bounty Provisions of the Dodd-Frank Act

The whistleblower bounty provision is similar to the Internal Revenue Service (IRS) Whistleblower Program in the Tax Relief and Health Care Act of 2006,[87] which mandated a minimum award for successful tips and led to an increase in the number of received tips regarding violation of tax laws.[88] In general, the Dodd-Frank Act states that a whistleblower who provides "original information"[89] of a fraudulent act by a public or privately held company leading to a monetary sanction of at least $1 million[90] will be rewarded 10%-30% of the monetary sanction.[91]

First, the Dodd-Frank Act requires the SEC and the CFTC to promulgate rules by which the whistleblower bounty provisions will be implemented.[92] These rules, of which must be finalized 270 days after the date of enactment, are, at the time of writing this Comment, currently only proposed rules by the SEC and CFTC.[93] The proposed rules by the CFTC are "intended to be the same as the [proposed SEC rules], except where the Dodd-Frank Act required a different result."[94] The areas that the proposed rules differ will be noted. The following analysis of the Dodd-Frank Act takes into account the language of the Act itself as well as the effect of the proposed rules.

The Dodd-Frank Act defines a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly, who provides information relating to a violation of [the securities laws] to the Commission

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87. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958-60 (codified at 26 U.S.C. § 7623 (2006)).

88. 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, 342-43 (2010).

89. §§ 748, 922, 124 Stat. at 1740, 1841-42.

90. §§ 748, 922, 124 Stat. at 1740, 1841.

91. §§ 748, 922, 124 Stat. at 1740-41, 1842.

92. §§ 748, 922, 124 Stat. at 1746, 1847-48.

93. § 748, 124 Stat. at 1746.

94. Steve Quinlivin, *CFTC Publishes Whistleblower Proposal-Double Jeopardy for SEC Registrants?,* LEONARD, STREET, & DEINARD, http://dodd-frank.com/cftc-publishes-whistleblower-proposal%E2%80%94double-jeopardy-for-sec-registrants/ (last visited May 1, 2011). The CFTC Rules are so similar to the SEC that the CFTC "forgot to change all of the references in the proposed forms it copied from the SEC" rules. *Id*.

. . . ."[95] Both the SEC and the CFTC's Proposed Rules[96] add the word "potential" to the type of violation reported by a whistleblower.[97] With this addition, the conduct reported by the whistleblower does not have to actually constitute a violation of the securities laws.[98]

"Original information" as defined in the Dodd-Frank Act is information "derived from the independent knowledge or analysis of [the] whistleblower," which cannot already be known to the SEC[99] or CFTC.[100] This definition contemplates that knowledge may be "obtained from any of the whistleblower's experiences, observations, or communications."[101] As the SEC and CFTC Proposed Rules Description makes clear, this definition of "independent knowledge . . . best effectuates" Congress's intentions to reward those individuals who voluntarily come forward with information if such information leads "to a successful enforcement action."[102] With regard to "independent analysis," the Proposed Rules define this to "mean the whistleblower's own analysis, whether done alone or in combination with others."[103] This definition contemplates that analysis can be the "product of collaboration among two or more individuals" of generally available information, "but which reveals information that is not generally known or available to the public" that could "provide vital assistance . . . in understanding complex schemes and identifying securities violations."[104] Therefore, "new analysis, even

95. §§ 748, 922, 124 Stat. at 1740, 1842.

96. Proposed Rules Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act (Implementing Whistleblower of SEA), 75 Fed. Reg. 70,488 (proposed Nov. 17, 2010) (to be codified at 17 C.F.R. pt. 240, 249); Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act (Implementing Whistleblower of CEA), 75 Fed. Reg. 75,728 (proposed Dec. 6, 2010) (to be codified at 17 C.F.R. pt. 165).

97. Implementing the Whistleblower SEA, 75 Fed. Reg. at 70,519; Implementing the Whistleblower CEA, 75 Fed. Reg. at 75,745.

98. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,489; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,729.

99. § 922, 124 Stat. at 1841-42.

100. § 748, 124 Stat. at 1740.

101. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,492; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,729.

102. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,492; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,729-30.

103. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,492; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,731 (internal quotation marks omitted).

104. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,492; *see also* Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,729.

without new facts, can qualify if the whistleblower is the first person to put together all of the facts and detect the wrongdoing."[105]

While this definition may seem expansive, it does not include certain groups of individuals who gain information through performance of an audit of financial statements required under the securities law governed by the SEC.[106] Furthermore, the Act also excludes individuals who at the time of acquiring and submitting the original information to the SEC is an "employee of (i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a self-regulatory organization; (iv) the Public Company Accounting Oversight Board; or (v) a law enforcement organization."[107] The SEC and CFTC Proposed Rules also include similar limitations.[108] Certain information will not be considered to have "derived from [an individual's] independent knowledge or independent analysis,"[109] including the following: attorneys and persons who assist attorneys on client matters; persons who obtain information by performing an audit; and individuals who receive the information communicated "with the reasonable expectation that the person would take appropriate steps to cause the entity to respond to the violation."[110] Accordingly, the definition of original information is simultaneously broad in the sense that it expands the type of information that an individual comes forward with, and narrow in the sense that it limits the type of individual that brings the information forward.

Exclusive to claims brought by the SEC, Congress has limited what entity may bring claims against fraudulent actions under the Dodd-Frank Act to the government alone.[111] This is unlike the False Claims Act's[112] qui tam claims.[113] To effectively bring claims under the

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105. Securities Law Practice Center, *Whistleblower Protections Under the Dodd-Frank Act*, PRACTICING L. INST., http://seclawcenter.pli.edu/2010/09/09/whistleblower-protections-under-the-dodd-frank-act/ (last visited May 2, 2011).

106. § 922, 124 Stat. at 1843.

107. *Id.* Section 748 precludes an award to any individuals who at the time of acquiring and submitting the original information to the CFTC is an "employee of (i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a registred entity; (iv) a registered futures association; (v) a self-regulatory organization . . .; or (vi) a law enforcement organization." § 748, 124 Stat. at 1741.

108. *See* Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,746.

109. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,520; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,744.

110. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,492-93; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,730.

111. *See* § 924, 124 Stat. at 1850.

112. 31 U.S.C. § 3729-3733 (2006 & Supp. 2009).

Dodd-Frank Act forward, Congress has created a special SEC whistleblower office, the SEC Center for Complaints and Enforcement Tips,[114] to be in charge of pursuing the complaints filed by whistleblowers.[115]

In addition to not providing a qui tam cause of action, the Dodd-Frank Act also limits a whistleblower's recovery only to cases where, in a covered judicial or administrative action, the SEC or CFTC monetarily sanctions the company in violation of the Act in excess of $1 million.[116] Under the Dodd-Frank Act, whistleblowers may recover an award for only those claim that are obtained by the government as part of any action brought by the SEC "under the securities laws"[117] or brought by the CFTC.[118] The SEC and CFTC Proposed Rules "interpret the term 'action' to mean a single captioned civil or administrative proceeding."[119]

While the Act does provide a mandatory award to a whistleblower that provides original information, the Act limits the amount of recovery that a whistleblower can be awarded to between 10%-30% of the monetary sanction.[120] The SEC and CFTC Proposed Rules add that in a case of multiple whistleblowers entitled to an award, the Commission "independently determine[s] the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected . . . ."[121] Additionally, both the Proposed Rules anticipate that the percentages awarded in one action may differ from the percentages awarded in related actions.[122] The Dodd-Frank Act requires the SEC and CFTC to consider numerous factors in determining the percentage of the award, including the significance of the information provided, the degree of assistance the whistleblower provided, and the level of government

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113. *Compare* § 924, 124 Stat. at 1850 (creating a separate office to pursue whistleblower claims) *with* 31 U.S.C. § 3730(b) (2006) (allowing qui tam claims to be brought by an individual).

