

A FISTFUL OF DOLLARS: BOUNTY HUNTING UNDER THE DODD-FRANK ACT'S WHISTLEBLOWER PROVISIONS

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I. INTRODUCTION

“A man’s life in these parts often depends on a mere scrap of information.”

-The Man with No Name, in *A Fistful of Dollars*¹

From the collapse of Enron and WorldCom² to the Great Recession later in the decade,³ economic turmoil was just one defining characteristic of the 2000s. In direct response to these problems, the U.S. Congress passed multiple statutes in hopes that future instability could be avoided.⁴ In passing legislation, Congress recognized regulators lacked a key component to avert future crises or, worse, an industry-wide collapse: inside information.⁵

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) contains Congress’ most recent effort to obtain inside information from knowledgeable individuals.⁶ The Dodd-Frank Act is considered to be “the most comprehensive financial regulatory overhaul since the Great Depression.”⁷ Unlike past legislation that only provided

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1. A FISTFUL OF DOLLARS (Constantin Film Produktion 1967).
2. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives For Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U.L. REV. 91, 94 (2007).
3. David Wessel, *Did ‘Great Recession’ Live Up to the Name?*, WALL ST. J., Apr. 8, 2010, <http://online.wsj.com/article/SB10001424052702303591204575169693166352882.html>.
4. See Rapp, *supra* note 2, at 92; Damian Paletta, *U.S. Lawmakers Reach Accord on New Finance Rules*, WALL ST. J., June 25, 2010, <http://online.wsj.com/article/SB10001424052748703615104575328020013164184.html>.
5. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 8 (2002).
6. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
7. Ross Colvin, *Obama Signs Sweeping Wall Street Overhaul into Law*, REUTERS, July 21, 2010, <http://www.reuters.com/article/2010/07/21/us-financial-regulation-obama-idUSTRE66K1QR20100721>.

protections and private causes of action to informants,⁸ the Dodd-Frank Act created a bounty program to increase the number of insiders in the financial industry who voluntarily provide the government with information on fraud.⁹ Such incentives, however, raise concerns about frivolous claims and bad-faith whistleblowers: self-interested employees seeking large bounties who are willing to bypass internal compliance programs.¹⁰

But many of these worries are misplaced. The Dodd-Frank Act's requirement that whistleblowers provide "original information"¹¹ can create a proper threshold so that the Securities and Exchange Commission (SEC) only rewards good-faith whistleblowers. This would allow the SEC to bar frivolous claims and only obtain quality tips so it can remain efficient in investigating claims. This Comment argues that, if "original information" is interpreted in a non-restrictive way and if the appropriate rules are promulgated by the SEC, the Dodd-Frank Act can strike the proper balance between the government's interest in obtaining inside information from whistleblowers while not rewarding self-interested employees and avoiding frivolous whistleblowing claims.

Section II provides a history and analysis of successful whistleblower and bounty programs. Next, Section III discusses the incentives and disincentives facing individuals deciding to become whistleblowers, as well as the government's need for information within the financial sector. Section IV provides an overview of the Dodd-Frank Act's whistleblower bounty program that was passed in 2010. Finally, Section V will analyze the whistleblower program within the Dodd-Frank Act.

II. HISTORICAL WHISTLEBLOWER SCHEMES

Prior to the collapses of Enron and WorldCom, individuals like Sherron Watkins and Cynthia Cooper blew the whistle on their respective companies' faulty accounting and bookkeeping practices.¹² Although these two whistleblowers brought the practices to light, many other employees were aware of, if not directly involved with, the wrongdoings of the companies and yet did nothing.¹³ With so many knowledgeable employees and so few whistleblowers, Congress realized that if it truly wanted to

8. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

9. James Parkinson & Lauren Randell, *Fuel to the Fire: Whistle-Blower Incentives in the Dodd-Frank Act*, 1848 PLI/CORP. 897, 900 (2010).

10. See Jessica Holzer, *Companies Prod SEC on Whistleblower Proposal*, WALL ST. J., Feb. 17, 2011, <http://online.wsj.com/article/SB10001424052748703961104576148690611631226.html>.

11. 15 U.S.C.A. § 78u-6(b)(1) (West 2011).

12. Richard Lacayo & Amanda Ripley, *Persons of The Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002, <http://www.time.com/time/magazine/article/0,9171,1003998,00.html>.

13. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1119-20 (2006).

prevent future crises it would have to coax more insiders to “bring information about ongoing corporate and securities fraud to the attention of regulators.”¹⁴

With the Dodd-Frank Act, the U.S. government hopes to increase the number of whistleblowers like Ms. Watkins and Ms. Cooper through enhanced incentives.¹⁵ The Dodd-Frank Act amended the Sarbanes-Oxley Act¹⁶ to include a whistleblower bounty scheme similar to those used under the successful False Claims Act (FCA)¹⁷ and by agencies like the U.S. Customs Service¹⁸ and the SEC.¹⁹ Therefore, an overview of the bounty schemes used in the FCA, the award structures of the Customs informant statute, and the whistleblower protections offered in the Sarbanes-Oxley Act are provided below.

A. The False Claims Act

The FCA is one of the most successful bounty programs the government has in place.²⁰ While the FCA currently awards bounties to whistleblowers who are an “original source” of information leading to successful actions,²¹ Congress modified what is required of a whistleblower under the FCA twice during the twentieth century before settling on the “original source” requirement.²²

The FCA was initially passed in 1863²³ and allowed the government to recover funds from contractors who filed fraudulent claims during the Civil War.²⁴ Also, the FCA allowed for *qui tam* suits,²⁵ where private

14. Rapp, *supra* note 2, at 108.

15. Parkinson & Randell, *supra* note 9, at 897.

16. Christopher Wiener, *Blowing the Whistle on Van Asdale: Analysis and Recommendations*, 62 HASTINGS L.J. 531, 556 (2010).

17. 31 U.S.C.A. § 3730 (West 2011).

18. 19 U.S.C.A. § 1619 (West 2011).

19. See H.R. REP. NO. 100-910, at 22-23 (1988), reprinted in 1988 U.S.C.C.A.N. 1643, 6059-60. See also James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 19 DICK. J. INT'L. L. 117 n.48 (2000) (for a list of federal bounty statutes).

20. Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 141-42 (2006).

21. 31 U.S.C.A. § 3730(e)(4)(A) (West 2011).

