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

* Associate Professor of Law and Associate Dean for Faculty, University of Nebraska College of Law. I appreciate the helpful comments from A.J. Brown and the attendees of colloquia at Griffith University, Queensland, Australia; the University of Tasmania, Tasmania, Australia; and the International Whistleblower Research Network conference at Seattle University School of Law.
SARBANES-OXLEY’S WHISTLEBLOWER PROVISIONS – TEN YEARS LATER

TABLE OF CONTENTS

Introduction ........................................................................................................................... 2
I. Enacting Sarbanes-Oxley ................................................................................................. 5
II. Successes ......................................................................................................................... 11
III. Failures .......................................................................................................................... 20
   A. Encouraging Disclosures ....................................................................................... 22
   B. Protecting Whistleblowers From Retaliation ....................................................... 26
   C. Addressing Misconduct Effectively ...................................................................... 33
IV. Lessons Learned .......................................................................................................... 36
   A. People Matter As Much as Provisions .................................................................. 37
   B. Applying a New Model .......................................................................................... 43
Conclusion ........................................................................................................................ 50

INTRODUCTION

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

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

Now, ten years after the Act’s passage, this Article takes a fresh look at its whistleblower provisions to examine its successes and failures. Sarbanes-Oxley has had a substantial impact on whistleblower law, but perhaps in some counterintuitive and maybe even contradictory ways. As an initial matter, Sarbanes-Oxley was enormously successful as a model for subsequent legal measures that encourage and protect whistleblowers. However, despite these successes, the Act’s failures in other respects demonstrate that these

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8 See 18 U.S.C. § 1514A; see also Moberly, Unfulfilled Expectations, supra note 5, at 75.

9 See, e.g., Vaughn, supra note 3, at 105 (asserting that Sarbanes-Oxley is “the most important whistleblower protection law in the world”); Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 COLUM. L. REV. 319, 376 (2005) (calling the provision the “gold standard” of whistleblower protection); S. REP. No. 107-146, at 10 (2002) (quoting a representative of Taxpayers Against Fraud calling the statute “the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets”); see also Moberly, Unfulfilled Expectations, supra note 5, at 68 (quoting responses from academics, advocates, and the press).

traditional strategies may not be sufficient to encourage effective whistleblowing.

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

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

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

I. ENACTING SARBANES-OXLEY

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

As a result of such testimony, Congress included expansive whistleblower provisions in the Sarbanes-Oxley Act of 2002. The Senate Report on the legislation noted that, “In a variety of instances when corporate employees at both Enron and Andersen attempted to report or ‘blow the whistle’ on fraud, . . . they were discouraged at nearly every turn.”\(^{18}\) The Report also noted media


\(^{13}\) See id. at 15-16; see also Moberly, Unfulfilled Expectations, supra note 5, at 1123 & n.64; Leslie Griffin, Whistleblowing in the Business World, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 209, 209-11 (Nancy B. Rapoport & Bala G. Dharan, eds. 2004).

\(^{14}\) See Watkins Testimony, supra note 12, at 19.


\(^{16}\) See id. Ultimately, Watkins’ requested a transfer and wound up in a job in human resources with greatly reduced responsibilities. See Griffin, supra note 13, at 213-14 & 217.

\(^{17}\) S. REP. No. 107-146, at 5 (2002). At the same time, some employees had more success blowing the whistle on corporate fraud. See Moberly, Structural Model, supra note 5, at 1117-19. For example, Congressional testimony from WorldCom officers indicated that Cynthia Cooper, an internal investigator, uncovered the fraud of WorldCom’s Chief Financial Officer and reported him to the company’s Board of Directors. See Wrong Numbers: The Accounting Problems at WorldCom: Hearing Before the H. Comm. on Financial Seros., supra note 4, at 93-94, 129-30. WorldCom’s Board took a different approach than Enron and fired the wrongdoer rather than the whistleblower. See Moberly, Structural Model, supra note 5, at 1117.

\(^{18}\) See S. REP. No. 107-146, at 4-5 (2002).
accounts of several other instances in which an employee attempted to report corporate misconduct, only to be retaliated against:

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

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

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

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

19 Id. at 5.
20 Id. at 10.
21 See Moberly, Unfulfilled Expectations, supra note 5, at 76-78.
“silos” of protection aided the enforcement of a particular statute, such as the Clean Air Act\textsuperscript{23} or the Surface Transportation Assistance Act,\textsuperscript{24} but did not address more far-reaching misconduct such as the fraud that led to Enron-like scandals.\textsuperscript{25} If an employee reported corporate wrongdoing, but it was not the “right” type of wrongdoing—that is, wrongdoing covered by a particular statute with a whistleblower provision—then federal law would not protect the employee from retaliation.\textsuperscript{26}

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

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

\textsuperscript{23} Clean Air Act of 1977, 42 U.S.C. § 7622(a).
\textsuperscript{25} See Moberly, Unfulfilled Expectations, supra note 5, at 76-77.
\textsuperscript{26} See Moberly, supra note 22, at 982, 986.
\textsuperscript{27} See DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 77-78 (2d ed. 2004) (noting that 17 states have statutes covering private-sector whistleblowers, not including fair employment statutes similar to Title VII that have an antiretaliation provision).
\textsuperscript{28} See Moberly, supra note 22, at 983.
\textsuperscript{29} See WESTMAN & MODESITT, supra note 27, at 95 (noting that 40 jurisdictions permit whistleblowers to bring a tort claim for wrongful discharge in violation of public policy).
\textsuperscript{30} See Moberly, supra note 22, at 983-86.
\textsuperscript{31} See S. REP. NO. 107-146, at 10 (2002).
\textsuperscript{32} See 18 U.S.C. § 1514A.
\textsuperscript{33} See S. REP. NO. 107-146, at 10 (2002).
construed federal mail and wire fraud statutes. Although it is a “silo,” because it does not protect all disclosures related to illegality (only the six types of illegal conduct specifically listed in the Act), in 2002 it appeared to be a very large silo. Not only did it protect, for the first time, disclosures related to the types of fraud that led to the scandals, but also it potentially covered a great deal more. Indeed, shortly after the Act’s passage, whistleblower expert Robert Vaughn argued for broadly interpreting the protected activity to include disclosures of misconduct as diverse as health and safety violations, the suppression of information regarding product risks, environmental misconduct, consumer fraud, false claims against the government, disregard of statutes requiring the disclosure of information to federal regulatory agencies, violations of federal antidiscrimination laws, violations of statutes and rules protective of labor, conspiracies to break the antitrust laws, bribery of public officials, including foreign officials, and human rights abuses.

Additionally, because the Act adopted the burden of proof scheme from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as “AIR21,” Sarbanes-Oxley’s burden of proof seemed more employee-friendly than most whistleblower statutes. The employee must prove that a protected activity (such as whistleblowing) was a “contributing factor” in the retaliation suffered by the employee. Academics and the Department of Labor consider this standard easier for employees to meet than other types of burdens, such as the “but for” standard typically required by tort law and the “motivating factor” standard.

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

35 Vaughn, supra note 3, at 23.


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

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

often applied in “mixed-motive” discrimination cases.\textsuperscript{40} If the employee satisfies this burden, the employer’s burden becomes more difficult than normal as well. An employer only can prevail if it proves, by clear and convincing evidence, that it would have taken the same adverse employment action even if the employee had not engaged in the protected activity.\textsuperscript{41}

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

The Act’s combination of broad applicability, friendly burdens of proof, and procedural protections led many scholars and advocates at the time to conclude that Sarbanes-Oxley greatly improved whistleblower protections in the United States.\textsuperscript{47} Professor Vaughn


\textsuperscript{41} See id. \S 1980.104(c).

\textsuperscript{42} See id. \S 1980.104(b)(1). The Act actually assigns such claims to the Secretary of Labor, who delegated the investigative process to OSHA’s Assistant Secretary. See Secretary’s Order 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002).

\textsuperscript{43} See 18 U.S.C. \S 1514A(c); 29 C.F.R. \S 1980.105(a)(1); (c).

\textsuperscript{44} See 29 C.F.R. \S 1980.107(b).

\textsuperscript{45} See id. \S 1980.110 & 112(a).