114. *See* U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/complaint.shtml.

115. § 924, 124 Stat. at 1850.

116. §§ 748, 922, 124 Stat. at 1740, 1841.

117. § 922, 124 Stat. at 1841.

118. § 748, 124 Stat. at 1740.

119. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,498; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,743.

120. §§ 748, 922, 124 Stat. at 1740-41, 1842-43.

121. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,499, 70,521; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,738, 75,746-47.

122. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,499, 70,521; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,738.

interest in deterring such violations.[123] Notably, the Description of the Proposed Rules by the SEC includes whether "a whistleblower reported the potential violation through effective internal whistleblower . . . procedures" as a factor in the determination.[124] Additionally, the SEC Proposed Rules allow a whistleblower who reported first internally and then, within 90 days, externally to the SEC, to relate back to the date of the whistleblower's internal report.[125] Likewise, a similar factor is in the Proposed Rules by the CFTC.[126]

The monetary award determined by the SEC cannot be appealed unless the award is less than 10% or more than 30%.[127] In order to receive the award, the SEC and CFTC Proposed Rules require first that the award be published on the Commission's website—thereby giving "notice" of the action and sanctions to the public—once the judicial and administrative action results in the imposition of monetary sanctions exceeding $1 million.[128] The claimants must file their claim for an award within sixty days of the date the notice is published on the website, otherwise the claimant is barred from recovering an award.[129] In order to make a claim for an award, the claimant must submit a form declaring, among other things, the eligibility of the whistleblower to receive an award.[130] Additionally, and in accordance with §§ 922 and 748 of the Dodd-Frank Act, an anonymous whistleblower must reveal his identity to receive his award.[131]

While both the CFTC and SEC begin the award determination process after the time for filing any appeals of the Commission's judicial or administrative action has expired,[132] the SEC and CFTC differ in their

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123. §§ 748, 922, 124 Stat. at 1741, 1842-43.

124. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,500.

125. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,516.

126. *See* Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,733.

127. § 922, 124 Stat. at 1844.

128. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,746. However, under the SEC Proposed Rules, if the monetary sanctions are obtained without a judgment or order, like when a contribution is made pursuant to Sarbanes-Oxley § 308(b), then the notice would be published within thirty days of the deposit of monetary sanctions that exceeds $1 million. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523.

129. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,746.

130. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,746.

131. §§ 748, 922, 124 Stat. at 1742, 1843-44; *see also* Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,746.

132. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,746.

claim review process–the SEC Proposed Rules provides an administrative appeal.[133] Under the Dodd-Frank Act, if the award by the SEC is outside the 10%-30% range, then the award may be appealed to a United States circuit court of appeals within the circuit where the alleged action occurred or where the complainant resided on the day of the violation.[134] However, a decision regarding "whether or to whom to make an award may be [appealable to an appropriate court of appeals] within 30 days after the Commission issues its final decision."[135] Alternatively, an award determined by the CFTC may be appealed regardless of whether the award was within the 10%-30% range.[136] Accordingly, the SEC has proposed an administrative appeals process unique to the SEC[137] because Congress did not provide a claimant with an appeal similar to the one provided to claims brought in the CFTC.[138]

The process begins when the SEC makes a "Preliminary Determination" over whether the claimant is entitled to an award and, if so, the proposed award percentage amount.[139] The SEC Proposed Rules provide an administrative appeals process that allows the claimant the opportunity to contest the preliminary determination by requesting, within thirty days, the information the Commission used to determine the amount and requesting a meeting with the Whistleblower Office.[140] If a claimant fails to timely respond to the preliminary determination and accordingly fails to exhaust administrative remedies, then the claimant would be prohibited from pursuing a judicial appeal.[141] If the claimant does timely respond, the claims review staff would consider the issues and grounds advanced in the claimant's response and prepare a "Proposed Final Determination."[142] Thereafter, a Commissioner could request that the proposed final Determination be reviewed by the Commission, and after review, issue its "Final Order."[143] However, if

133. *See* Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523.

134. § 922, 124 Stat. at 1844; *see also* Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,524-25.

135. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,524.

136. § 748, 124 Stat. at 1742.

137. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523.

138. *See* § 748, 124 Stat. at 1742.

139. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523.

140. *Id.* The requested meeting by the claimant, however, is not required, as the SEC has the discretion to decline this request. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 70,523-24.

a Commissioner does not make this request, then the proposed final determination becomes a "Final Order of the Commission."[144]

Under the Dodd-Frank Act, a known whistleblower is permitted, but not required, to be represented by counsel.[145] However, if a whistleblower chooses to remain anonymous, the whistleblower must retain an attorney,[146] and "the attorney's contact information [must] be provided to the Commission" so as to "prevent fraudulent submissions and to facilitate communication and assistance between the whistleblower and the Commission's staff."[147] Accordingly, the whistleblower does not need to appear as a party in the case and can remain anonymous as an informant.[148] However, if the whistleblower chooses to remain anonymous, then the whistleblower is required to be represented by counsel under the Act and must disclose his identity prior to the payment of the award.[149] However, the SEC and CFTC Proposed Rules authorize disclosure in certain situations such as when disclosure is required in federal court or in an administrative action.[150]

There are several procedural requirements in the Proposed Rules that a whistleblower must follow for submitting original information and making a claim for a whistleblower award to the SEC and CFTC.[151] The Proposed Rules include provisions that are designed to aid the Commissions in evaluating and using the information provided, such as providing explanations and additional information regarding the submitted information.[152] Additionally, both Proposed Rules require that the whistleblower submit information under the penalty of perjury.[153] In the instance of an anonymous whistleblower, the attorney must certify that he has verified the whistleblower's identity and eligibility before an award is appropriate.[154] Overall, the SEC and

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144. *Id.* at 70,524.

145. §§ 748, 922, 124 Stat. at 1742, 1843.

146. *Id.*

147. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,501; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,736.

148. *See* §§ 748, 922, 124 Stat. at 1742, 1843-44.

149. *Id.*

150. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,521-22; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

151. *See* Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522-23; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

152. *See* Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522-23; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

153. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

154. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75, 738, 75,745.