22. See Tipton F. McCubbins & Tara I. Fitzgerald, *As False Claim Penalties Mount, Defendants Scramble for Answers Qui Tam Liab.*, 62 BUS. LAW. 103, 105 (2006). See also S. REP. NO. 99-345, at 9-13 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273-78.

23. Act of March 2, 1863, ch. 67, 12 Stat. 696-98.

24. S. REP. NO. 99-345, at 4 (1986).

25. “Qui tam” is derived from the phrase, “qui tam pro domino rege quam pro se ipso in hac parte sequitur.” This means “he who pursues this action on our Lord the King’s behalf as well as his own.” See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n. 1 (2000). See also BLACK’S LAW DICTIONARY 1368 (9th ed. 2009) (translating *qui tam* as “who as well for the king as for himself sues in this matter”).

individuals bring suit on behalf of the government.²⁶ Individuals bringing a *qui tam* suit under the FCA are called “relators.”²⁷ The *qui tam* suits allowed whistleblowers alleging and proving fraud to bring an action under the FCA in federal court, the penalty of which was divided between the relator and the government.²⁸ After the whistleblower presents the claim to the government, the government can choose whether to intervene and take over primary responsibility for the action.²⁹

The FCA originally punished any persons who “knowingly make or present for payment any false claim against the United States” and allowed other private individuals to bring suit against whoever made the false claim.³⁰ Initially, relators brought very few *qui tam* suits.³¹ The FCA originally stated that:

Such suit may be brought and carried on by any person, as well for himself as the United States. The same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney.³²

As the original language of the FCA did not require an individual to contribute anything to a suit, “a number of so-called ‘parasitical-actions’ were brought under the [FCA]” where informants merely copied public documents and brought *qui tam* suits using the public information.³³ Courts even allowed relators to recover damages despite the fact that they copied allegations in their complaints directly from publicly disclosed criminal indictments.³⁴

Congress amended the FCA in 1943 to prevent these “parasitical-actions” from continuing.³⁵ The amendments allowed *qui tam* actions only when the individual provided “information not in the possession of the [U.S.],” thus only allowing persons “providing new information to sue”

26. S. Rep. No. 99-345, at 10 (1986).

27. *Id.*

28. See Bucy, *supra* note 5, at 44.

29. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. at 769-70.

30. *United States v. Griswold*, 24 F. 361, 363 (1885), *citing* Rev. Stat. § 3490 (1863).

31. Andrew L. Hurst, *Civil False Claims Act of 2003: The United States Has Recovered Billions of Dollars from Government Contractors Over the Last Decade Using a Statue with Origins in the Civil War. What is the Civil False Claims Act, and Where Is It Heading?*, 51-JAN FED. LAW. 26, 26 (2004).

32. Rev. Stat. § 3491 (1863), *restated as* Pub. L. 86-507, 57 Stat. 608, *amended by* 31 U.S.C. § 3730 (1988).

33. *United States ex rel. LaValley v. First Nat'l Bank of Bos.*, 707 F.Supp. 1351, 1354 (D. Mass. 1988).

34. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

35. McCubbins, *supra* note 22, at 105.

when there had been any form of public disclosure of allegations.³⁶ Basically, individuals were barred from bringing *qui tam* suits if their information was known to the government.³⁷

These changes were interpreted restrictively and made private suits very difficult for individuals to bring.³⁸ The 1943 amendments and judicial interpretations created a “total bar on *qui tam* actions based on information already in the Government’s possession,” in what came to be known as the “Government knowledge bar.”³⁹ This interpretation barred individuals from bringing a *qui tam* action after the government learned of the false claim, regardless of where it learned about the claim.⁴⁰ With the 1943 amendment, “the volume and efficacy of *qui tam* litigation dwindled.”⁴¹

To fix the problem of the Government knowledge bar, Congress acted again in 1986 due to defense contractors defrauding the government.⁴² Congress sought “the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant interest to contribute on their own.”⁴³ To achieve this mean, the 1986 amendments were hoped to “encourage more private enforcement suits,”⁴⁴ which Congress viewed as “one of the least expensive and most effective means of preventing frauds.”⁴⁵

The 1986 amendments allowed “an ‘original source’ relator to pursue a *qui tam* action even when the government [was] aware of the source’s information prior to the filing of a suit.”⁴⁶ After these amendments, relators were given more control over suits, and the use of the *qui tam* provision in the Act “increased dramatically.”⁴⁷ Before 1986, the Department of Justice (DOJ) received about six *qui tam* cases per year.⁴⁸ After the amendments, over 200 *qui tam* suits on average were filed per year for a fifteen-year period.⁴⁹

36. United States *ex rel.* Stinson, Gerlin & Bustamante, P.A. v. Provident Life & Ins. Co., 721 F.Supp. 1247, 1249 (S.D. Fla. 1989).

37. Rapp, *supra* note 2, at 128.

38. Stinson, Gerlin & Bustamante, P.A. v. Provident Life & Ins., 721 F.Supp. at 1249.

39. Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S.Ct 1396, 1406-07 (2010), *reh'g denied*, 130 S.Ct. 3351 (2010).

40. *Id.* at 1406.

41. *Id.*

42. McCubbins, *supra* note 22, at 105.

43. United States *ex rel.* Springfield Terminal R. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

44. S. REP. NO. 99-345, at 23-24 (1986).

45. *Id.* at 11.

46. Rapp, *supra* note 2, at 128.

47. Jill Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 185 (1997).

48. Bucy, *supra* note 5, at 48.

49. *Id.*

The relevant portion of the 1986 False Claim Act's *qui tam* section reads:

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means 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.⁵⁰

When a public disclosure occurs, the original source requirement in the FCA's current form bars relators from bringing a *qui tam* action.⁵¹ Even if the government is aware of certain information, when there has been no public allegations or disclosures then "there is no need for a *qui tam* relator to show that he is the 'original source' of the information."⁵² The major threshold is therefore "whether the allegations of fraud have been 'public[ly] disclos[ed], . . . not whether they have landed on the desk of a DOJ lawyer."⁵³

By amending the Government knowledge bar and including the original source exception, Congress "allowed private parties to sue even based on information already in the Government's possession" so long as no public disclosures had been made.⁵⁴ After these changes, the amount of claims brought under the *qui tam* provisions skyrocketed.⁵⁵ Now, the DOJ is working through roughly 1,000 FCA whistleblower cases at any one time.⁵⁶

50. 31 U.S.C. § 3730(e)(4) (1988), amended by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 896 (2010).