\textsuperscript{46} See 18 U.S.C. \S 1514A(b)(1)(B) (permitting withdrawal and federal court filing if the Department of Labor does not issue a final decision within 180 days); see also Vaughn, supra note 3, at 87 (“This authorization for a whistleblower to commence a civil action in a federal district court is new with the whistleblower provision and differs in this way from other whistleblower statutes administered by the Department [of Labor]. Its novelty, however, attests to the importance that Congress attached to it.”).

called it "the most important whistleblower protection law in the world" and Professor Cynthia Estlund labeled it the "gold standard" of whistleblower protection. Taxpayers Against Fraud called Sarbanes-Oxley "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets," while Tom Devine of the Government Accountability Project, a whistleblower advocacy group, described the Act as "the promised land.... [T]he law represents a revolution in corporate freedom of speech [that] far surpasses, indeed laps, the rights available for government workers."

The press fueled expectations as well. For example, in 2002 Business Week stated that the Act "gives those who report corporate misconduct sweeping new legal protection ... [W]histleblowers are going to find life a bit easier." In short, in 2002, expectations for the Act were high.

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

I predicted that these improvements “may produce more effective disclosures from whistleblowing employees than prior
attempts to encourage whistleblowing because [Sarbanes-Oxley’s Structural] Model addresses two significant problems that previously kept employees from consistently functioning as successful corporate monitors: (1) the corporate norm of silence, and (2) the corporate tradition of blocking and filtering employee whistleblowing.” In fact, I suggested that the structural model is more likely than the Antiretaliation Model to reduce the flow-of-information problems that contributed to recent corporate scandals . . .. The Structural Model encourages more whistleblowing because it provides incentives to increase employee participation as corporate monitors and reduces various disincentives to employee whistleblowing. Equally important, this direct channel to the board should encourage effective whistleblowing by circumventing information blocking and filtering by corporate executives. In this way, Sarbanes-Oxley’s Structural Model minimizes the principal-agent problem that arises when employees provide information about misconduct to mid-level managers and corporate executives who cover-up or ignore fraud. Furthermore, the model should provide several secondary benefits to corporations and their employees, such as improving corporate decision-making, reducing monitoring costs, and increasing employee voice within the corporation. Such benefits may lead to greater acceptance and implementation than pre-scandal attempts to encourage whistleblowers.

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

II. SUCCESSES

In many ways, Sarbanes-Oxley represents a great leap forward for whistleblowers in the United States and the Act served as the model for subsequent reform. Indeed, in the decade after its enactment, legislatures and regulators unleashed a torrent of formal encouragement for whistleblowers. Federal and state governments

59 See id. at 1109.
60 Id. at 1110-11.
61 See 15 U.S.C. § 7264(a)
62 See infra text accompanying notes 111-17.
passed an impressive array of broad antiretaliation statutes and regulators mandated the widespread use of corporate codes of ethics that explicitly protect whistleblowers and implement whistleblower hotlines. Sarbanes-Oxley, as the most prominent example of reform during this time, should receive some credit for these developments.

At the federal level, Congress passed at least nine new antiretaliation provisions during the last decade.\textsuperscript{63} It also amended several other whistleblower provisions to broaden their applicability.\textsuperscript{64} Many of the new statutes utilize the advanced substantive and procedurals protections Sarbanes-Oxley made prominent, such as the employee friendly burden of proof\textsuperscript{65} and the broad remedies of reinstatement, consequential damages, and attorneys’ fees.\textsuperscript{66} Although each of them contains their own “silo” of protected activity, because they only protect certain types of whistleblower disclosures related to the subject matter of the particular statute, the provisions protect a wide-range of behaviors, often including both internal and external reporting\textsuperscript{67} and participation in investigations related to violations of the statute.\textsuperscript{68}


\textsuperscript{66} See sources cited supra note 63.

\textsuperscript{67} See FDA Food Safety Modernization Act § 402; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057; The Patient Protection and Affordable Care Act,
Many of the new statutes also adopt the procedural innovation requiring an initial administrative investigation of a retaliation complaint followed by providing the whistleblower an opportunity for *de novo* review in federal district court. Indeed, Congress designated the Department of Labor (which subsequently designated OSHA) as the initial administrative investigative agency in eight antiretaliation statutes after Sarbanes-Oxley was passed in 2002, raising the total number of statutes under OSHA’s whistleblower umbrella from thirteen to twenty-one statutes over the last decade.

In addition to providing for new whistleblower protection, some federal legislation in the last decade fixed older whistleblower provisions that provided less than the best practices popularized by Sarbanes-Oxley. For example, Congress amended the Surface Transportation Assistance Act of 1982 and the Federal Railroad Safety Act to make their procedures related to burden of proof, remedies, and federal district court *de novo* review more in line with Sarbanes-Oxley. Also, the Energy Policy Act of 2005 amended

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68 See id.; see also Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 748, 922.
the Energy Reorganization Act of 1974\textsuperscript{76} to permit \textit{de novo} review by a federal district court if the Department of Labor has not completed review of a whistleblower’s complaint within one year.\textsuperscript{77} Finally, Congress expanded the scope of two older whistleblower provisions to specify that they protected independent contractors as well as employees, in the same manner as Sarbanes-Oxley.\textsuperscript{78}

Some of the statutes take Sarbanes-Oxley as a baseline and improve upon it. The 2009 economic “stimulus bill,” for example, gives specific examples of the types of circumstantial evidence that an employee may use to satisfy the “contributing factor” burden of proof, such as demonstrating temporal proximity between the protected activity and the reprisal, or knowledge by the decision maker of the protected activity.\textsuperscript{79} Many newer statutes add “refusing to engage in unlawful conduct,” as a protected activity.\textsuperscript{80} Several statutes passed in the last decade prohibit pre-dispute arbitration agreements from covering whistleblower claims arising under the statute and also prohibit employees from waiving their rights under the antiretaliation provision.\textsuperscript{81} Also, several new whistleblower provisions explicitly provide for jury trials as part of the \textit{de novo} review in federal court,\textsuperscript{82} which Sarbanes-Oxley’s provision
originally failed to do. Similarly, Sarbanes-Oxley did not explicitly permit federal courts to enforce an OSHA order, an oversight not repeated in later statutes. Moreover, new statutes make clear that whistleblowers would be protected even if reporting misconduct related to their job duties, a provision that became prudent after the Supreme Court’s 2006 decision in *Garcetti v. Ceballos* holding that the First Amendment did not protect such “job-duty” whistleblowers. All of the new statutes provide more time for whistleblowers to file claims than Sarbanes-Oxley’s original 90-day statute of limitations, and four provide enhanced remedies, such as double back pay damages or punitive damages. Further, the Dodd-Frank Act amended the False Claims Act to prohibit associational discrimination as retaliation.

Finally, in 2010, Congress fixed problems that had become apparent with Sarbanes-Oxley itself. First, Sarbanes-Oxley’s statute of limitations of ninety days seemed unreasonably short. In fact, from 2002 to 2005, OSHA and ALJs dismissed a large percentage of Sarbanes-Oxley whistleblower cases for failure to comply with the statute of limitations. Some cases missed the deadline by mere days, often missing it because of confusion regarding when exactly the limitations period began to run. The Dodd-Frank Act changed

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84 See FDA Food Safety Modernization Act § 402; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1057; The Patient Protection and Affordable Care Act § 1558 (180 days); Consumer Product Safety Improvement Act of 2008 § 219 (180 days); Implementing Recommendations of the 9/11 Comm’n Act of 2007, §§ 1413, 1521.


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

88 See FDA Food Safety Modernization Act § 402 (180 days); Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 748 (two years), 922 (up to six years), 1057 (180 days); The Patient Protection and Affordable Care Act § 1558 (180 days); Consumer Product Safety Improvement Act of 2008 § 219 (180 days); Implementing Recommendations of the 9/11 Comm’n Act of 2007, §§ 1413, 1521 (180 days), 1536 (180 days); Pipeline Safety Improvement Act of 2002 § 6 (180 days).

89 See Dodd-Frank Wall Street Reform and Consumer Protection Act § 922.

90 Implementing Recommendations of the 9/11 Comm’n Act of 2007, §§ 1413, 1521, 1536 (all providing for award of up to $250,000 in punitive damages).