CFTC procedural requirements are important for whistleblowers to follow as the Commissions will not pay an award to a whistleblower "who fails to submit information to the Commission in such form as the Commission may, by rule [or regulation], require."[155]

The SEC and CFTC Proposed Rules contain a two-step process to submit original information.[156] First, the information must be submitted either on a standard form or through the Commission's online database.[157] Second, the whistleblower must complete a Whistleblower Office form and make certain representations regarding the truth of the information provided.[158] Again, adherence to these procedural requirements is necessary in order to receive an award.[159]

It is also important to note that under § 748, the CFTC whistleblower section, the rights and remedies "may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement[,]" and that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."[160] Accordingly, employers will not be able to compel arbitration of CFTC whistleblower claims.[161]

B. Protection Against Retaliation

In addition to providing monetary incentives for whistleblowers, the Dodd-Frank Act also contains protection for whistleblowers against retaliation by their employers.[162] Accordingly, an individual who provides information to the SEC or the CFTC, or an individual who assists in any investigation or action of the SEC or the CFTC is

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155. §§ 748, 922, 124 Stat. at 1742, 1843.

156. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

157. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

158. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

159. §§ 748, 922, 124 Stat. at 1742, 1843. The Dodd-Frank Act allows information to be submitted to the Commission after the enactment date of the Act, but before the Rules are finalized by the Commission. § 924, 124 Stat. at 1850. Accordingly, the Proposed Rules state that a whistleblower who fell into this category would perfect their status by submitting the required information within 120 days of the effective date of the proposed rules. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

160. § 748, 124 Stat. at 1746; *see also* Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,748.

161. § 748, 124 Stat. at 1746; *see also* Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,748.

162. *See §§* 748, 922, 124 Stat. at 1744, 1845.

protected against retaliation.[163] It is important to note that the Dodd-Frank Act does not completely usurp Sarbanes-Oxley's administrative process; rather, it creates an entirely new and separate enforcement mechanism for retaliation claims that parallels the existing regime under Sarbanes-Oxley.[164] Therefore, the Dodd-Frank Act simultaneously enhances the protections available to whistleblowers under Sarbanes-Oxley but also creates a separate enforcement mechanism for claims brought under the SEC or CFTC.

1. Dodd-Frank Act Retaliation Protection, SEC & CFTC. First, the Dodd-Frank Act provides retaliation protection against an employer who "may discharge, demote, suspend, threaten, harass, directly or indirectly, or . . . discriminate against, a whistleblower . . . because of any lawful act done by the whistleblower . . . ."[165] Specifically, the Dodd-Frank Act protects an employee who provides information to the SEC[166] or CFTC;[167] who initiates, testifies in, or assists in any investigation or judicial administrative action of the SEC;[168] who assists in any investigation of the CFTC;[169] who makes disclosures to the SEC required under Sarbanes-Oxley or "any other law, rule, or regulation subject to the jurisdiction of the Commission."[170] This final protection under the SEC allows for whistleblowers to bring retaliation causes of action under the Dodd-Frank Act when the disclosures are protected and required under Sarbanes-Oxley.[171] As mentioned above, the SEC and CFTC Proposed Rules include the word "potential" to the type of violation an employee may report to qualify as a whistleblower.[172] Accordingly, the retaliation protection does not depend on whether the information provided to the SEC or CFTC led to an ultimate adjudicia-

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163. *Id.*

164. *Dodd-Frank Act: Enhanced Protection for Whistleblowers Against Employer Retaliation*, COVINGTON & BURLING LLP (July 29, 2010), http://www.cov.com (follow "Covington E-Alert & Advisory" hyperlink; then follow "2010" hyperlink; then follow "Dodd-Frank Act: Enhanced Protection for Whistleblowers Against Employer Retaliation" hyperlink).

165. §§ 748, 922, 124 Stat. at 1744, 1845.

166. § 922, 124 Stat. at 1845.

167. § 748, 124 Stat. at 1744.

168. § 922, 124 Stat. at 1845-46.

169. § 748, 124 Stat. at 1744.

170. § 922, 124 Stat. at 1846.

171. *See id.*

172. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,519; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

tion or conclusion that the corporation-employer violated a securities law.[173]

Under the Dodd-Frank Act, whistleblowers are given a private right of action to file an initial complaint of retaliation under the SEC[174] and CFTC[175] in federal district court and accordingly do not have to exhaust any administrative remedies.[176] The statute of limitations for actions brought under the SEC is no more than six years after the violation or three years after the right of action is known or reasonably should have been known by the employee.[177] However, no action may be brought more than ten years after the date of the violation.[178] The statute of limitations brought under the CFTC is limited to "not . . . more than 2 years after the date on which the violation reported . . . is committed."[179] Once in federal district court, the remedies available for a successful retaliation claim under the SEC provide a successful whistleblower up to two times back pay plus interest in addition to being entitled to reimbursement of reasonable attorney's fees and other costs of litigation.[180] The same measures of relief apply to a CFTC claim; however, the Dodd-Frank Act limits the "amount of back pay to the amount otherwise owed to the individual."[181]

The Dodd-Frank Act also provides a new private right of action under the SEA and the CEA for employees who suffered retaliation as a result of providing information to the SEC or CFTC.[182] These causes of action are separate from an employee's rights under the Sarbanes-Oxley Act's and the Dodd-Frank Act's whistleblower provisions for financial services employees and, therefore, may be brought directly into federal court.[183] Additionally, employees protected by the SEA have up to six years after the retaliatory conduct, or three years after becoming aware of such conduct, to bring such a claim.[184] Employees protected by the CEA, have up to two years to bring such a claim.[185]

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173. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,489; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.
174. § 922, 124 Stat. at 1846.
175. § 748, 124 Stat. at 1744.
176. §§ 748, 922, 124 Stat. at 1744, 1846.
177. § 922, 124 Stat. at 1846.
178. *Id.*
179. § 748, 124 Stat. at 1744.
180. § 922, 124 Stat. at 1846.
181. § 748, 124 Stat. at 1744.
182. §§ 748, 922, 124 Stat. at 1744, 1846.
183. *Id.*
184. § 922, 124 Stat. at 1846.
185. § 748, 124 Stat. at 1744.

The Proposed Rules for the anti-retaliation provisions in the SEA and the CEA are far less extensive than for the rules regarding the whistleblower awards. Indeed, the comments received in response to the Proposed Rules on the anti-retaliation provisions are far less than the amount received in response to the whistleblower awards Proposed Rules.[186] One of the requests for comment by the SEC is noteworthy: the SEC requested comment "on ensuring that appropriate employment actions . . . are not impaired by whistleblower protections and barring whistleblower protection for frivolous or bad faith claims."[187] This is normally included within other statutes, however, not within the Dodd-Frank Act.[188]

2. Retaliation Protection for Financial Services Employees. In addition to the retaliation protection for whistleblowers in §§ 748 and 922 of the Dodd-Frank Act, § 1057 creates a private right of action for employees in the financial services industry who suffer retaliation for disclosing information of fraudulent conduct related to the offering or provision of consumer financial products or services.[189] The retaliation protection procedure for financial services is different from the procedure for whistleblowers under §§ 748 and 922.[190] First, the statute of limitation is 180 days, and second, the complaint must be filed with the Secretary of Labor, rather than in the federal courts.[191] However, § 1057 provides a burden-shifting framework that is favorable to employees, allowing a complainant to prevail by showing by a preponderance of the evidence that the protected activity was a "contributing factor in the unfavorable personnel action . . . ."[192]

If the Secretary of Labor concludes that there is reasonable cause to believe that a violation has occurred, the Secretary is required to issue a preliminary order that may include reinstatement with full back pay, compensatory damages, and costs.[193] Within sixty days of the Secretary's findings, any aggrieved party may appeal to the circuit court of

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186. David W. Garland & Allen B. Roberts, *SEC's Proposed Dodd-Frank Anti-Retaliation Rules: What Is An Employer To Do?* (Dec. 20, 2010), http://www.whistleblowingcompliancelaw.com/2010/12/articles/restoring-american-financial-s/secs-proposed-doddfrank-antiretaliation-rules-what-is-an-employer-to-do/.