51. McCubbins, *supra* note 22, at 105.

52. United States *ex rel.* Wang v. FMC Corp., 975 F.2d 1412, 1416 (9th Cir. 1992).

53. Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S.Ct. 1396, 1410 (2010), *reh'g denied*, 130 S.Ct. 3351 (2010).

54. *Id.* at 1415 (Sotomayor, S., dissenting) (quoting Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 133 (2003)).

55. Rapp, *supra* note 2, at 129.

56. Joe Palazollo, *After Dodd-Frank, SEC Getting At Least One FCPA Tip A Day*, WALL ST. J. L. BLOG (Sept. 30, 2010, 11:21 AM), <http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day>.

The FCA allows relators to receive anywhere from fifteen percent to twenty-five percent of the proceeds of the claim when the DOJ takes over the action.⁵⁷ If the DOJ does not take over the claim and the relator proceeds on behalf of the government, the relator, at a minimum, can receive twenty-five percent of the proceeds with the possibility of receiving thirty percent.⁵⁸ During the fourteen year period after the 1986 amendments, the net recovery for FCA cases was over four billion dollars, and the average successful *qui tam* relator made over one million dollars.⁵⁹

Even with these successes, many of the contractors who have been subject to FCA *qui tam* suits consider the FCA “as a costly, substantial burden of doing business with the government.”⁶⁰ Also, the DOJ has noted that “[a] ‘significant number’ of *qui tam* cases lack merit, a fact the Justice Department found ‘unsurprising’ given that ‘any bounty statute will foster opportunism and wishful thinking to some degree.’”⁶¹ Such suits often carry substantial and unnecessary costs to the targeted company.⁶²

Regardless of some companies’ thoughts on the FCA, some commentators have suggested bringing in the FCA’s *qui tam* bounty model to private securities litigation.⁶³ These commentators view the sheer volume of *qui tam* suits filed and the billions of dollars of misappropriated funds recovered by the government as indicative of the bounty scheme’s effectiveness.⁶⁴

B. The Customs Informant Statute

Just as Congress passed the FCA to deal with contractors defrauding the government, the U.S. Treasury began awarding informers with the hope of stopping smuggling.⁶⁵ The Secretary of the Treasury is given discretion to award informers who provide “original information” about these customs frauds and violations.⁶⁶

57. 31 U.S.C.A. § 3730(d)(1) (West 2011).

58. 31 U.S.C.A. § 3730(d)(2) (West 2011).

59. Rapp, *supra* note 2, at 131.

60. William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 205 (1998).

61. Rapp, *supra* note 2, at 133 (quoting Stuart M. Gerson, Assistant Attorney Gen., Civil Div. Dept. of Justice, Remarks Before the 1991 Annual Meeting of the American Bar Association Public Contract Section (Aug. 12, 1991)).

62. Bucy, *supra* note 5, at 63.

63. *E.g., id.*; Rapp, *supra* note 2.

64. Depoorter & De Mot, *supra* note 20, at 141-42, *accord.*, Bucy, *supra* note 5; Rapp, *supra* note 2.

65. M. Chris Ludtke, *Export Enforcement by U.S. Customs: Practical Information that Every Lawyer Should Know*, 675 PLI/COMM 581 (1993).

66. 19 U.S.C.A. § 1619(a)(1)(B) (West 2011).

Unlike the Dodd-Frank Act, where “original information” is further defined within the statute,⁶⁷ the Treasury statute awarding informants does not define “original information.” Even so, courts have read that the Customs informant statute: 1) requires the information to initiate an investigation before leading to a reward;⁶⁸ 2) bars disclosure of information on a piecemeal basis;⁶⁹ and 3) creates mandatory awards for “original information,” the amount of which is at the Secretary of the Treasury’s discretion.⁷⁰ The threshold created by the statute is meant to increase an informant’s monetary incentive so as not to “severely curtail the quality and quantity of original information received by Customs.”⁷¹

The Customs informant statute gives the award to the informant providing original information, but, “whether justly or unjustly, awards nothing to those who furnish evidence to confirm the truth of the statements of the original informers.”⁷² In one case involving “original information,” three airplane fuelers tipped off the Federal Bureau of Investigation (FBI) and the Customs Service about an aircraft being loaded with arms and ammunition at the airport where they worked.⁷³ While an investigation was underway about this arms and ammunition transportation, another informant, a mechanic at the same airport, informed agents of the aircraft’s whereabouts.⁷⁴ The three fuelers were given awards under the statute, but the mechanic was denied an award because by the time he provided information, “the investigation of [the criminal’s] arms export was well underway.”⁷⁵ The court noted that “[h]owever helpful [the mechanic’s] location of the aircraft may have been, it was not the original information leading to investigation and ultimately the forfeiture of the aircraft.”⁷⁶

In another case, a court had to determine whether an informant should receive multiple awards for information on unpaid duties caused by the improper invoice practices of multiple companies.⁷⁷ The informant argued that the reward should be “computed individually for each company involved,”⁷⁸ lest future informants be encouraged “to give out information on a piecemeal basis in order to obtain the maximum compensation.”⁷⁹ The court disagreed with the informant, noting the “original” requirement for

67. 15 U.S.C.A. § 78u-6(a)(3) (West Supp. 2011).

68. *Lacy v. United States*, 607 F.2d 951, 954 (Ct. Cl. 1979).

69. *Cornman v. United States*, 409 F.2d 230, 234 (Ct. Cl. 1969).

70. *Lewis v. United States*, 32 Fed. Cl. 59, 64 (1994).

71. *Id.*

72. *United States v. Simons*, 7 F. 709, 712 (E.D. Mich. 1881).

73. *Lacy*, 607 F.2d at 952.

74. *Id.* at 953.

75. *Id.*

76. *Id.*

77. *Cornman v. United States*, 409 F.2d 230, 231 (Ct. Cl. 1969).

78. *Id.* at 233.

79. *Id.* at 234.

information would preclude any tip on a similar matter as that provided in the initial disclosure from being awarded, thus barring informants from being rewarded for disclosing information on a piecemeal basis.⁸⁰

Finally, the Customs informant statute is interpreted to give the Secretary of the Treasury discretion as to the amount of an award, but does not allow the Secretary to deny an award arbitrarily.⁸¹ While the statute states that “the Secretary may award” an informant,⁸² courts have interpreted an award to be mandatory because an “informer would have little incentive to give original information upon occasions at considerable personal risk to officers of the United States if his compensation rested in the absolute discretion, almost, one might say, in the whim, of an executive officer.”⁸³

Thus, while the Customs informant statute requires informants to receive an award when they produce information initiating an investigation, subsequent informants producing valuable information are denied if an investigation has begun. The mandatory monetary award is meant to increase the incentive to produce information, but the threshold created by “original information” removes incentives for possible informants willing to produce details of an investigation.