91 Dodd-Frank Wall Street Reform and Consumer Protection Act § 1079B.

92 See Moberly, *Unfulfilled Expectations*, supra note 5, at 132-34.

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

94 See Moberly, *Unfulfilled Expectations*, supra note 5, at 107-09.
the limitations period to 180 days and clarified that the period began running “after the date on which the employee became aware” of the retaliation.\(^{95}\) Second, ALJs and the ARB had issued confusing decisions regarding whether Sarbanes-Oxley protected employees of private subsidiaries of publicly traded companies.\(^{96}\) Dodd-Frank also clarified that such employees should be protected from retaliation as whistleblowers.\(^{97}\) Third, Dodd-Frank amended Sarbanes-Oxley to prohibit employee waivers and pre-dispute arbitration agreements related to Sarbanes-Oxley’s antiretaliation protection.\(^{98}\) Fourth, Dodd-Frank clarified that \textit{de novo} review of a Sarbanes-Oxley claim in federal district court included the right to a jury trial.\(^{99}\)

Political party did not seem to matter during this lawmaking spree, as both Republican and Democratic presidents signed whistleblower laws.\(^{100}\) Congresses with a variety of political compositions included such provisions in important legislation.\(^{101}\) Notably, all of President Obama’s signature legislative accomplishments—the economic stimulus bill,\(^{102}\) health care reform,\(^{103}\) and the reform of the financial industry\(^{104}\)— contained antiretaliation provisions.\(^{105}\) Although bits and pieces of these reforms may have been found in laws predating Sarbanes-Oxley in 2002, the Act

\(^{95}\) See Dodd-Frank Wall Street Reform and Consumer Protection Act § 922(c)(1).

\(^{96}\) See Moberly, \textit{Unfulfilled Expectations}, supra note 5, at 109-13. In 2011, the ARB noted that “[s]ignificant conflicts have developed in the case law interpreting pre-amendment Section 806’s coverage of subsidiaries. Department of Labor’s ARB, its ALJs, and the federal courts have been deeply divided over the subsidiary coverage issue under Section 806. Opinions have ranged from near universal subsidiary coverage to no coverage for subsidiaries.” Johnson v. Siemens Bldg. Tech., Inc., No. 08-032, at 10 (ARB March 1, 2011) (listing various cases).

\(^{97}\) Dodd-Frank Wall Street Reform and Consumer Protection Act § 929A. Subsequently, the ARB determined that the Dodd-Frank provision, as a “clarifying amendment,” should be applied to cases pending on the Act’s effective date. See Johnson, No. 08-032, at 16.

\(^{98}\) See Dodd-Frank Wall Street Reform and Consumer Protection Act § 922(c)(2).

\(^{99}\) See id. § 922(c)(1).

\(^{100}\) The federal government passed whistleblower provisions during the Republican George W. Bush presidency after Sarbanes-Oxley in 2002 through January 2009 as well as during the Democrat Barack Obama presidency from January 2009 to the time of this article’s publication. See sources cited supra note 63 (providing dates of statutes containing whistleblower provisions).

\(^{101}\) During the last decade, both Democrats and Republicans have, at various times, controlled both the House of Representatives and the Senate. See Visual Guide: The Balance of Power Between Congress and the Presidency (1945-2011), \url{http://wiredpen.com/resources/political-commentary-and-analysis/a-visual-guide-balance-of-power-congress-presidency/} (last visited March 26, 2012).


\(^{103}\) See The Patient Protection and Affordable Care Act § 1558.

\(^{104}\) See Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 748, 922, 1057.

brought all of them together and set the benchmark for federal whistleblowing law during the decade after its passage.

Arguably, Sarbanes-Oxley’s influence went beyond federal law. One survey of state law completed recently found that, since 2006, forty states have broadened or toughened their whistleblower laws for public employees, while none have weakened them.\textsuperscript{106} States have added protections for private employees as well. Since Sarbanes-Oxley passed in 2002, twenty-three states have enacted thirty-six laws that either created new whistleblower protections for private-sector employees or strengthened existing statutory protections.\textsuperscript{107}

Additionally, the corporate hotlines required by Sarbanes-Oxley have become commonplace in corporate America. One recent study found that approximately 80\% of companies have whistleblower hotlines that employees can use to report misconduct.\textsuperscript{108} In 2010, a KPMG study found that 87\% of U.S. companies have in place “whistleblower mechanisms,” such as a hotline or an ombudsman.\textsuperscript{109} This number increased from 75\% in KPMG’s 2008 survey.\textsuperscript{110}


\textsuperscript{108} See ETHICS RESOURCE CENTER, 2011 NATIONAL BUSINESS ETHICS SURVEY 48 (2011). Another study provided some indication that hotlines were not as prevalent as indicated by the Ethics Resource Center study. Moberly and Wylie examined corporate codes of ethics in 2007 and found that only 47.2\% of the codes instructed employees to report misconduct to a hotline. See Richard Moberly and Lindsey E. Wylie, An Empirical Study of Whistleblower Policies in the United States Corporate Codes of Ethics, in WHISTLEBLOWING AND DEMOCRATIC VALUES 27, 35 (David B. Lewis & Wim Vandekerckhove, eds. 2011). However, this statistic may understate the use of hotlines, as companies may use a hotline, but not mention it in the company’s code of ethics. See id.


\textsuperscript{110} See id.
Finally, Sarbanes-Oxley influenced the development of corporate codes of ethics containing formal whistleblower protection. These code provisions grew out of Sarbanes-Oxley’s mandate that each publicly traded company disclose whether it had a code of ethics applicable to its senior financial officers and, if it did not have one, to explain publicly why it did not.111 As a co-author and I described elsewhere, after Sarbanes-Oxley implemented this code of ethics requirement,

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

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

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

the Code of Ethics available on the company’s website or in print to any shareholder who requests it.\footnote{\textsuperscript{112}}

Our empirical study of corporate codes of ethics found that companies comply with these statutory and regulatory requirements by explicitly promising employees that the company will not retaliate against them for reporting misconduct.\footnote{\textsuperscript{113}} In fact, these codes often provide broader promises to protect their employees from retaliation than provided by statutory provisions or tort claims.\footnote{\textsuperscript{114}} For example, corporate codes of ethics typically protect employees who report a broad range of wrongdoing, from illegal behavior generally (76.4\% of codes include this protection) to violations of the code itself (93.3\%) to even “unethical or improper” conduct (52.8\%).\footnote{\textsuperscript{115}} These promises not to retaliate usually apply to all employees in the company, which could provide for more consistent protection than the nuanced whistleblower laws that vary from state to state.\footnote{\textsuperscript{116}} Importantly, employees should not have difficulty finding these corporate non-retaliation promises: over 85\% of the codes in the study could be found on corporate websites.\footnote{\textsuperscript{117}}

Sarbanes-Oxley influenced the development of these formal statutory, regulatory, and corporate provisions. I use the term “formal,” because they exist for all to see and for whistleblowers to rely upon and enforce.\footnote{\textsuperscript{118}} Their presence could encourage employees to blow the whistle and protect them from retaliation. As formal statements of policy, they also have the symbolic effect of conveying the importance of whistleblowing to society’s law enforcement efforts.\footnote{\textsuperscript{119}} They demonstrate that insiders can, and should, monitor organizations on behalf of the public. Moreover,

\begin{itemize}
\item \textsuperscript{112} Moberly & Wylie, \textit{supra} note 108, at 29-30 (citing 17 C.F.R. \textsection 229.406 and NYSE Listing Manual, \textsection 303A10).
\item \textsuperscript{113} See \textit{id.} at 54, tbl. 7 (reporting that 91\% of company corporate codes in the study promised “no retaliation” against employees or explicitly prohibited retaliation)
\item \textsuperscript{114} See \textit{id.} at 32-43.
\item \textsuperscript{115} See \textit{id.} at 40-41.
\item \textsuperscript{116} See \textit{id.} at 41-42.
\item \textsuperscript{117} See \textit{id.} at 50, tbl. 1. Notably, the 2010 KPMG survey found that 100\% of U.S. companies distributed to all employees their anti-bribery and corruption policies, which often include formal whistleblower provisions. See KPMG, \textit{supra} note 109, at 12.
\item \textsuperscript{118} See Moberly, \textit{supra} note 22, at 1021-38 (arguing for the enforceability of anti-retaliation promises made in corporate codes of ethics).
\item \textsuperscript{119} See, e.g. Peter Roberts, \textit{Evaluating Agency Responses: The Comprehensiveness and Impact of Whistleblowing Procedures, in WHISTLEBLOWING IN THE PUBLIC SECTOR} 233, 239 (A.J. Brown, ed., 2008) (“Whistleblowing legislation appears to do at least one thing for which it was intended: it increases employees’ expectations that they will be taken seriously and will be protected if they blow the whistle.”); Lawrence Lessig, \textit{The Regulation of Social Meaning}, 62 U. CHI. L. REV. 943 (1995); Cass Sunstein, \textit{On the Expressive Function of Law}, 144 U. PENN. L. REV. 2021, 2051 (1996) (“There can be no doubt that law, like action in general, has an expressive function.”)
\end{itemize}
they communicate that retaliation against whistleblowers should not be tolerated. Organizations and government agencies altered their policies and procedures to comply with Sarbanes-Oxley, and this too sends a message to employees about the importance of reporting misconduct.