187. *Id*.

188. *Id*.

189. § 1057, 124 Stat. at 2031-32.

190. *Compare* § 1057, 124 Stat. at 2032, *with* §§ 748, 922, 124 Stat. at 1743-46, 1845-47.

191. § 1057, 124 Stat. at 2032.

192. § 1057, 124 Stat. at 2033.

193. *Id.*

appeals where the violation occurred or in the circuit where the complainant resided on the day of the violation.[194] If the Secretary has not issued a final order within 210 days of the filing of the complaint, the employee can file a lawsuit in a federal district court.[195] The Dodd-Frank Act accordingly creates new causes of action for employment retaliation that were previously not recognized under Sarbanes-Oxley, thus giving employees in the financial services industry a cause of action.[196]

3. Dodd-Frank Act Amendment to the Sarbanes-Oxley Act. The Dodd-Frank Act's retaliation protections also significantly amends Sarbanes-Oxley. First, § 929A of the Dodd-Frank Act clarifies a provision of Sarbanes-Oxley that greatly divided federal courts:[197] the whistleblower protection provisions of Sarbanes-Oxley apply to all employers, not just public companies.[198] This definition includes subsidiaries and affiliates of public companies; therefore, almost every employee in the financial services industry, whether the employer is publically or privately held, is accorded whistleblower protection.[199] In addition, the Act closes an anti-retaliation loophole in Sarbanes-Oxley and the False Claims Act by clarifying that whistleblower protections apply to both parent companies and affiliates whose financial information is included in consolidated financial statements.[200]

Next, two main procedural aspects of the retaliation claim should be considered. First, the statute of limitations period for which an employee may pursue a claim for retaliation under Sarbanes-Oxley has been amended and thus extended under the Act.[201] Under Sarbanes-

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194. § 1057, 124 Stat. at 2034.

195. *Id.*

196. *See generally* § 1057, 124 Stat. at 2031.

197. *See* Fred W. Alvarez et al., *The Sarbanes-Oxley Act: Current Issues in Whistleblower Enforcement*, 27 A.L.I.-A.B.A. 233, 241-42 (2009). The course of study stated, "Prior to the administrative review board's ('ARB') decision in *Klopfenstein v. PCC Flow Technologies Holdings Inc.*, the case law addressing whether subsidiaries could be covered under SOX was somewhat inconsistent. [Administrative Law judges] applied varying standards for evaluating coverage, alternately applying a veil-piercing standing, and a joint employer standard." *Id.* at 241. However, this conflict was ended when the federal courts and ARB set an agency standard: "to obtain coverage under SOX, the non-public subsidiary must act as an agent of the publicly-traded parent, and the agency must relate to employment matters." *Id.*

198. *See* § 929A, 124 Stat. at 1852.

199. *See id.*

200. *See id.*

201. *See* § 922, 124 Stat. at 1848.

Oxley, the statute of limitations was 90 days;[202] however, the Act amended, and accordingly increased, the statute of limitations under Sarbanes-Oxley to 180 days.[203]

The Act also amends Sarbanes-Oxley in two more respects. Section 922 of the Act expands whistleblower rights to pursue litigation.[204] The Act states that whistleblower rights and remedies under Sarbanes-Oxley "may not be waived by an agreement, policy form, or condition of employment," and prohibits enforcement of any pre-dispute arbitration agreements requiring arbitration of a Sarbanes-Oxley whistleblower dispute.[205] Finally, the Act clarifies that jury trials are available for actions brought in a federal court under Sarbanes-Oxley.[206]

IV. COMPARING THE DODD-FRANK WHISTLEBLOWER PROVISIONS TO THE SECURITIES EXCHANGE ACT, FALSE CLAIMS ACT, AND SARBANES-OXLEY

A. *Dodd-Frank Act Versus the Securities Exchange Act*

The Dodd-Frank Act[207] creates new whistleblower incentive programs and new private causes of action under the SEA,[208] for whistleblowers.[209] This addition to the SEA provides the incentive for "whistleblowers to report perceived wrongdoing to the [SEC] rather than to the employer."[210]

Most notably, the type of claims for which a whistleblower may receive an award under the Act are far more expansive than the previous provision in the SEA.[211] Prior to the Act, a whistleblower under the SEA would only recover in an instance of insider trading.[212] However, under the Dodd-Frank Act, a whistleblower may recover an award obtained by the government as part of any action brought by the SEC

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202. § 806(a), 116 Stat. 745, 803 (codified at 18 U.S.C. § 1514A(b)(2)(D) (2006)).
203. § 922, 124 Stat. at 1848.
204. *Id.*
205. *Id.*
206. *Id.*
207. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
208. 15 U.S.C. ch. 2B (2006 & Supp. 2009).
209. § 922(a), 124 Stat. at 1841; Miranda Tolar, *Whistleblower Claims in the Corporate Context: An Employer's Perspective,* ASPATORE, Nov. 2010, *available at* 2010 WL 4774893, *3.
210. Tolar, *supra* note 209, at *3.
211. *Compare* §§ 748, 922, 124 Stat. at 1740, 1841, *with* 15 U.S.C. § 78u-1(a)(1) (2006).
212. 15 U.S.C. § 78u-1(a)(1).

"under the securities laws"[213] or an action under the CEA[214] brought by the CFTC.[215] Additionally, the minimum amount awarded to informants under the Act is the maximum awarded amount under the SEA.[216] Under the Act, a whistleblower stands to gain between 10% and 30% of the monetary sanctions imposed;[217] whereas, under the SEA, the percentage for recovery cannot exceed 10% of the monetary sanctions imposed.[218]

Finally, the Dodd-Frank Act also provides retaliation protection for employees who report fraudulent activity under the SEA.[219] While this provision does not amend the SEA, the Dodd-Frank Act nevertheless provides retaliation protection.[220]

B. Dodd-Frank Act Versus False Claims Act

The Dodd-Frank Act's whistleblower bounty provisions can be contrasted most sharply with the False Claims Act's[221] whistleblower provision. First, contrary to the Dodd-Frank Act's expanded definition of "original information" to include individuals with either information or analysis,[222] the False Claims Act's comparable definition of "original source" is limited to an individual with "direct and independent knowledge."[223] Accordingly, "original source" as defined under the False Claims Act is more narrow than the definition of original information under the Dodd-Frank Act; the False Claims Act's definition does not include the ability to recover based on an analysis alone.[224] Further, the phrases "exclusively derived" and "a source" are not included within the False Claims Act's original source provision and again indicates an expansion of the pool of SEC whistleblowers.[225]

Another area where the Dodd-Frank Act contrasts with the False Claims Act is in what entity can pursue a cause of action. The Dodd-Frank Act only gives the government the cause of action to pursue a