C. The Sarbanes-Oxley Act

The federal government decided to increase regulations and offer more protections to whistleblowers after the well-publicized roles of Ms. Watkins and Ms. Cooper during the collapse of Enron and WorldCom.⁸⁴ The Sarbanes-Oxley Act of 2002⁸⁵ was meant to “increase transparency in financial markets, which allow[ed] investors to rely on the accuracy of financial information.”⁸⁶

Unlike the FCA, which only applies to government contractors, the Sarbanes-Oxley Act affects publicly traded companies in the financial sector.⁸⁷ Prior to 2002, protections for whistleblowers in the private sector were generally “decentralized and uneven.”⁸⁸ After all of the publicity whistleblowers like Ms. Watkins and Ms. Cooper received after the Enron

80. *Id.*

81. *Lewis v. United States*, 32 Fed. Cl. 59, 64 (1994).

82. 19 U.S.C.A. § 1619 (West 2011).

83. *Wilson v. United States*, 135 F.2d 1005, 1009 (3d Cir. 1943).

84. *E.g.*, Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1031 (2004); Richard Lacayo & Amanda Ripley, *Persons of The Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002, <http://www.time.com/time/magazine/article/0,9171,1003998,00.html>.

85. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

86. Cherry, *supra* note 84, at 1055.

87. *Id.* at 1064.

88. *Id.* at 1033.

and WorldCom fiascos,⁸⁹ Congress worked to ensure they and other whistleblowers would receive protection.⁹⁰ The Sarbanes-Oxley Act partially fixed the “piecemeal” protections offered under federal and state laws and created a more even system of protections.⁹¹

The Act sought to protect whistleblowers who “provide[d] information, cause[d] information to be provided, or otherwise assist[ed] in an investigation regarding any conduct which the employee reasonably believes constitute[d] a violation” of federal law.⁹² Once the employee passed this threshold and was able to establish a *prima facie* case of a violation, she must report the violations to a supervisor or the government.⁹³ Once established, the Sarbanes-Oxley Act’s anti-retaliation provisions come into effect.⁹⁴ If a whistleblower is able to demonstrate her employer violated the anti-retaliation portions of the Sarbanes-Oxley Act the Occupational Safety and Health Administration (OSHA) will investigate the retaliation.⁹⁵ Once a successful case has been established by the whistleblower and OSHA,⁹⁶ OSHA will sanction the company and provide “all relief necessary to make the employee whole.”⁹⁷

Even so, commentators have referred to many of the Sarbanes-Oxley Act’s provisions as “garbage.”⁹⁸ While the Act provides some protections, potential whistleblowers may “doubt their ability to prove more subtle forms of workplace retaliation,” such as public humiliation and demoralization by co-workers.⁹⁹ Therefore, commentators argued that the Sarbanes-Oxley Act needed to be strengthened to better effectuate Congress’ goal of inducing whistleblowers in private companies to come forward with reliable information, either by allowing for private causes of action through *qui tam* suits like the FCA or through the creation a separate fund where bounties are rewarded to the whistleblower who provides information to the SEC.¹⁰⁰

89. See Lacayo, *supra* note 84.

90. Cherry, *supra* note 84, at 1031-33.

91. *Id.* at 1049.

92. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §806(a), 116 Stat. 745, 803 (2002).

93. *Id.*

94. *Id.*

95. Cherry, *supra* note 84, at 1066.

96. *Id.* at 1066-67 (the Sarbanes-Oxley Act gave oversight to the Department of Labor, which delegated authority over retaliation claims to OSHA).

97. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 803 (2002).

98. Rapp, *supra* note 2, at 94-95.

99. *Id.* at 115.

100. See *id.* at 143-54. See also Moberly, *supra* note 13; Cherry, *supra* note 84.

III. THE WHISTLEBLOWER'S DILEMMA

Before any employee or insider decides to blow the whistle, a balancing must take place. Many obstacles stand in the way of employees who decide to become a whistleblower, including employee retaliation, the psychological burdens of social ostracism, and even industry blacklisting.¹⁰¹ The potential whistleblower must balance these obstacles against her desire to correct fraud.¹⁰²

While the government desires the information of insiders, the largest problem for the government is the lack of incentives for whistleblowers to reveal that information.¹⁰³ For potential whistleblowers, “[i]t is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one’s employer, colleagues and friends.”¹⁰⁴

One study of whistleblowers showed that many whistleblowers experienced harassment, were fired from their job, and some even attempted suicide after feeling isolated after blowing the whistle.¹⁰⁵ In one tragic case, two whistleblowers reported corruption that included sexual harassment and kickback schemes.¹⁰⁶ Both whistleblowers were threatened by a supervisor, causing “anxiety, stress and depression” in one coworker.¹⁰⁷ The supervisor’s threats to the second whistleblower became serious, ending with the supervisor shooting the whistleblower before committing suicide.¹⁰⁸

While the previous tale may be an extreme case, a whistleblower is still often viewed “as a type of scoundrel” who is a “disgruntled employee with an axe to grind with his or her former employer.”¹⁰⁹ This widely held belief creates a large disincentive for honest employees to blow the whistle for fear of being viewed as disloyal to their company.¹¹⁰

Even with these disincentives, the government still desires inside information.¹¹¹ Obtaining and revealing insider information improves markets functionality as markets “more efficiently allocate resources to the

101. Rapp, *supra* note 2, at 95-96.

102. Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 99 U. ILL. L. REV. 1141, 1151-52 (1999).

103. *E.g.*, Rapp, *supra* note 2, at 107-11.

104. Bucy, *supra* note 5, at 61.

105. Cherry, *supra* note 84, at 1053, *citing* David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards A Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 113 (1995).

106. *Bowen v. Parking Auth. of Cty. of Camden*, No. CIV.00-5765(JBS), 2003 WL 22145814, at *1-6 (D.N.J. Sept. 18, 2003).

107. *Id.* at *6.

108. *Id.* at *14.