At the same time, the Act had significant impact as a symbol of the importance of whistleblowing for organizational governance. The culture around whistleblowing has changed in the last decade, making it more acceptable and formally encouraged. It is somewhat unclear what role Sarbanes-Oxley has played in this transformation – did Sarbanes-Oxley bring whistleblowing into public prominence, or is it merely the most prominent marker in whistleblowing’s increased prominence over the last decade? In other words, has Sarbanes-Oxley caused the rise or is it merely correlative? Although the answer is probably somewhere in between those extremes, I argue that, at a minimum, Sarbanes-Oxley paved the way for the law to frequently utilize formal mechanisms that encourage whistleblowing.

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

III. FAILURES

Scholars typically ask three questions to evaluate whether a whistleblowing law works. First, does the law encourage employees to report misconduct? Second, does the law protect them from retaliation if they do report? Third, if they do report, are whistleblowers effective at stopping the misconduct—in other words, are whistleblower reports “properly assessed and, where necessary, investigated and actioned”?120

To answer these questions definitively, more empirical research needs to be conducted in the United States.121 One model U.S.

120 See A.J. Brown, et al., Best-practice Whistleblowing Legislation in the Public Sector: The Key Principles, in WHISTLEBLOWING IN THE PUBLIC SECTOR 261, 263 (A.J. Brown, ed., 2008); cf. MARCIA P. MICELI, ET AL., WHISTLEBLOWING IN ORGANIZATIONS 4 (2008) (focusing on “evidence of the extensiveness of (a) the wrongdoing whistle-blowers say they have witnessed; (b) whistle-blowing; (c) the retaliation whistle-blowers believe they experience; and (d) the effectiveness of whistle-blowing”).

121 In particular, the question of how to measure a whistleblower’s effectiveness remains difficult to resolve because of issues related to when to measure the whistleblower’s
SARBANES-OXLEY’S WHISTLEBLOWER PROVISIONS – TEN YEARS LATER

scholars could follow has been used with great success in Australia, in which scholars examined whistleblowing and compliance system in dozens of public sector agencies from a variety of perspectives. They surveyed employees, supervisors, and organizational leaders, examined documents related to compliance systems, and also conducted in-depth interviews with dozens of workers and managers. Nothing completed in the United States private sector matches the analytical depth of the Australian study. Moreover, the studies that have been completed in the U.S. often offer contradictory and inconsistent results concerning the incidence of whistleblowing in the general employee population, the amount of retaliation that occurs, and the overall effectiveness of whistleblowers at stopping the wrongdoing they report.

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

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

effectiveness and from whose perspective the effectiveness should be measured. See Micell et al., supra note 120, at 16-18.


123 See id.

124 Several studies have been conducted related to public sector whistleblowing that use similar methods as the Australian study. See, e.g., Merit Systems Protection Board (MSPB), Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings (1984); MSPB, Whistle-Blowing and the Federal Employee (1981). Other studies have taken samples from various private sector organizations, but none of them have matched the depth and comprehensiveness of the Australian study. See, e.g., Joyce Rothschild & Terance D. Miethe, Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information about Organization Corruption, 26 Work and Occupations 107-28 (1999). Moreover, these studies do not cover the post-Sarbanes-Oxley period.

125 See Micell et al., supra note 120, at 18-32. (2008)

126 For good explanations of the complicated back story to the recession beginning in 2007, see Bethany McLean & Joe Nocera, All the Devils Are Here (2010); Andrew Ross Sorkin, Too Big to Fail (2011); Paul Muolo & Mathew Padilla, Chain of Blame (2008); Robert Shiller, The Subprime Solution (2008); and Steven L. Schwarcz, Understanding the Subprime Financial Crisis, 60 S.C. L. Rev. 549 (2009).
began defaulting on these mortgages, the value of these securities, and the companies that invested heavily in them (such as Lehman Brothers) or that guaranteed them (such as AIG), plummeted. Some companies, like Lehman Brothers, went bankrupt. Others, like AIG, received massive federal bailout loans. Billions of dollars of shareholder value disappeared and money for loans to businesses and individuals dried up. Recession quickly followed.

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

A. Encouraging Disclosures

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

In 1992, the most recent systematic survey of federal employees, approximately 48% of observers blew the whistle. In a subsequent survey of federal employees, 1,280 reported being the victim of sexual harassment, but only 67 (about 4%) blew the whistle. In 1997, only 26% of the observers of wrongdoing at a large military base blew the whistle; this sample was composed of about half military and half civilian employees. Among directors of internal auditing—whose job it is to ferret out and report financial wrongdoing internally in their organization—about 90% of those who observed wrongdoing reported it.127

None of these studies, of course, apply directly to private sector employees reporting corporate misconduct. Either they examine government or military employees, or they focus on auditors, whose jobs “legitimate and even require whistle-blowing” in a way that typical employee roles do not.128

However, some relevant empirical evidence since 2002 does exist. The Ethics Resource Center (ERC) has conducted a survey of private sector employees regularly since 1994.129 In 2011, the ERC

127 Miceli, et al., supra note 120, at 22-23.
128 See id. at 23.
129 See Ethics Resource Center, supra note 108, at 8.
reported that 65% of the employees who claimed they observed misconduct also asserted that they reported it. This result marked the highest disclosure rate in the seventeen-year history of the survey, an increase of 12 points from a record low of 53% in 2005. Interestingly, however, in 2003 the ERC reported that 64% of employees disclosed misconduct they observed, meaning that immediately after Sarbanes-Oxley was passed employees started reporting less. Since 2005, however, the percentage of employees reporting has risen consistently. The ERC assigns some of the credit for this increase in reporting to an increase in corporate ethics and compliance programs, which “is changing the behavior [of employees] for the better.” As the ERC notes, in companies with “strong ethics programs, more than four out of five employees (83%) who observed misconduct later reported it.” These results would suggest that Sarbanes-Oxley, which clearly enhanced the need for corporate compliance systems, has had some impact on employee willingness to blow the whistle.

Yet, other evidence indicates that Sarbanes-Oxley’s influence may not be as robust. For example, the Association of Certified Fraud Examiners (ACFE) conducted surveys in both 2002 and 2010 regarding the source of fraud detection. Although employees were the largest source of reporting fraud in both surveys, their importance relative to other sources (such as government regulators, auditors, or competitors) did not change and actually appeared to decrease over time. A 2011 KPMG survey found a lower number of employees who reported (10%), but also found that anonymous tipsters reported about 14% of all fraud—making the overall numbers similar to the ACFE statistics. Another study examined U.S. fraud cases from 1996 to 2004 and found that employees reported the fraud 17% of the time it became public—again more than other source. However, this study compared cases before and after

130 See id. at 12.
131 See id.
132 See id. at 23.
133 See id.
134 See id.
135 Id.
136 See ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2010 REPORT TO NATIONS 16-20 (2010) (reporting that tips initially detected 37.8% of occupation fraud in the U.S. and that, worldwide, 40.2% of reported fraud was detected by tips and employees consisted of 49.2% of the tips); ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2002 REPORT TO THE NATION: OCCUPATIONAL FRAUD AND ABUSE 11 (2002) (reporting that employees were the source of a report about fraud 26.3% of the time). In other words, the 2010 report indicated that employees were the source of the fraud disclosure about 20% of the time, down 6% from 2002.
137 See KPMG, WHO IS THE TYPICAL FRAUDSTER 10 (2011)
138 Alexander Dyck et al., Who Blows the Whistle on Corporate Fraud?, 65 J. Fin. 2213, 2214 (2010).
Sarbanes-Oxley was passed. It found that the percentage of employee tips actually decreased after Sarbanes-Oxley.139 The authors speculated that