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213. § 922, 124 Stat. at 1841.
214. 7 U.S.C. ch. 1 (2006 & Supp. 2008).
215. § 748, 124 Stat. at 1740.
216. 15 U.S.C. § 78u-1(e) (2006).
217. §§ 748, 922, 124 Stat. at 1741, 1842.
218. 15 U.S.C. § 78u-1(e).
219. *See* § 922, 124 Stat. at 1845-46.
220. *Id*.
221. 31 U.S.C. § 3729-3733 (2006 & Supp. 2009).
222. §§ 748, 922, 124 Stat. at 1740, 1842.
223. 31 U.S.C. § 3730(e)(4)(B) (2006).
224. *Id.*
225. *Id.*; *cf.* §§ 748, 922, 124 Stat. at 1740, 1842.

securities fraud claim.[226] Alternatively, the False Claims Act authorizes both the government and individual relators to pursue the claims; the latter claimant securing the private right of action after the government chooses not to pursue the claim.[227] However, under the Dodd-Frank Act, claims are pursued by a special SEC whistleblower office;[228] whereas, in the False Claims Act, the claims are administered and enforced by either the Department of Justice Civil Division attorneys or by local Assistant United States Attorneys.[229] The practical significance of this change has yet to be seen; however, it is likely to provide greater amounts of resources for the government to pursue these claims.

Additionally, the Dodd-Frank Act imposes a significant limitation to potential whistleblower recoveries, while the False Claims Act does not have a similar limitation.[230] Under the Dodd-Frank Act, a whistleblower may only recover an award if the monetary sanction exceeds $1 million.[231] The False Claims Act, in contrast, does not mandate that the sanction meet a monetary threshold.[232] Finally, while the factors to determine the amount of recovery are the same as in the False Claims Act, the Act requires the SEC or CFTC to determine the allocation of that recovery, not the court or the parties, as required by the False Claims Act.[233]

C. Dodd-Frank Act Versus Sarbanes-Oxley Act

A great deal of the Sarbanes-Oxley Act[234] was amended by the Dodd-Frank Act; however, there are a few significant differences that remain. First, the resulting scope of the protected disclosures underlying the retaliation cause of action is broader in the Dodd-Frank Act than the scope of the protected disclosures in Sarbanes-Oxley because any retaliation claim that previously could not have been brought under Sarbanes-Oxley can now be brought under the Dodd-Frank Act.[235] Second, Sarbanes-Oxley requires that claimants first exhaust all administrative remedies with the Occupational Safety and Health

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226. *See* § 922, 124 Stat. at 1841.
227. 31 U.S.C. § 3730(b) (2006).
228. § 924, 124 Stat. at 1850.
229. 31 U.S.C. § 3730(a) (2006).
230. *Compare* §§ 748, 922, 124 Stat. at 1740, 1841 *with* 31 U.S.C. §§ 3729, 3730(a), (b) (2006).
231. §§ 748, 922, 124 Stat. at 1740, 1841.
232. 31 U.S.C. §§ 3729, 3730(a), (b).
233. *Compare* §§ 748, 922, 124 Stat. at 1741, 1842, *with* 31 U.S.C. § 3730(d)(1), (2).
234. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.).
235. § 922, 124 Stat. at 1846.

Administration (OSHA) in the Department of Labor before bringing an action in federal district court.[236] In contrast, the Dodd-Frank Act does not provide any such similar exhaustion requirement, giving the claimant a private right of action into federal district court.[237] Third, the remedies under the Dodd-Frank Act are more expansive than those under Sarbanes-Oxley. Under Sarbanes-Oxley, a whistleblower who ultimately succeeds in his claim of retaliation is entitled, among other remedies, to back pay with interest.[238] Alternatively, a successful whistleblower retaliation claim under the Dodd-Frank Act entitles the whistleblower to two times the amount of back pay plus interest in addition to being entitled to reimbursement of reasonable attorney's fees and other costs of litigation.[239]

V. DISCUSSION OF INTENDED AND UNINTENDED CONSEQUENCES

The Dodd-Frank Act[240] will have far-reaching effects not only for the whistleblowers and companies, but also for any courts and attorneys involved. While the whistleblower provisions of the Dodd-Frank Act have potential positive effects on the national financial system, it also has many potential negative effects for companies. Perhaps scaring companies and deterring them from fraudulent violations will prove to be effective; however, it remains to be seen whether a company can effectively battle against the lottery mentality of its employees. Indeed even when a company is acting in full compliance with law, the risk nevertheless remains that uninformed employees may develop concerns about potential misconduct.

A. The Effect of Bounty Awards

The Dodd-Frank Act's whistleblower provisions will undoubtedly assist the government in detecting fraud because of the financial incentives for whistleblowers to report perceived fraudulent violations. Prior to the Dodd-Frank Act, whistleblowers' reports already accounted for uncovering over 50% of the fraud schemes discovered in public companies.[241] Even in the months that followed the enactment of the Dodd-Frank Act, the SEC "has already received numerous tips from potential whistle-

236. § 806(a), 116 Stat. at 803 (codified at 18 U.S.C. § 1514A(b)(1) (2006)).
237. §§ 748, 922, 124 Stat. at 1744, 1846.
238. § 806(a), 116 Stat. at 803 (codified at 18 U.S.C. § 1514A(c)(2) (2006)).
239. §§ 748, 922, 124 Stat. at 1744, 1846.
240. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
241. S. Rep. No. 111-176, at 96 (2010).

blowers."[242] Perhaps the Dodd-Frank Act will increase the likelihood that not only fraudulent acts by companies will be reported, but that, even more importantly, companies will be forced to perform better financing techniques and possibly even proactively self-report.

The obvious implication of the Dodd-Frank Act's whistleblower bounty provisions is that it will increase the number of employees who report information to the SEC or CFTC, thus necessarily leading to Congress' stated intention "[t]o promote the financial stability of the United States."[243] Indeed, the Dodd-Frank Act is not just limited to current and former employees; it is broadly written to include whistleblowers who are "independent contractors, consultants, joint venture partners, sales agents, accountants . . . as well as others . . . [who] can gather and provide original information to government officials . . . ."[244] Thus, by expanding the amount of people who can report information and who can earn a hefty financial award, Congress has undoubtedly increased the amount of complaints that will be turned into the SEC or the CFTC.

The monetary incentive alone would likely provide the "quite large" potential financial benefit "to stimulate a risk-averse employee to blow the whistle"[245] that was missing from other whistleblowing incentive statutes.[246] This quite large financial award is not overstated. Indeed, in some instances, it is understated. For starters, the SEC does not necessarily fine "small potatoes."[247] Even though the whistleblower is entitled to just 10%-30% of that sanction, that award can still, nevertheless, be "staggering."[248] Take, for example, the SEC's recent $1.6 billion settlement with Siemens AG (Siemens), the electronics and engineering conglomerate, involving charges that Siemens violated the Foreign Corrupt Practices Act (FCPA)[249] in 2010.[250] Under the boun-

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242. Proposed Rules Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act (Implementing Whistleblower of SEA), 75 Fed. Reg. 70,488, 70,504 (proposed Nov. 17, 2010) (to be codified at 17 C.F.R. pt. 240, 239).

243. § 929, 124 Stat. at 1376.