109. Cherry, *supra* note 84, at 1052.

110. *Id.*

111. *E.g.*, Rapp, *supra* note 2, at 98-100.

most productive activities” when the markets have the most information.¹¹² Agencies or law enforcement divisions would be required to spend a large amount of resources that would be easily obtainable if an insider simply stepped forward and provided them information of malfeasance.¹¹³

The legislation passed by Congress, such as the Sarbanes-Oxley Act and the Dodd-Frank Act, is meant to gather inside information despite the obstacles facing whistleblowers.¹¹⁴ As mentioned above, the Sarbanes-Oxley Act offered whistleblowers protection from being retaliated against if the company acts out against the whistleblower.¹¹⁵ The Sarbanes-Oxley Act “require[d] that corporations provide employees with a standardized channel to report organizational misconduct internally within the corporation.”¹¹⁶ The belief is that when whistleblowers have an identifiable means for reporting fraud they are more likely to do so.¹¹⁷

However, only providing for internal reporting channels and post hoc protection may not be enough “to optimize the quantity and quality of information that whistleblowers bring to light.”¹¹⁸ Employers still have an incentive to create real, but non-operative, compliance systems that meet statutory requirements but that are in reality worthless.¹¹⁹ Thus, the most successful programs for obtaining information are often the ones offering monetary incentives, as monetary incentives can tip the balance in favor of whistleblowing.¹²⁰

Even though many of these bounty schemes are successful due to the high number of bounty applicants received,¹²¹ the schemes have many detractors, even in the government.¹²² Senator Harry Reid called one successful bounty scheme for information the “Reward for Rats program,” and called for its elimination.¹²³ The Senator went so far as to claim that any individual providing information to the bounty program did so out of “individual greed or [a] desire for revenge.”¹²⁴ Thus, while the prospect of monetary rewards can create an incentive to blow the whistle on

112. *Id.* at 99.

113. Bucy, *supra* note 5, at 59.

114. *See generally* Pub. L. No. 107-204, 116 Stat. 745 (2002), Pub. L. No. 103-73, 103 Stat. 183 (1989), 31 U.S.C. § 3730 (2006).

115. *E.g.*, Corporate and Auditing Accountability and Responsibility Act of 2002, 18 U.S.C. § 1514A (2006).

116. Moberly, *supra* note 13, at 1109.

117. Rapp, *supra* note 2, at 116.

118. *Id.*

119. *Id.*

120. Ferziger & Currell, *supra* note 102, at 1144.

121. *Id.* (the Internal Revenue Service’s informant reward program receives more than 10,000 applications for bounty per year).

122. *Id.* at 1142.

123. 144 CONG. REC. 8,193. (1998).

124. *Id.*

wrongdoing, public perception of the whistleblower may actually be adversely affected when monetary gains are involved.

For potential whistleblowers in the financial sector, monetary incentives and protections may still not be enough to outweigh the disincentives. Even with protection and rewards, the uncertainties surrounding incentives continue to make inaction an attractive route.¹²⁵ From fears of subtle humiliation and harassment¹²⁶ to fears of an Enron-style collapse that revealing fraud could bring,¹²⁷ there exist many disincentives weighing against blowing the whistle on one's company.

IV. RECENT DEVELOPMENTS IN WHISTLEBLOWER LAWS: THE DODD-FRANK ACT

The Dodd-Frank Act creates monetary incentives to whistleblowers providing "original information" and increases the government's access to information in the private securities industry. While the FCA provided monetary incentives to whistleblowers, and the Sarbanes-Oxley Act only offered anti-retaliation protections to whistleblowers, the Dodd-Frank Act uses both financial incentives and anti-retaliation protections to induce whistleblowers to come forward.¹²⁸ Among its myriad of codifications, the Dodd-Frank Act amends many of the whistleblower provisions in the Sarbanes-Oxley Act.¹²⁹ Similarly to the FCA and other, lesser-used, bounty statutes,¹³⁰ the Dodd-Frank Act tries to incentivize whistleblowers in the financial industry with monetary rewards.¹³¹ These financial incentives are meant to "overcome the disincentives to a potential whistleblower" mentioned above.¹³²

Like the FCA, the Dodd-Frank Act awards a percentage of the penalties to the whistleblower. However, unlike the FCA the Dodd-Frank Act award is not dependent on whether the informant brings suit on behalf of the government. The awards offered under the Dodd-Frank Act are a minimum of ten percent of the penalties from a successful enforcement action by the SEC where the penalties exceed one million dollars.¹³³ These

125. Rapp, *supra* note 2, at 115.

126. *Id.*

127. *Id.* at 95.

128. See 15 U.S.C.A. § 78u-6 (West 2010); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 923-24, 124 Stat. 1376, 1849-50 (2010).

129. Wiener, *supra* note 16, at 556.

130. See Ferziger & Currell, *supra* note 102, at n.4 (listing civil programs that offer bounty incentives but that have "not gotten any real use").

131. 15 U.S.C.A. § 78u-6 (West 2011).

132. Rapp, *supra* note 2, at 135.

133. 15 U.S.C.A. § 78u-6(b) (West 2011).

awards, though, are not allowed to exceed thirty percent of the total sanctions received by the SEC.¹³⁴

The exact amount of the award is determined at the discretion of the SEC.¹³⁵ The SEC must consider the significance of the information provided, the degree of assistance provided by the whistleblower, and the SEC's interest in deterring further securities laws violations.¹³⁶

Before the Dodd-Frank Act, the SEC had offered bounties to whistleblowers who provided "information leading to the imposition" of a penalty for insider trading.¹³⁷ The original SEC program offered awards at the sole discretion of the SEC, meaning "[p]erfectly good information from informants may [have led] to no reward if the [SEC] so decide[d]."¹³⁸

The Dodd-Frank Act whistleblower provisions cover "any judicial or administrative action brought by the [SEC]."¹³⁹ The Dodd-Frank Act also creates a fund to be set aside specifically for the whistleblower program,¹⁴⁰ from which bounties are paid to whistleblowers who provide "original information" that leads to a successful enforcement action by the SEC.¹⁴¹ Original information is defined under the Dodd-Frank Act as information that:

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the [SEC] from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.¹⁴²

The SEC's final rules, promulgated in June 2011, amended the Dodd-Frank Act to provide the agency even more discretion when awarding whistleblowers. Along with developing the factors set forth in the Dodd-Frank Act,¹⁴³ the final rules have the SEC check whether the whistleblower

134. *Id.*

135. 15 U.S.C.A. § 78u-6(c)(1) (West 2010).