[one possible explanation is that rules that strengthen the protection of the whistleblowers’ current jobs offer only a small reward relative to the extensive ostracism whistleblowers face. Additionally, just because jobs are protected does not mean that career advancements in the firm are not impacted by whistleblowing. Another explanation could be that job protection is of no use if the firm goes bankrupt after the revelation of fraud.]140

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

The financial crisis I mentioned above provides some interesting evidence to consider. Recently, numerous media outlets highlighted employee attempts to report rampant fraud in the subprime mortgage industry prior to 2008. For example, Eileen Foster, a former executive vice-president in charge of fraud investigations for Countrywide Financial, and at least thirty other Countrywide employees claim that they told numerous officers within Countrywide about systemic fraud within the company, which at the time was the country’s leading mortgage lender.141 The press also publicized the whistleblowing of Richard Bowen, a former Citigroup vice president who claims to have informed

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139 See id. at 2250-51.
140 Id.
Citigroup’s officers and directors about massive fraud in the mortgage loan division of the company.142

Employees at other companies involved in the mortgage debacle, like Lehman Brothers,143 General Electric,144 Wells Fargo,145 Ameriquest,146 and Washington Mutual,147 also claim to have repeatedly told company officials about massive fraud that ultimately resulted in billions of dollars in losses. In fact, one investigative reporter (an author of a book about the crisis148) published an award-winning series of articles describing how he scoured administrative records and court filings for retaliation claims against mortgage companies and banks to interview former employees who claimed to have blown the whistle.149 He found over sixty employees from twenty different financial institutions who tell similar stories about reporting massive mortgage fraud within their companies.150

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

142 See Dave Lieber, Blowing the Whistle on the Federal Government, at http://www.star-telegram.com/2012/02/09/3724513/blowing-the-whistle-on-the-federal.html#storylink=cpy (“I sent e-mails. I gave weekly reports. I made presentations. I started yelling. Yet through 2006 and 2007, the volumes [of purchases] increased, and the rate of defective mortgages increased’ in his division to as high as 80 percent.”) (quoting Richard Bowen); 60 Minutes, supra note 141.

143 See M. Thomas Arnold, “It’s Déjà Vu All Over Again”: Using Bounty Hunters to Leverage Gatekeeper Duties, 45 Tulsa L. Rev. 419, 448 (2010).


146 See id.


149 See Hudson, supra note 145; see also id. (noting that the series was selected to appear in Columbia University Press’s Best Business Writing, 2012 and also won a “Best-in-Business” award from the Society of American Business Editors and Writers).

150 See Hudson, supra note 144; Hudson, supra note 147; Hudson, supra note 145
B. Protecting Whistleblowers From Retaliation

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

The empirical evidence for these failures derives most immediately from examining the outcomes of Sarbanes-Oxley retaliation cases filed with OSHA, which I detail below. Before discussing this evidence, however, I should explain the existing empirical evidence related to the incidence of retaliation found in more general surveys. Even before 2002, whistleblower scholars noted the wide-ranging estimates of how often retaliation occurs.\(^{151}\) For example, one 1991 study concluded that only 6% of internal auditors suffered reprisals, while others “indicated that huge majorities” of whistleblowers felt retaliated against.\(^{152}\) These differences could have resulted from methodological differences in the studies (some were non-random samples of whistleblowers, while others were random samples of employees in various workplaces) or from variance in factors such as organizational norms or legal protections from retaliation.\(^{153}\)

More recent studies mirror these variances. The ERC survey mentioned above found a sharp increase between 2007 and 2011 in the percentage of employees who reported retaliation after they disclosed misconduct, from 12% to an “all-time high” of 22%.\(^{154}\) By contrast, the study of fraud cases between 1996 and 2004 determined that 82% of the employee whistleblowers suffered retaliation.\(^{155}\)

Given the lack of consistent survey evidence, one way to examine whether Sarbanes-Oxley’s antiretaliation protection worked is to look at how often employees won retaliation claims they filed with OSHA. Of course, the OSHA win-rate does not reflect how many employees reported misconduct and did not suffer retaliation—these employees would not file claims and we would not know about them.\(^{156}\) A greater problem might be that win-rates are notoriously difficult to interpret.\(^{157}\) After all, what should the proper

\(^{151}\) See Miceli, et al., supra note 120, at 23-25.
\(^{152}\) See id. (citing, among other studies, Marcia P. Miceli, et al., Who Blows the Whistle and Why, 45 IND. L. REV. 113 (1991)).
\(^{153}\) See id. at 25.
\(^{154}\) See ETHICS RESOURCE CENTER, supra note 108, at 15.
\(^{155}\) See Dyck, et al., supra note 138, at 2240 (noting that these employees were “fired, quit under duress, or had significantly altered responsibilities”).
\(^{156}\) See Moberly, Unfulfilled Expectations, supra note 5, at 99 & n.149.
win-rate be for a claim? That might be difficult to determine because the “ideal” win-rate depends, in part, upon the number of meritorious claims filed, which is likely impossible to reasonably determine.\(^{158}\)

However, in this case, examining OSHA win-rates does provide some sense of whether Sarbanes-Oxley’s statutory protections appropriately compensated victims of retaliation, because the statistics are so skewed against whistleblowers. In 2007, I published an extensive empirical study of OSHA decisions in Sarbanes-Oxley cases.\(^{159}\) I found that 3.6% of all claimants won at the OSHA level—a paltry amount and lower than almost any other comparable statute.\(^{160}\) To put that in real numbers—by July 13, 2005 (almost exactly three full years after Sarbanes-Oxley’s enactment), OSHA issued 361 Sarbanes-Oxley decisions and 13 claimants won.\(^{161}\) While these numbers seem low, the numbers are even worse for whistleblowers since the study ended. From that point until May 20, 2011, almost six full years later, only eight more whistleblowers won a case in front of OSHA (out of a total of 1,232 cases decided by the agency) for a total win rate of 1.7% since the Act’s effective date.\(^{162}\) Remarkably, for three straight years between Fiscal Years 2006 and 2008, OSHA did not decide a single case in favor of a Sarbanes-Oxley claimant. During that time, OSHA found for employers in 488 straight decisions.\(^{163}\)

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

\textit{Administrative Recalcitrance}: When I examined OSHA whistleblower decisions in 2007, I found that the low win-rate for Sarbanes-Oxley claimants resulted, in part, from OSHA investigators improperly applying Sarbanes-Oxley’s favorable burden of proof to the claimant’s detriment.\(^{164}\) At the time, the OSHA Investigative Manual did not accurately reflect the Sarbanes-Oxley burden shifting and I speculated that OSHA’s procedures simply had not caught up with the new law.\(^{165}\) Moreover, I believed that OSHA investigators were overwhelmed with the law because of the influx of hundreds of new cases without a corresponding increase in personnel.\(^{166}\) Others questioned whether OSHA had the expertise

\(^{158}\) See Moberly, Unfulfilled Expectations, supra note 5, at 99.

\(^{159}\) See generally id. at 83-90 (describing study methodology).

\(^{160}\) See id. at 91-95.

\(^{161}\) See id. at 91.

\(^{162}\) See id. at 125-26.

\(^{163}\) See id. at 124-25.
to investigate Sarbanes-Oxley cases because of the complexity of financial fraud compared with other laws under OSHA’s mandate, such as those related to worker safety.167

In 2009 and 2010, these conclusions received some support from two Government Accountability Office (GAO) independent audits of OSHA’s whistleblower program.168 These audits found that OSHA lacked resources to investigate whistleblower claims adequately and that OSHA’s investigators often lacked training to investigate complex cases.169 For example, between 2003 and 2009, OSHA did not receive any new resources for whistleblower protection, despite the addition of hundreds of new cases.170 Moreover, between one-third and one-half of investigators said they did not receive any training on Sarbanes-Oxley, while three-fourths said they needed more training on Sarbanes-Oxley to do their jobs.171 The GAO found that OSHA has “done little to ensure investigators attend mandatory training” or “have the necessary tools for the job”.172 Not surprisingly, OSHA investigators cited Sarbanes-Oxley most often as the act they needed help understanding because of its complexity, different burden of proof, and the unique types of disclosures the Act protects.173 Ultimately, in 2010, the GAO con-

167 See Sarbanes-Oxley Procedures, supra note 40 at 52,104 (noting that some commentators questioned whether OSHA could adequately investigate claims involving “complex matters of corporate securities laws and other financial and accountancy laws and practices”); Cherry, supra note 47, at 1083 n.383.
170 See GAO 2009 Report, supra note 168, at 2-3; see GAO 2010 Report, supra note 168, at 16-17 (reporting that the number of OSHA whistleblower investigators has remained “relatively flat” from 1978 to 2010, even though statutes for which OSHA has responsibility has grown from seven in 1978 to eighteen in 2010).
173 See GAO 2009 Report, supra note 168, at 39. The GAO 2009 Report found that:

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

cluded, “OSHA’s lack of focus on training may jeopardize the quality and consistency of investigations.”