244. *U.S. Financial Reform: New Whistleblower Incentives and Protections, and More Enforcement Expected*, DUANE MORRIS (Aug. 24, 2010), http://www.duanemorris.com/alerts/-financial_reform_new_whistleblower_incentives_protections_3772.html.

245. Rapp, *supra* note 10, at 113.

246. *See id.*; *see also* Stauffer & Kennedy, *supra* note 26.

247. Jesse R. Morton, *Can Hedge Funds Double Dip Under Dodd-Frank Whistleblower Rules*?, FIN. REG. F. (Jan. 6, 2011, 12:25 PM), http://blogs.reuters.com/financial-regulatory-forum/2011/01/06/can-hedge-funds-double-dip-under-dodd-frank-whistleblower-rules-westlaw-business/.

248. D. Michael Crites & Joseph C. Krella, *Dodd-Frank: Impact of the Whistleblower Incentives and the Corporate Response*, DINSMORE & SHOHL, LLP (Sept. 27, 2010), http://www.dinslaw.com/dodd_frank_whistleblower_incentives/.

249. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 to 78dd-3 (2006).

ty provisions of the Dodd-Frank Act, an individual who reported to the SEC that Siemens had engaged in a "systematic practice of paying bribes to foreign government officials to obtain business"[251] would stand to gain an award of a minimum of $160 million to a maximum of $480 million.[252] Likewise, for example, take the $550 million SEC settlement with Goldman, Sachs & Co. (Goldman) for misleading investors.[253] Under the Dodd-Frank Act, a whistleblower in this instance would be awarded anywhere from $55 million to $165 million.[254] When attaching a number to the award, quite large does not even come close to describing the amount of recovery a whistleblower stands to gain.

Furthermore, in addition to the staggering award given to a whistleblower, the amount of money paid to an attorney representing either an anonymous or non-anonymous whistleblower is also quite large. With a fee contingent on recovery of "often 40%,"[255] an attorney for a Dodd-Frank whistleblower would make up to $192 million in the Siemens incident and up to $66 million in the Goldman incident.

On the surface, a statute that awards money to people who "do[ ] the right thing,"[256] and in turn pays lawyers who help those people to do the right thing, while sanctioning companies who do the wrong thing, does not really seem all that terrible. However, as Christopher George Latore Wallace, a.k.a. Notorious B.I.G., once proclaimed, "It's like the more money we come across / The more problems we see."[257]

1. Lottery Mentality: Whistleblowers. Playing the lottery entails adopting the philosophy that there is a chance to instantly win economic success.[258] Likewise, this "lottery mentality"[259] has, in the wake of

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250. Crites & Krella, *supra* note 248. The FCPA is a securities law governed by the SEC, and would fall under the whistleblower provisions of the Dodd-Frank Act. § 922, 124 Stat. at 1841.

251. Crites & Krella, *supra* note 248.

252. §§ 748, 922, 124 Stat. at 1741, 1842.

253. Crites & Krella, *supra* note 248.

254. *See* §§ 748, 922, 124 Stat. at 1741, 1842.

255. Maxwell S. Kennerly, *The Idiot's Guide Whistleblowing Under the Dodd-Frank Wall Street Reform Act*, LITIGATION & TRIAL: THE TALES AND TRIBULATIONS OF A PHILADELPHIA LAWYER (Sept. 10, 2010, 7:39 AM), http://www.litigationandtrial.com/2010/09/articles/the-law/for-people/the-idiots-guide-whistleblowing-under-the-doddfrank-wall-street-reform-act/.

256. Rapp, *supra* note 10, at 112 (internal quotation marks omitted).

257. NOTORIOUS B.I.G., MO MONEY MO PROBLEMS (Bad Boy Records/Arista Records 1997).

258. Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 51 n.53 (2011).

the Dodd-Frank Act, already been adopted by whistleblowers and attorneys and will fuel the filing of frivolous complaints.[260] Similar to playing the lottery, few win; almost all lose.

The considerations behind a whistleblower's decision to report are undoubtedly complex; however, the principle of a cost-benefit analysis remains at the foundation of the decision.[261] A potential whistleblower considers both pecuniary and non-pecuniary elements.[262] Besides monetary rewards from the government under the Dodd-Frank Act[263] and the False Claims Act,[264] the whistleblower also stands to gain a book deal, as in the case of the Enron whistleblower Sherron Watkins,[265] or a movie deal, like Jeff Wigand of Big Tobacco.[266] Additionally, a whistleblower may gain the personal satisfaction that comes from "doing the right thing."[267] Organization loyalty and job loss are large factors that likely make the decision to report substantially harder.[268] However, the benefits and protections provided by the Dodd-Frank Act will substantially change the analysis over the decision of whether to report.[269] Thus, the financial incentives under the Dodd-Frank Act may drive an employee to file a claim under the SEC or CFTC.

The chance of a significant financial gain will likely drive the whistleblower to report fraudulent activities by an employer corporation. While in some circumstances, the information reported to the SEC or CFTC may lead to a finding that the corporation had acted fraudulently; in other circumstances, the complaint filed by the employee may be nothing more than frivolous. Both the SEC and CFTC Proposed Rules

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259. Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1486 n. 147 (2007) (internal quotation marks omitted). A lottery mentality is neither a new concept nor one that is attributed solely to private securities law, it has also been attributed to personal injury claims in which plaintiffs file frivolous lawsuits with the hopes of winning big at the cost of practically nothing. *Id*.

260. Bruce Carton, *Pitfalls Emerge in Dodd-Frank Whistleblower Bounty Provision*, SECURITIES DOCKET: GLOBAL SECURITIES LITIGATION & ENFORCEMENT REPORT (Sept. 9, 2010, 3:37 PM), http://www.securitiesdocket.com/2010/09/09/pitfalls-emerge-in-dodd-frank-whistleblower-bounty-provision/.

261. Rapp, *supra* note 10, at 111.

262. *Id*. at 112.

263. § 748, 922, 124 Stat. at 1741, 1842.

264. 31 U.S.C. § 3730(d)(1), (2) (2006).

265. *See* MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON (2003).

266. *See* THE INSIDER (Blue Lion Entertainment 1999).

267. Rapp, *supra* note 10, at 112 (internal quotation marks omitted).

268. *Id*.

269. *See id*.

seek to deter this lottery mentality in the latter circumstance by requiring information submitted to be under penalty of perjury.[270] But not all frivolous complaints are untruthful. In the case of a truthful but frivolous complaint, a non-legal trained employee who is generally aware of the Dodd-Frank Act and who chooses not to retain an attorney, evaluates whether the action of the corporation-employer violates securities law by likely reading the statute. The employee may also be aware of a sense of urgency to file "original information," recognizing that filing a truthful but frivolous claim will be at no personal expense. Finally, the employee is aware, and likely makes the decision not only to file but to file quickly, because of the potential for a significant financial award, and thus, is acting under a lottery mentality. In the end, the complaint filed is considered frivolous; the corporation-employer did not act fraudulently.