136. *Id.*

137. 15 U.S.C. § 78u-1 (2006), amended by Pub. L. No. 111-203 (2010).

138. Ferziger, *supra* note 102, at 1201.

139. 15 U.S.C.A. § 78u-6(a)(1) (West 2011).

140. *Id.* § 78u-6(g).

141. *Id.* § 78u-6(b).

142. *Id.* § 78u-6(a)(3).

143. *See supra* note 136 and accompanying text.

reported the violation to the company's internal compliance system before reporting the violation to the SEC.¹⁴⁴

However, while reporting a violation to an internal compliance system is a factor in determining a reward, the rules do not require reporting to the company's internal compliance system as a prerequisite for award eligibility.¹⁴⁵ Many companies are unhappy that these rules allow whistleblowers to bypass their companies' internal compliance systems that became mandatory after the Sarbanes-Oxley Act.¹⁴⁶

The rules further define "original information" by allowing informants providing additional, not only completely new, information to recover a reward so long as the information "materially adds" to information in the SEC's possession.¹⁴⁷ Also, at its discretion the SEC can limit the award to a whistleblower if it finds the whistleblower "unreasonably delayed reporting the securities violations."¹⁴⁸

Unlike the FCA, the Dodd-Frank Act does not create a private right of action for individuals, only allowing for actions by the SEC. There is a possibility this could change, however. The Dodd-Frank Act requires the inspector general of the SEC to study the whistleblower protection program and publish results in 2013.¹⁴⁹ Part of the study requires the inspector general to determine:

[W]hether, in the interest of protecting investors and identifying and preventing fraud, it would be useful for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves against persons who have committed securities fraud.¹⁵⁰

In other words, this determination sets out whether Congress should allow whistleblowers to bring a *qui tam* suit similar to that of the FCA.¹⁵¹ Allowing for *qui tam* suits with securities fraud in publicly held companies

144. Joe Palazzolo, *SEC Approves Whistleblower Rules*, WALL ST. J. L. BLOG (May 25, 2011, 10:12 AM), <http://blogs.wsj.com/corruption-currents/2011/05/25/whistleblowers-could-collect-on-info-their-employers-report-to-the-sec/>; See also Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34366 (June 13, 2011) (to be codified at 17 C.F.R. § 240.21F-6(a)(4)).

145. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34366.

146. Ashby Jones, *Corporate America Not Totally Thrilled With New Whistleblower Rules*, WALL ST. J. L. BLOG (May 25, 2011, 11:50 AM), <http://blogs.wsj.com/law/2011/05/25/corporate-america-not-totally-thrilled-with-new-whistleblower-rules/>.

147. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34365.

148. *Id.* at 34367.

149. Parkinson & Randell, *supra* note 9, at 901.

150. Pub. L. No. 111-203, § 922(d)(1)(g), 124 Stat. 1376 (2010).

151. Parkinson & Randell, *supra* note 9, at 901. While this could create interesting dimensions to whistleblower cases in the private securities industry, it is beyond the scope of this Comment.

has the potential of changing the dynamics of the Dodd-Frank Act by making it very similar to the FCA. As the Dodd-Frank Act is now, the SEC determines whether to pursue a case, and the whistleblower only receives an award based on the action of the SEC.¹⁵² If *qui tam* suits are allowed, companies will have to defend claims against both the government and individuals, just as companies do under the FCA.

After the Dodd-Frank Act's passage the SEC began receiving a "surge in tips" by whistleblowers.¹⁵³ The SEC's plan to create a whistleblower office to handle the tips was initially put on hold amidst "budget uncertainty" in the federal government.¹⁵⁴ Even a year after its passage, the future of the entire Dodd-Frank Act was uncertain because its regulations were viewed as "unduly complex," making financial regulation "more cumbersome and less nimble."¹⁵⁵

V. ANALYSIS

The Dodd-Frank Act's structure has the possibility of striking a good balance between creating incentives for insiders to provide information to the government and not encouraging insiders to immediately come to the government in the hope of receiving a massive payoff. The requirement that informants provide "original information" to the SEC before they can receive an award can create the proper threshold if the SEC interprets the phrase correctly and if more rules are promulgated. First, a proper threshold requires "original information" to be interpreted in a non-restrictive way. Also, the SEC should promulgate more rules to restrict bounty awards. This should be accomplished by first requiring employees to use their companies' internal compliance programs, save for good cause, and second, by capping awards based on when the employee learns of possible violations.

A. "Original Information"

Unlike the FCA, which provides bounties to whistleblowers who are the "original source" of information, the Dodd-Frank Act requires that an

152. 15 U.S.C.A. § 78u-6(b) (West 2010).

153. Joe Palazollo, *After Dodd-Frank, SEC Getting At Least One FCPA Tip A Day*, WALL ST. J. L. BLOG (Sept. 30, 2010, 11:21 AM), <http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day>.

154. Joe Palazollo, *Whistleblower Office Put On Hold Amid Budget Concerns*, WALL ST. J. L. BLOG (Dec. 3, 2010, 11:38 AM), <http://blogs.wsj.com/corruption-currents/2010/12/03/whistleblower-office-put-on-hold-amid-budget-concerns/>.

155. Ben Protes, *Former S.E.C. Chief Says Dodd-Frank Misses Goals*, N.Y. TIMES (July 12, 2011, 1:29 PM), <http://dealbook.nytimes.com/2011/07/12/former-s-e-c-chairman-criticizes-dodd-frank/?scp=1&sq=SEC%20Whistleblower%20rules&st=cse>.

informant provide the SEC with “original information,” similar to the Customs informant statute. The Dodd-Frank Act specifies that the information cannot be “known to the [SEC] from any other source, unless the whistleblower is the original source.”¹⁵⁶ This potentially could lead to more restrictive interpretations of the type of eligible whistleblower, akin to the Government knowledge bar in place in the FCA from the 1943 amendments until 1986.

While FCA claims brought by individuals have the potential for bounties so long as there has been no public disclosure,¹⁵⁷ the Dodd-Frank Act does not allow for an individual to receive a bounty when the SEC has previous knowledge of that information, regardless of a public disclosure of that information. While similar to the Government knowledge bar, the Dodd-Frank Act differs by allowing for the whistleblower to recover if that individual is the “original source” of the SEC’s knowledge.