In 2010, the Department of Labor Inspector General (DOL IG) similarly concluded, “complaints did not always receive appropriate investigations under the Whistleblower Protection Program.” The audit revealed that approximately 80% of whistleblower investigations under the OSH Act, Sarbanes-Oxley, and the Surface Transportation Assistance Act “did not meet one or more of eight elements from the Whistleblower Investigations Manual that were essential to the investigative process.” In 23% of cases, an investigator failed to conduct a formal interview with complainant, and 44% of the time they did not identify any complainant witnesses, a process the DOL IG believes to be “critical to successfully developing relevant and sufficient evidence in order to support the complainant's allegation and reach an appropriate determination of the case.” Even if OSHA identified witnesses, in 37% of the [total] cases, they weren't interviewed. OSHA also did not provide complainants the opportunity to respond to the employer’s allegations in 38% of the cases.

The DOL IG reiterated the GAO conclusion that Sarbanes-Oxley’s complexity created a stumbling block for the investigators. The audit found that “many investigators did not have subject matter experts for technical guidance on the 17 statutes they were responsible for enforcing.” Moreover, the Investigations Manual had not been updated since 2003 and, as a result, the investigators did not have any written guidance on how to conduct investigations under three new statutes since the last update. Also, the DOL IG found that OSHA overworked its investigators because the agency was understaffed. Even after OSHA received approval to hire twenty-five new investigators in 2010, for some reason the agency hired only sixteen. Furthermore, OSHA did not properly

Id. at 19-20.


175 DEP’T OF LABOR, INSPECTOR GEN.-OFFICE OF AUDIT, COMPLAINTS DID NOT ALWAYS RECEIVE APPROPRIATE INVESTIGATIONS UNDER THE WHISTLEBLOWER PROTECTION PROGRAM pre-2 (2010) [hereinafter Dep’t of Labor IG Report].

176 Id.

177 Id. at 4.

178 Id.

179 See id. at 5.


181 See id. at 2. As I noted in 2007, even the 2003 Manual inadequately described Sarbanes-Oxley’s burden of proof and complexity. See Moberly, Unfulfilled Expectations, supra note 5, at 125-26.

182 See Dep’t of Labor IG Report, supra note 175, at 8.
distribute its investigators across the OSHA regions to address caseload disparity.183 Lastly, the DOL IG criticized the program because OSHA’s national office did not review the program consistently and the office lacked internal controls to measure the program’s performance.184

In response to these external audits, OSHA conducted its own “top-to-bottom review” in 2011.185 OSHA’s own findings reflected the problems revealed by the GAO and the DOL IG. OSHA disclosed that 65% of its Whistleblower Program managers believe the program is stressed, while 29% believe it is broken.186 Furthermore, non-management employees believe overwhelmingly that the whistleblower program is not a priority for OSHA.187 The internal review found many of the same problems as the other audits: a lack of training and resources,188 investigators overwhelmed by the complexity of the statutes,189 and a failure to complete basic tasks, such as updating the program’s Investigations Manual.190

Adjudicatory Hamstringing: My 2007 empirical study also revealed that ALJs and the ARB issued a series of decisions reading Sarbanes-Oxley’s protections narrowly.191 For example, ALJs often made it difficult, if not impossible, for the Act to cover employees of privately held subsidiaries of publicly traded companies.192 ALJs subsequently received support for this narrow interpretation from a 2006 ARB decision in which the ARB found that a publicly traded company could only be liable under Sarbanes-Oxley for retaliation by a privately held subsidiary if an employee demonstrated specifically that the subsidiary acted as an agent of the parent company to commit the retaliation.193

Moreover, ALJs often narrowed the scope of Sarbanes-Oxley’s “protected conduct” to the detriment of employees.194 The ARB

183 See id. at 7.
184 See id. at 10.
187 See id.
188 See id. at 37-38; 50.
189 See id. at 37.
190 See id. at 40 (noting that because the Manual has not been updated since 2003, “the field lacks up to date guidance, especially on new statutes that creates inconsistent results from region to region”).
191 See Moberly, Unfulfilled Expectations, supra note 5, at 109-20.
192 See id. at 110-12.
194 Moberly, Unfulfilled Expectations, supra note 5, at 113-20.
later enshrined the ALJs’ restrictive approach by determining that whistleblowers had to “definitively and specifically” connect their disclosure to one of the six listed illegalities.\textsuperscript{195} Additionally, instead of protecting whistleblowers who disclose any of six different types of fraud, as listed in the statute, the ARB determined that the fraud reported must be fraud “related to shareholders” and “of the type that would be adverse to investors’ interests.”\textsuperscript{196} Further, the fraud had to be “material,” as defined by securities laws to mean “information that a reasonable investor would consider important in deciding how to vote.”\textsuperscript{197}

Although no study has been completed of federal court Sarbanes-Oxley decisions, some evidence exists that the federal judiciary’s decisions reflect the administrative judges’ narrow rulings. When reviewing ARB decisions, federal appellate courts seem willing to defer to the ARB’s narrow reading of the Act.\textsuperscript{198} Furthermore, when district courts heard cases de novo after whistleblowers withdrew the case from OSHA’s jurisdiction, some courts reiterated the administrative perspective. For example, some courts drew the same line between privately held subsidiaries and publicly traded companies as drawn by the ARB.\textsuperscript{199} Additionally, at least four circuit courts adopted the standard that a whistleblower’s complaint must “definitively and specifically” relate to one of the six areas of protected disclosures.\textsuperscript{200} Moreover, courts found that disclosures related to violations of “any rule or regulation of the Securities and Exchange Commission,” under the Act refers only to regulations prohibiting fraud (although that limitation does not exist in the Act’s language).\textsuperscript{201} Courts also followed the ARB in determining that the fraud disclosed must be fraud directed at

\textsuperscript{195} See Platone v. FLYi, Inc., No. 04-154, at 17 (ARB Sept. 29, 2006).
\textsuperscript{196} See id.
\textsuperscript{197} See id. at 16.
\textsuperscript{198} See Welch v. Chao, 536 F.3d 269, 276 (4th Cir. 2008) (stating that the court would grant deference to the ARB’s interpretation of Sarbanes-Oxley under the doctrine set forth in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 476 U.S. 837, 843-44 (1984)); see also Gale v. Dep’t of Lab., 384 Fed. Appx. 926, 928 (11th Cir. 2010) (“Although we review matters of law de novo, we must apply due deference to the Secretary of Labor’s interpretation of the statutes which he administers”); Platone v. U.S. Dep’t of Lab., 548 F.3d 322, 326 (4th Cir. 2008) (same).
\textsuperscript{199} See, e.g., Hein v. AT&T Operations, Inc., No. 09-CV-291 (D. Colo. Dec. 17, 2010); Rao v. Daimler Chrysler Corp., No. 2:06-CV-13723 (E.D. Mich. May 14, 2007); but see Carnero v. Boston Scientific Corp., 433 F. 3d 1, 6 (1st Cir. 2006) (finding that an employee of a subsidiary is covered employee when officers of the publicly traded parent company have the authority to affect the employment of the subsidiary’s employees).
\textsuperscript{200} See, e.g., Van Asdale v. International Game Technology, 577 F.3d 989, 996-97 (9th Cir. 2009); Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009); Welch, 536 F.3d at 275; Allen v. Admin. Review Bd., 514 F.3d 468, 476 (5th Cir. 2008).
\textsuperscript{201} See Livingston v. Wyeth, 520 F.3d 344, 354 (4th Cir. 2008).
shareholders, another limitation not found in the Act itself.\footnote{See Bishop v. PCS Admin. (USA), Inc., No. 05 Civ. 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006); \textit{but see} O’Mahony v. Accenture Ltd., 537 F. Supp.2d 506, 516-17 (S.D.N.Y. Feb. 5, 2008) (rejecting the reasoning in this line of cases); Reyna v. ConAgra Foods, Inc., 506 F. Supp. 2d 1363, 1381 (M.D. Ga. 2007).} Federal courts mirrored the high standards set forth by the ARB regarding the disclosures about fraud, concluding that the disclosure must “at least approximate the basic elements of a claim of securities fraud”\footnote{See \textit{Van Asdale}, 577 F.3d at 1001 (quoting \textit{Day}, 555 F.3d at 55) (internal quotation marks omitted).} and that the improprieties disclosed be “material” to investors.\footnote{See, \textit{e.g.}, \textit{Day}, 555 F.3d at 55; \textit{Livingston}, 520 F.3d at 355.} At least one court even shortsightedly refused to protect disclosures of a violation that could happen in the future, because it interpreted the Act to protect only whistleblowers who reported existing violations.\footnote{See \textit{Livingston}, 520 F.3d at 352.} Courts also denied plaintiffs jury trials,\footnote{See, \textit{e.g.}, \textit{Van Asdale} v. Intern’l Game Tech., No. 3:04-CV-00703-RAM (D. Nev. Apr. 13, 2010); Skidmore v. ACI Worldwide, Inc., No. 8:08CV01 (D. Neb. July 20, 2010); Walton v. Nova Info. Sys., 514 F. Supp.2d 1031, 1034 (E.D. Tenn. 2007); Schmidt v. Levi Strauss & Co., 621 F. Supp.2d 796, 804 (N.D. Ca. 2008). For a good discussion of whether Sarbanes-Oxley’s original language should have been interpreted to permit jury trials, see Gonzalez, \textit{supra} note 83. The Dodd-Frank Wall Street Reform and Consumer Protection Act amended Sarbanes-Oxley’s language to specific permit jury trials of whistleblower claims. \textit{See} Pub. L. 111-203, § 922(c), 124 Stat. 1376, 1848 (codified at 18 U.S.C. § 1514A(b)(2)(E)).} presumably one of the primary reasons a whistleblower might opt for federal court.