This lottery mentality is accompanied by the reassurance of the Dodd-Frank Act's retaliation protection and the employee's ability to remain anonymous if counsel is retained. Accordingly, the Dodd-Frank Act made the pitfalls of whistleblowing seem meager. Additionally, the SEC and CFTC's Proposed Rules further the possible truthful yet frivolous complaint by including the word "potential" in the definition of whistleblower to describe the type of violation an employee may report.[271]

Not only will the lottery mentality drive employees to report truthful but frivolous claims of fraud and other improper conduct, but it will encourage the employee to file the claim with the SEC or CFTC first, rather than reporting internally through the company's internal procedures or guidelines. However, given the significant monetary awards that employees can now receive under the Dodd-Frank Act,[272] the employee is more likely to report externally first. Therefore, the ethics and compliance programs of reporting fraud internally could be significantly undermined.

One of the factors included in the Description of the SEC's Proposed Rules may partially stop the internal reports from being undermined because the SEC "will consider higher percentage awards for whistle-

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270. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,522; Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act (Implementing Whistleblower of CEA), 75 Fed. Reg. at 75,728, 75,745 (proposed Dec. 6, 2010) (to be codified at 17 C.F.R. pt. 165).

271. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,519; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,744.

272. *See* §§ 748, 922, 124 Stat. at 1741, 1842.

blowers who first report violations" internally.[273] However, this consideration is a "permissible" consideration and is only included in the Description of the Proposed Rules, and not the Proposed Rules themselves.[274] Additionally, the CFTC Proposed Rules regarding the criteria for the amount of the award includes the exact language of the correlating SEC Proposed Rules; however, the CFTC does not include this consideration in CFTC Description of the Proposed Rules.[275] Additionally, while both Proposed Rules alleviate pressure for an employee to report to the SEC or CFTC quickly by allowing the whistleblower to relate back to the date of reporting internally, this does not necessarily encourage a whistleblower to internally report first. Therefore, without a requirement that the whistleblower first report internally, the internal guidelines and compliance procedures are at risk of being undermined.

2. Lottery Mentality: The Cottage Industry and Plaintiff's Attorneys. The Dodd-Frank Act has and will continue to create a lottery mentality for plaintiff's attorneys. This is most evidenced by the "cottage industry" that has already been created to assist potential whistleblowers with their SEC or CFTC complaints.[276] In the legal community, this type of industry emerges when practice groups are formed to assist plaintiffs in pursuing legal claims, "similar to whistleblower litigation in regulated industries such as pharmaceuticals and oil and gas."[277] In the wake of Dodd-Frank, the cottage industry was quick to emerge where plaintiff's lawyers already specialized in securities litigation.[278] Additionally, with an easier original information standard for the employee and an easier burden of proof, as well as a majority of successful claims reaching into the hundreds of millions of monetary sanctions against companies, attorneys stand to make considerable profits.

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273. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,500.

274. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,521.

275. *See* Implementing Whistleblower of CEA, 75 Fed. Reg. 75,738-39.

276. Ronald D. Orol, *Dodd-Frank Spawns Cottage Industry: Law Firms and Swaps Consultants Ramp Up to Advise Companies with Statute*, MARKET WATCH (Dec. 7, 2010, 6:00 a.m.), http://www.marketwatch.com/story/dodd-frank-spawns-cottage-industry-2010-12-07/; *see also* Kennerly, *supra* note 255 (encouraging potential whistleblowers to retain counsel for Dodd-Frank whistleblowing litigation).

277. Adele Nicholas, *Whistleblower Provisions of the Dodd-Frank Act Pressure Employers to Improve Compliance*, INSIDE COUNSEL (Oct. 1, 2010), http://www.insidecounsel.com/Issues/2010/October-2010/Pages/Whistleblower-provisions-of-the-DoddFrank-Act-pressure-employers-to-improve-compliance.aspx?page=2.

278. Dulce J. Foster, *Whistleblower Windfall*, FREDRIKSON & BYRON, P.A. (Aug. 2010), http://www.fredlaw.com/articles/investigations/invest_1008_djf.html.

Based on the aforementioned figures,[279] plaintiff's attorneys stand to make a large amount of money. However, when filing with the SEC, this may not be necessarily hard-earned money. Unlike the False Claims Act,[280] Congress did not include qui tam provisions that an employee could bring himself. Instead, Congress created an office within the SEC to solely handle Dodd-Frank claims.[281] The prescribed role for the attorney is to represent an anonymous or known client and, in the case of an anonymous client, certify to the SEC, or CFTC, that the identity of the whistleblower is verified.[282] However, the SEC would likely do most of the investigation as an attorney would not likely participate in a large part of the litigation.[283] Accordingly, a simple cost to benefit ratio analysis demonstrates that an attorney with a 30%-50% contingency fee would be receiving a large sum of money for not actually doing a lot of legal work.

A preliminary glance at the amount of work and risk an attorney would undergo when filing such claims to the SEC or CFTC on a client's behalf and the potential for a large financial sum raises an ethical concern. Under ABA Model Rule 1.5(a),[284] an attorney must charge a client a reasonable fee.[285] Specifically, one factor used to determine the reasonableness of a fee, among others, includes the "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly."[286] Thus, a large contingency fee, especially when the work of the attorney is minimal, is likely unethical.

However, at least one attorney suggests that attorneys will "navigate the nascent stages of the investigation and . . . put the case together for the government" because the SEC Center for Complaints and Enforcement Tips will, "as a rule, [be] understaffed and overworked."[287] Furthermore, an attorney for a client with a successful report would ensure that the whisteblower's interests are properly taken care of when the SEC decides his reward. This is especially true considering one of

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279. *Supra* notes 245-55 and accompanying text.

280. 31 U.S.C. § 3730 (2006).

281. § 924, 124 Stat. at 1850.

282. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,738.

283. Letter from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Oct. 12, 2010), *available at* http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-19.pdf.

284. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2008).

285. *Id*.

286. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(1).

287. Kennerly, *supra* note 255.

the factors that the SEC must consider is the whistleblower's participation in the investigation. Even so, the reasonableness of a contingency fee in a case in which an attorney's work is comparatively minimal when compared to the same fee charged in a qui tam case[288] under the False Claims Act calls the reasonableness of the fee into question.

The concern regarding the mechanics of a lawyer representing whistleblowers is not speculation: the Dodd-Frank whistleblower cottage industry is, even in the early stages, booming, as the "flood[]" of whistleblowers that go to law firms with whistleblower practice groups is considerable.[289] When Erika Kelton, a partner at Phillips & Cohen in Washington, D.C., was asked compare the surge of tipster calls since the passage of the Dodd-Frank Act, she replied, "It's not only a different ballpark, it's an entirely different galaxy."[290] From the viewpoint of an attorney, this influx of clients means the increase in revenue, especially if the costs of actually representing clients is minimal. Accordingly, attorneys need to remain cautious of filing frivolous claims. This can be a hard task, not only because attorney's run the grave risk of adopting the lottery mentality, but also because the nature of the claim, being the first to file original information, is such an important part of the complaint process. Attorneys should remember that in cases of anonymous clients, they must certify the identity of the client to the SEC or CFTC under the Proposed Rules,[291] giving them some incentive to verify the legitimacy of the claims. Additionally, Congress has expressed concern regarding false reporting and directed the SEC Inspector General to conduct a study examining "whether the reward levels are so high as to encourage illegitimate whistleblower claims."[292] While the study is not yet released, it remains to be seen whether a majority of the reports are legitimate.