By requiring a whistleblower to be an “original source” and to provide the SEC with information “not known to the [SEC],” Congress has created an extra threshold in order to achieve what the 1986 Congress desired with its amendments to the FCA. That is, the Dodd-Frank Act can reach a golden mean that manages to encourage whistleblowing and discourage opportunistic behavior.¹⁵⁸

However, the original information requirement has the potential for creating too high a threshold for possible whistleblowers. Because “much of what the SEC learns from informants can be reconstructed from information already in its hands,”¹⁵⁹ whistleblowers providing information on suspicious trading may be denied any award because the SEC would have general knowledge the trading occurred, even if the SEC had never suspected it of being suspicious. As such, the SEC could have general knowledge of activities, but would not be able to make the correlation between the activities and securities violations without the help of insiders.

If the SEC were to define “original information” restrictively, only allowing for information not already in its hands regardless of the connections the tip provides, the SEC likely would not face as many problems of frivolous claims and thus would increase the efficiency of processing claims. Potential whistleblowers would be less willing to bring information to the SEC if there was a strong possibility any claim for a reward would be denied.

While limiting the number of frivolous claims, a restrictive definition of “original information” would also limit the amount of good faith claims, as well as information from insiders connecting information available to the

156. 15 U.S.C.A. § 78u-6(a)(3)(B) (West 2011).

157. See *supra* notes 51-53 and accompanying text.

158. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

159. Ferziger, *supra* note 102, at 1150-51.

SEC, bringing to light violations of securities laws. Like the Customs informant statute, defining “original information” to only allow the informant that initiates an investigation to recover would create a high threshold. It would simultaneously increase incentives to be the first informant, while reducing incentives for any informant with valuable details to contact the SEC. Such a limitation also could lead the Dodd-Frank Act to become nearly ineffective, just as the FCA was from 1943 to 1986.

As such, a broader, less-restrictive interpretation of “original information” would be best to achieve the goal of obtaining information on fraud so the SEC can prosecute true violations. If more types of information have the possibility of being rewarded by the SEC, more whistleblowers will be encouraged to bring their information forward. With all of the disincentives facing whistleblowers, a more definite possibility of a reward for their efforts would tip the balance in favor of blowing the whistle for many employees. By defining “original information” broadly, the SEC will be able to reward whistleblowers offering a connection between the knowledge it possesses and the illegal activity.

As this type of information connecting the fraud to the facts would be valuable, a broad definition would allow the SEC to use its discretion when rewarding whistleblowers. While being required to award whistleblowers for “original information,” the SEC should not bar subsequent whistleblowers from recovery merely because an investigation is underway. Rather, the SEC should use its discretion to determine the originality of the information provided.

The final rules do provide more discretion to the SEC when determining whether information is original. The rules offer a more liberal interpretation of “original information” than the plain language of the statute does, as it allows a whistleblower’s “independent analysis” to be based on an evaluation of publicly available information.¹⁶⁰ Also, the SEC will consider whistleblowers providing information that “materially adds” to an investigation to be considered original sources.¹⁶¹

These changes create a less-restrictive interpretation, yet all of these changes rest upon the SEC’s “exercise of discretion in determining whether to open an investigation, whether to bring an enforcement action, and the nature and scope of any action filed and relief granted.”¹⁶² With such unfettered discretion, the SEC needs to ensure it maintains consistency when making decisions on information received. A consistently broad

160. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34311 (June 13, 2011) (to be codified at 17 C.F.R. § 240.21F-4(b)(3)).

161. *Id.* at 34310.

162. *Id.*

interpretation of “original information” will encourage new whistleblowers, fearful of what end-results may come about by revealing their inside information. The SEC should treat its discretion as courts treated the discretionary language in the Customs informant statute, as mandating awards when information meets the statutory requirements. Consistency and guarantees will bring more information from knowledgeable information than inconsistent or loose definitions of the agency’s rules.

However, the quantity of tips should not be the sole goal of the SEC. Rather, its goal should be to acquire valuable, quality information from good-faith whistleblowers. Taking a broad definition of “original information” could lead the SEC to find itself in a similar situation as the DOJ is in with FCA claims. As mentioned above, the DOJ is working through over one thousand FCA *qui tam* claims a day, many of which lack merit. Given the quantity of tips the Dodd-Frank Act’s whistleblower provisions are already receiving, it seems very likely the SEC could face a similar dilemma. The SEC already delayed creating the whistleblower office due to “budget uncertainty,” and the Dodd-Frank Act faces an uncertain future in Congress in the midst of the economic recovery.¹⁶³ If “original information” is defined to include a wide range of tips, the SEC will be forced to spend its valuable resources on an already uncertain budget investigating thousands of claims, many of which will likely be frivolous.

Thus, in a time where much uncertainty faces the SEC, and when tips are surging and similar schemes are rummaging through one thousand tips a day, a higher threshold is still necessary. However, this higher threshold should not come from a restrictive interpretation of “original information,” but rather from new rules promulgated by the SEC. This would keep incentives for good-faith whistleblowers high, while removing many of the incentives for whistleblowers without valuable information.

B. Requiring Use of Internal Compliance Structures

The Dodd-Frank Act provides the SEC with guidelines for determining how much of a bounty to reward a whistleblower with.¹⁶⁴ While reporting to a targeted company’s internal compliance system is a factor in the award determination, reporting to the internal compliance system is not required to become eligible for a reward.¹⁶⁵

Companies fear the Dodd-Frank bounty program will encourage employees to skip any internal compliance programs and report any minute

163. Edward Wyatt, *Dodd-Frank Under Fire a Year Later*, N.Y. TIMES, July 18, 2011, available at http://www.nytimes.com/2011/07/19/business/dodd-frank-under-fire-a-year-later.html?_r=3.

164. 15 U.S.C.A. § 78u-6(c)(1)(B) (West 2010).

165. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34366.

violation directly to the SEC.¹⁶⁶ By not requiring employees to report potential violations internally first before being rewarded by the SEC, the Dodd-Frank Act can create the perverse incentive for companies to no longer maintain a functioning internal compliance program.

This would be an unfortunate by-product of the Dodd-Frank Act. One success of the Sarbanes-Oxley Act was that it required companies to create a clear channel through which employees could report misconduct or potential violations.¹⁶⁷ As mentioned above, having a clear structure through which to report violations encourages employees who are not willing to go to the government to come forward internally. If a company with a working internal compliance structure is sanctioned by the SEC based on information never reported to its internal compliance program, that company would have little incentive to maintain its program.