These types of decisions may have influenced whether whistleblowers chose to withdraw their OSHA claim. Had Sarbanes-Oxley whistleblower claims received better treatment in federal courts than in the Department of Labor, the number of withdrawals should have risen over the last decade.\footnote{These narrow decisions were not universal, as some courts interpreted Sarbanes-Oxley more broadly. \textit{See, e.g.}, Schlicksup v. Caterpillar, Inc., No. 09-CV-1208 (C.D. Ill. July 13, 2010) (finding that a transfer in positions could be an adverse action sufficient to support a claim of retaliation); O’Mahony v. Accenture Ltd., 537 F. Supp.2d 506, 516-17 (S.D.N.Y. Feb. 5, 2008) (holding that fraud disclosed did not need to be related to shareholder fraud in order to be protected conduct); Reyna v. ConAgra Foods, Inc., 506 F. Supp. 2d 1363, 1381 (M.D. Ga. 2007) (same).} Instead, the number of withdrawals to federal court from the OSHA process remained steadily between ten and seventeen percent during the last ten years.\footnote{See \textit{Petterson Email}, \textit{supra} note 162.} Thus, after ten years, there is some evidence that Sarbanes-Oxley has neither prevented nor remedied retaliation against whistleblowers. Two causes of these failures relate to OSHA’s inability to effectively enforce Sarbanes-Oxley’s antiretaliation provision and to narrow and restrictive interpretations of the Act.
C. Addressing Misconduct Effectively

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

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

Similarly, Richard Bowen of Citigroup claims the company ignored his warnings (and also retaliated against him, first by relieving him of his duties and then ultimately by firing him).\footnote{See \textit{60 Minutes}, supra note 141.} Numerous other whistleblowers allege that management in their companies either ignored or minimized their warnings.\footnote{See Hudson, supra note 144; Hudson, supra note 147; Hudson, supra note 145.}

One reporter who spoke with many of these whistleblowers concluded that

\[ \text{[t]hese ex-employees’ accounts provide evidence that the muzzling of whistleblowers played an important role in allowing corruption to flourish as mortgage lenders and their patrons on Wall Street pumped up loan volume and profits. Codes of silence at many lenders, former employees claim, helped discourage media, regulators and policymakers from taking a hard look at illegal practices that ultimately harmed borrowers, investors and the economy.}\footnote{See Hudson, supra note 145.}

Government investigations also found that financial company officials ignored reports of widespread fraud from employees.\footnote{See U.S. Senate Permanent Subcommittee on Investigations, Majority and Minority Staff Report: \textit{Wall Street and the Financial Crisis: Anatomy of a Financial Collapse} 95 (Apr. 13, 2011) (“Perhaps the clearest evidence of WaMu’s shoddy lending practices came when senior management was informed of loans containing fraudulent information, but then did little to stop the fraud.”) [hereinafter \textit{Senate Report}]. The Report also found that Loans not meeting the bank’s credit standards, deliberate risk layering, sales associates manufacturing documents, offices issuing loans in which 58\%, 62\%, or 83\% contained evidence of loan fraud, and selling fraudulent loans to investors are evidence of deep seated problems that existed within WaMu’s lending practices. Equally disturbing is evidence that when}
Not surprisingly, company officials denied any retaliation occurred. However, an impressive number of employees have either won retaliation lawsuits against the companies or entered into confidential settlement agreements. For example, OSHA re-instated Eileen Foster and awarded her $930,000 in back pay after investigating her claim of retaliation under Sarbanes-Oxley. OSHA also awarded over $1 million to a whistleblower from Washington Mutual who alleged the company retaliated against for reporting violations of federal lending laws. A California jury awarded a Countrywide whistleblower a $3.8 million verdict. The media has reported on several other settlements with financial industry whistleblowers. These ex post awards compensated these employees for the retaliation and validated their claims of reporting the misconduct. However, they came too late to stop the billions of dollars in losses resulting from the mortgage crisis.

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

 WaMu senior managers were confronted with evidence of substantial loan fraud, they failed to take corrective action.

Id. at 103.

220 See Hudson, supra note 145; 60 Minutes, supra note 141 (publicizing letter denying retaliation against Bowen).


222 See Hudson, supra note 141.

223 See Michael Hudson, Management Gurus Claim They Were Blindsided By Toxic Culture At Countrywide, at http://www.iwatchnews.org/2011/12/13/7606/management-gurus-claim-they-were-blindsided-toxic-culture-countrywide (Dec. 13, 2011). Bank of America has appealed the decision, claiming that it was not supported by the evidence. See id.

224 See id. (reporting about Countrywide whistleblower who settled with Bank of America); Hudson, supra note 141 (Countrywide settlements); Hudson, supra note 215 (Countrywide and Bank of America settlements); Hudson, supra note 145 (Citizens Financial Mortgage and Wells Fargo settlements); Hudson, supra note 214 (Countrywide settlements).

225 See ETHICS RESOURCE CENTER, BLOWING THE WHISTLE ON WORKPLACE MISCONDUCT 5 (2010) (noting that 46% of whistleblower reports go to an employee’s immediate supervisor, while another 29% went to “higher management”).

226 See Moberly, supra note 5, at 1121-25.
porate codes of ethics. This study found that most codes of ethics direct employees to report misconduct to their supervisors.\(^{227}\) Despite Sarbanes-Oxley’s requirement that companies have a whistleblower hotline, less than half of corporate codes of ethics identify a hotline for employees to use, and slightly less than half of those provide any contact information for the hotline in the code itself.\(^{228}\) Only 2.2% of the codes gave employees the option of reporting misconduct to an external authority.\(^{229}\) Perhaps not surprisingly, according to an Ethics Resource Center survey, only 3% of whistleblowers use company hotlines to report misconduct, while another 4% report the wrongdoing externally.\(^{230}\)

Moreover, a different Ethics Resource Center survey conducted in 2011 found the highest percentage of employees since 2000 – 42% – who say that their company has a weak ethical culture.\(^{231}\) Misconduct can flourish more readily at a company with a weak ethical culture.\(^{232}\) Time after time, whistleblowers in the financial industry complained that their company culture encouraged and fostered the fraudulent behavior that resulted in the 2008 meltdown.\(^{233}\) All of these statistics and evidence suggest that Sarbanes-Oxley, above all else, failed to change corporate culture sufficiently to address misconduct when employees report it.