3. Lottery Mentality: Effect on Companies and Corporations, and Defense Attorneys. Plaintiffs and their attorneys are not the only groups that should be concerned about the cottage industry built around the lottery mentality; nor are whistleblowers the only ones who

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288. *See, e.g.,* Roberts Law Firm, *False Claims Act Facts: Background, Issues and Impact* (last visited Feb. 27, 2011), http://www.roberts-partners.com/false_claims_facts_index.html.

289. Kennerly, *supra* note 255.

290. Sue Reisinger, *Firms Face Sudden Rush of Whistleblower Claims*, LAW.COM (Sep. 9, 2010) www.law.com/jsp/cc/PubArticleCC.jsd?id=1202471768561 (internal quotation marks omitted).

291. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,523; Implementing Whistleblower of CFTC, 75 Fed. Reg. at 75,738.

292. § 922, 124 Stat. at 1848-49.

need an attorney. Attorneys for companies and corporations have already joined the cottage industry by helping companies "adapt to the new mandates," especially in light of the new monetary incentives for the employees to report instances of fraudulent conduct.[293] However, this can hardly be seen as purely a monetary motive because companies stand to lose the most with the enactment of the Dodd-Frank Act. Recognizing the effect that the Dodd-Frank Act will have on companies, firms have been diligently issuing client alerts and advisory notices that provide client-companies with the basic information of the Dodd-Frank Act and with suggestions on how to avoid whistleblower litigation.[294]

Regardless, considering the lottery mentality that has likely consumed employees, avoiding litigation seems unrealistic. Indeed, the suggestions for helping companies strengthen their internal guidelines and procedures seem to barely make a dent in stopping the number of potential whistleblower claims. For example, law firms have suggested that companies reevaluate their current internal reporting system to encourage employees to first internally report.[295] But even then, a company is unlikely to provide any sort of incentive equivalent to the monetary incentives that employees stand to gain. Other suggestions include taking action to encourage and enhance the general loyalty of the employees or agents, thus discouraging employees from quietly working with the government and plaintiff's counsel with an investigation.[296] While this may have an effect in limited circumstances, a "large enough financial benefit in favor of blowing the whistle could outweigh any social or psychological factors favoring silence."[297] Perhaps the most promising advice for companies is to start where the problem occurs and focus on the adequateness of their current compliance programs[298] to make it less likely that an employee would violate the law in the first place by educating employees about the legal requirements.

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293. Orol, *supra* note 276.

294. *See Dodd-Frank Act: Enhanced Protection for Whistleblowers Against Employer Retaliation*, *supra* note 164; Womble, Carlyle, Sandridge & Rice, LLC, *Client Alert: Dodd-Frank Solicits Whistleblowers* (Sept. 2010), http://www.jdsupra.com/post/documentViewer.aspx?fid=57a93ea5-7b0d-4405-ac7f-09a8f1f97e15.

295. *See, e.g.,* Womble, Carlyle, Sandridge & Rice, LLP, *supra* note 294.

296. *See, e.g.,* Obiamaka P. Madubuko, Michael Kendall, *Whistleblowers and Dodd-Frank: Is Your Company Protected?*, BOARDMEMBER.COM, http://www.boardmember.com/Article_Details.aspx?id=5454 (last visited May 2, 2011).

297. Rapp, *supra* note 10, at 113.

298. *See, e.g.,* Stauffer & Kennedy, *supra* note 26; *Fueling the FCPA Fire: The Dodd-Frank Act Whistleblower Provisions*, ARENT FOX (July 20, 2010), http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=2565.

However, regardless of the suggestions offered by lawyers and the changes implemented by companies, the risk remains that companies will nevertheless have to endure not only legitimate claims, but also frivolous claims. Inherent within the increase of claims is the increase of costs that the company would have to spend to defend claims, even the frivolous ones. Because of this, a company may be even more likely to make a preemptory self-report to the SEC or CFTC. Consistent with Congress's purpose, it is clear that the Dodd-Frank Act may clean up various companies; however, the bounty provisions of the Dodd-Frank Act may also end up creating more problems for the legal community and law-abiding corporations.

B. Changes in Retaliation Claims

There are also several important considerations concerning the Dodd-Frank Act's employee protection provisions. First, inherent within the lottery mentality of employee-whistleblowers is the protection that the Dodd-Frank Act provides against employment retaliation. In addition to being driven by the monetary incentive, an employer is no longer concerned about the risk of retaliation for blowing the whistle on an employer-company.[299] The SEC and CFTC Proposed Rules only seek to make this easier, as the addition of "potential violation" to the definition of "whistleblower" affords the employee protection regardless of the adjudication of the matter.[300] In addition, the Dodd-Frank Act affords stronger protection by including, among other things, a lengthy statute of limitations.[301]

Furthermore, the Dodd-Frank Act gives a private cause of action to a whistleblower employee who suffered retaliation from the employer,[302] unlike Sarbanes-Oxley,[303] which mandates that an employee exhaust administrative remedies.[304] By giving plaintiffs a direct access to federal courts, Congress has further increased the need for attorneys as well as the amount of claims that federal courts will entertain. In addition, similar to litigation costs in defending whistleblowing claims, a company's litigation cost in defending retaliation claims will be significant. The extensive discovery and motion practice under the

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299. Rapp, *supra* note 10, at 113.

300. Implementing Whistleblower of SEA, 75 Fed. Reg. at 70,519; Implementing Whistleblower of CEA, 75 Fed. Reg. at 75,745.

301. *See* § 922, 124 Stat. at 1846.

302. § 922, 124 Stat. at 1846.

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

304. § 806(a), 116 Stat. at 803 (codified at 18 U.S.C. § 1514A(b)(1)(B) (2006)).

federal rules of civil procedure could result in not only higher litigation costs, but also a greater risk of confidential information being disclosed, as well as an increase in the possibility of other litigation.

The Dodd-Frank Act's retaliation provisions also allow for a higher award to whistleblowers who were retaliated against because, under the Dodd-Frank Act, a plaintiff could be awarded double back pay. In turn, an attorney's fees will also be higher because of the federal court venue and the higher back pay awards, of which attorney fees are based.

VI. CONCLUSION

It is too early to determine the exact ramifications and interpretations of the Dodd-Frank Act. In recent fashion, Congress has created a broad statutory charter and will leave it to the regulators to formulate the rules and the courts to interpret them. However, as more information is provided and interpreted, it is important to adjust practices of both law firms and companies to best adhere to the recent developments.

However, it is clear that under the Dodd-Frank Act, a whistleblower could potentially receive a large monetary award from filing a claim with the SEC or CFTC, or from a whistleblower's successful employment retaliation claim. While this has the potential to remedy significant financial concerns within companies as Congress intended, a lottery mentality and cottage industry has already emerged in the wake of the Dodd-Frank Act. The Act certainly provides more than just a sufficient monetary incentive and strong protections to encourage whistleblowers to report fraudulent actions. Indeed, the Act provides an award and protections that is incomprehensible, even fairy-tale like. Yet, the repercussions of reporting may end up, regretfully, creating a facet of society driven by greed and the potential for quick wealth. It is this latter unintended consequence that makes the Dodd-Frank Act seem almost too good to be true. However, perhaps after looking at the underlying effects of the Act, things are not always as they seem.

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