The SEC's rules do alleviate some of this fear by adding to the SEC's award determination.¹⁶⁸ The rules would still award a whistleblower for "original information," but would limit that award in its discretion if an employee-whistleblower had skipped over the internal compliance system of her company.¹⁶⁹ While better reflecting of the purposes of the program – to obtain information and encourage compliance – merely limiting the award of a whistleblower would not be enough. In a successful enforcement action, the whistleblower who avoids a compliance program will still receive at a minimum \$100,000 if the sanctions against the company only amount to \$1,000,000. Such large bounties still encourage employees to skip over internal compliance programs, thus discouraging companies from establishing robust compliance systems that the SEC has stated it desires.¹⁷⁰

A possible solution to this problem would be for the SEC to promulgate a rule barring individuals who do not use their company's internal compliance system. This could, however, create problems for employees whose companies' have weak systems. The Sarbanes-Oxley Act allowed internal compliance systems to be fairly simple.¹⁷¹ Companies thus had incentives to create weak internal compliance systems; the systems

166. John F. Baugman, *SEC Proposes Whistleblower Rules*, 1863 PLI/CORP. 635, 637 (2010).

167. Moberly, *supra* note 13, at 1109.

168. The SEC missed its statutory deadline for issuing new rules on the whistleblower rewards in the Dodd-Frank Act. See Joe Palazzolo, *SEC Will Miss Deadline for Whistleblower Rules*, WALL ST. J. L. BLOG (Apr. 21, 2011, 5:35 PM), <http://blogs.wsj.com/corruption-currents/2011/04/21/sec-will-miss-deadline-for-whistleblower-rules/>.

169. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34366.

170. Deputy Att'y Gen. Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations*, U.S. DEP'T OF JUSTICE (Jan. 20, 2003), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

171. Moberly, *supra* note 13, at n. 7.

existed but did not perform the tasks Congress envisioned with the passage of the Sarbanes-Oxley Act.

To alleviate such fears, the SEC could create a good cause exception to the internal compliance bar. If the whistleblower is able to demonstrate that the internal compliance structure is ineffective, the whistleblower would be allowed to report directly to the SEC. The whistleblower should have the burden of showing a system's ineffectiveness. If whistleblowers demonstrate prior employees who used the internal compliance system were retaliated against, or that their reports were unheeded by the company, then potential whistleblowers would meet their burden and not be barred from directly reporting to the SEC. While such demonstrations could be burdensome on whistleblowers, the SEC already requires companies to prove the efficiency of their internal compliance structures when determining whether or not to prosecute.¹⁷²

Barring whistleblowers from reporting directly to the SEC absent good cause would cut back on opportunistic employees as well. When an employee is first required to report internally, the company has the opportunity to fix violations it may have been unaware were occurring. This higher threshold would not discourage good faith whistleblowers, but would discourage employees looking for a quick pay off. As such, the government would receive information relating to securities fraud but would not overburden companies or encourage opportunism.

C. Capping Bounty Awards

Similarly, the SEC should promulgate rules creating a cap for awards based on the time whistleblowers learned of possible violations. As the rules stand now, there is no time frame that potential whistleblowers are required to follow. This creates a possible perverse incentive for employees who become aware of a violation to not report it, internally or otherwise. The longer the violation continues, the greater chance any sanction will become larger as well. The opportunistic employee could simply wait until such a time when the violation becomes great and then report it, receiving a windfall bounty under the Dodd-Frank Act.

If the SEC promulgated a rule capping possible rewards so that whistleblowers could only be rewarded for the amount they would have received had they immediately reported the violation, there would no longer be an incentive to hold off reporting. This type of bar would be similar to

172. Deputy Atty. Gen. Larry D. Thompson, Principles of Federal Prosecution of Business Organizations, U.S. DEP'T OF JUSTICE (Jan. 20, 2003), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

the Customs informant statute, which precludes informants from offering information on a piecemeal basis in order to collect more bounties.

As with an internal compliance bar, such a rule would need to have a good cause exception. If the SEC finds that there is a legitimate reason for a whistleblower to not immediately report a violation, then there would be no cap on the amount of a possible reward. If employees report a violation to company's internal compliance system or a superior and then holds off on reporting the violation to the SEC, the whistleblowers would have a legitimate reason for not immediately reporting the violation.

As with reporting to internal compliance systems, the SEC's rules approach the issue of delay in reporting. However, just as with not reporting to an internal compliance system, the rules only provide the SEC with the discretion to limit a reward, not to cap it. As the rule is stated, a whistleblower would still recover ten percent of a sanction regardless of the delay in reporting. Creating a cap as stated would better create the golden mean to encourage good faith whistleblowing.

Such rules would create a more effective system. Whereas defining "original information" broadly could lower the threshold and encourage opportunistic employees, requiring reporting to internal compliance systems and capping awards would raise the threshold to the correct level. Good faith employees would still have a strong incentive to report violations internally and to the SEC, and the SEC would not be overburdened by frivolous claims because opportunistic whistleblowers would be discouraged from reporting.

VI. CONCLUSION

*"Hey! Hey everybody look! He's giving him the filthy money! Judas!
You sold my hide!"*

-Tuco, in *The Good, the Bad and the Ugly*¹⁷³

No single statute can overcome all disincentives facing a whistleblower. To truly fix all the problems surrounding whistleblowing, the entire corporate culture would have to change, as well as societal views on whistleblowers. Members of Congress could take the lead on this front by referring to whistleblowers in a positive light, rather than as "rats" or "scoundrels." Otherwise whistleblowers will continually be thought of in the same light as a treacherous bounty hunter, selling out old partners for a few dollars more.

173. THE GOOD, THE BAD AND THE UGLY (Produzioni Europee Associati 1966).

Even so, while no statute can truly fix all the disincentives facing a potential whistleblower, a good statute can outweigh them with the proper incentives. Troubled interpretations can make or break an agency program. If the whistleblower provisions of the Dodd-Frank Act are interpreted less-restrictively, and if the SEC promulgates rules to promote internal compliance programs and internal reporting, the government will achieve a good balance that both rewards and incentivizes good-faith whistleblowing and discourages opportunistic employees. The SEC's currently proposed rules are a step in the right direction, but they leave open too much room for individuals to act as bounty hunters rather than what the statute should promote: individuals who report from a sense of civic pride.