IV. LESSONS LEARNED

Encouragingly, developments in the last two years of the decade demonstrate that policy makers may have learned from the Sarbanes-Oxley experience. First, in addition to focusing on the substance of various whistleblower statutory protections, renewed energy has been put towards determining who is involved in administering those protections. As a result, newly appointed whistleblower advocates in key government positions have begun to address the roadblocks previously used to thwart the strong antiretaliation protection Congress initially envisioned for the Act. Second, in 2010, Congress passed the Dodd-Frank Act to address the failings that preceded the most recent financial crisis. This Act

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\(^{227}\) See Moberly & Wylie, supra note 108, at 35.

\(^{228}\) See id. at 35-36.

\(^{229}\) See id. at 36 (noting that only 2 of the 89 codes examined mentioned an external recipient).

\(^{230}\) See ETHICS RESOURCE CENTER, supra note 225, at 5.

\(^{231}\) See ETHICS RESOURCE CENTER, supra note 108, at 20 [2011 report].

\(^{232}\) See id. at 20.

\(^{233}\) See Hudson, supra note 223 (describing a “toxic culture” at Countrywide); Hudson, supra note 144; SENATE REPORT, supra note 219, at 95-103 (describing several lack of internal controls at Washington Mutual leading to pervasive fraud), 143 (“WaMu’s compensation policies were rooted in the bank culture that put loan sales ahead of loan quality.”).
applies a radically different model to encourage whistleblowers by using financial rewards in addition to Sarbanes-Oxley’s traditional models.

A. People Matter As Much as Provisions

As I described above, at least two administrative departments undermined Sarbanes-Oxley’s antiretaliation protections. OSHA’s investigators failed to perform sufficient investigations of Sarbanes-Oxley retaliation claims for a variety of reasons, including lack of resources and inadequate training about a new, complex statute.234 Also, the ARB issued a series of decisions narrowing the scope of Sarbanes-Oxley’s protections dramatically.235

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

OSHA. First, President Obama appointed David Michaels as Assistant Secretary of Labor in charge of OSHA.236 After the Senate confirmed Michaels in December 2009,237 he quickly issued a “Vision Statement” in which he highlighted the importance of giving workers “voice” through whistleblower protection.238 In that statement, Michaels singled out the Workplace Protection Program (WPP) as an area that needed strengthening because it did not work:

We have been given the responsibility to enforce the whistleblower provisions of 17 statutes, with more likely to be added in the very near future.239 The importance of this work is enormous, as is the challenge of doing it well. OSHA whistleblower personnel strive to obtain justice for aggrieved workers covered under a mosaic of laws with different requirements, in tremendously varied subject areas, while carrying heavy case loads. Even in situations where the injustice is apparent, too often we are unable to protect the worker who has been the

234 See supra text accompanying notes 164-90.
235 See supra text accompanying notes 191-97.
237 See id.
object of discrimination or retaliation. This system is clearly not functioning well and we must find ways to improve it. Toward this end, we have begun a comprehensive review of our Whistleblower Protection Program, in order to identify ways to strengthen it.\textsuperscript{240}

Secretary Michaels followed up this statement by commissioning the “top-to-bottom review” of the WPP mentioned above.\textsuperscript{241} In response to the criticisms from the independent audits by the Department of Labor Inspector General and the Government Accountability Office, and the weaknesses disclosed in this internal review,\textsuperscript{242} Michaels promised a number of reforms.\textsuperscript{243} He pledged better training and more resources for the WPP,\textsuperscript{244} a promise he fulfilled with the administration’s budget request for Fiscal Year 2013. That request made whistleblower protection a priority by asking for $4.9 million in new funding and thirty-seven additional full-time employees.\textsuperscript{245} Moreover, he moved the WPP out from under the Directorate of Enforcement to a stand-alone program reporting directly to the Assistant Secretary for OSHA.\textsuperscript{246}

Additionally, OSHA issued a new, revised Whistleblower Investigation Manual that greatly improves upon the last release in 2003.\textsuperscript{247} It discusses all of the recently added statutory protections and also provides a correct summary of Sarbanes-Oxley’s legal requirements.\textsuperscript{248} Importantly, it accurately describes Sarbanes-Oxley’s whistleblower-friendly burden of proof,\textsuperscript{249} which the 2003 Manual failed to acknowledge.\textsuperscript{250} Also, it requires investigators to attempt to interview the complainant in all cases, which, remarka-

\textsuperscript{240} See OSHA at Forty: New Challenges and New Directions, supra note 238.

\textsuperscript{241} See LUCERO, ET AL., supra note 186.

\textsuperscript{242} See supra text accompanying notes 168-84.


\textsuperscript{244} See id.


\textsuperscript{247} See OSHA, WHISTLEBLOWER INVESTIGATIONS MANUAL (2011).

\textsuperscript{248} See id. at 14-1 to 14-5.

\textsuperscript{249} See id. at 3-7 (noting that Sarbanes-Oxley and other statutes “require a lower standard to establish causation and a higher standard of proof in order to establish a respondent’s affirmative defense”).

\textsuperscript{250} See OSHA, WHISTLEBLOWER INVESTIGATIONS MANUAL 3-2 & 3-3; 14-1 to 14-11 (2003).
SARBANES-OXLEY’S WHISTLEBLOWER PROVISIONS –
TEN YEARS LATER

bly, the 2003 Manual did not require as explicitly. The new Manual makes clear that OSHA will accept complaints orally as well as in writing, including electronically over the internet.

Secretary Michaels’ leadership may be having an effect, as OSHA recently issued a number of orders in favor of Sarbanes-Oxley whistleblowers. In March 2010, OSHA ordered reinstatement of two separate whistleblowers along with payment of over $600,000 to one and more than $1,000,000 to the other. In June 2010, OSHA ordered U.S. Bank to reinstate a whistleblower and pay back wages. In September 2011, OSHA ordered a company and its former CEO to pay a whistleblower approximately $500,000 in back pay. Finally, as mentioned above, also in September 2011, OSHA ordered Bank of America to reinstate whistleblower Eileen Foster and pay her approximately $930,000 in back wages, interest, and compensatory damages. Given that during the three year period between Fiscal Years 2006 and 2008 OSHA did not find in favor of a single whistleblower, these victories with substantial financial awards may mark a new beginning for the statute’s antiretaliation provision.

ARB. Second, recent appointments to the ARB reconfigured its political makeup and, apparently, its outlook towards the Sarbanes-Oxley whistleblower provision. In 2010 and 2011, President Obama’s Secretary of Labor, Hilda Solis, appointed five new mem-

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252 See id. at 2-1.
258 See Petterson Email, supra note 162.
bers to the ARB’s five-member panel. As two whistleblower advocates claimed at the time, “Together they have the most experience, subject matter expertise, and demonstrated commitments to the board’s mission of any members in its history.”

Perhaps as a result of this new makeup, the new ARB found in favor of whistleblowers more often than its predecessors. During a six-month period in 2010 after the appointment of four of these new members, whistleblowers won six out of sixteen cases (37.5%) before the ARB on the merits, as opposed to 19.75% (eight out of forty-one cases) in 2009.

As important, the new ARB also reversed the Board’s restrictive interpretations of Sarbanes-Oxley and significantly expanded the scope of the Act’s whistleblower protection. In 2011, the Board held that a whistleblower’s protected activity no longer had to relate to shareholders’ interest, nor did the fraud disclosed have to be “material.” Moreover, it dispensed with the need for a whistleblower to “definitively and specifically” identify a securities fraud violation as part of a disclosure of misconduct. The Board also determined that the Dodd-Frank Act “clarified” that Sarbanes-Oxley applied to privately held subsidiaries of publicly traded companies—a decision that overturned prior ARB decisions regarding this issue.

When confronting new questions, the revamped ARB interpreted Sarbanes-Oxley broadly rather than narrowly. In Funke v. Federal Express Corp., for example, the ARB held that a whistleblower could make a disclosure to local or state law enforcement, despite ambiguity in Sarbanes-Oxley’s language about whether the Act protects such reports. Similarly, the new ARB expanded the

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261 Id.
262 I provide a longer discussion of the ARB’s 2011 decisions in Moberly, supra note 105.
263 See Brown v. Lockheed Martin Corp., No. 10-050, at 9 (ARB Feb. 28, 2011) (shareholders’ interest); see also Funke v. Federal Express Corp., No. 09-004, at 8 (ARB July 8, 2011) (shareholders’ interest); Sylvester v. Parexel, Int’l, No. 07-123, at 21 (ARB May 25, 2011) (materiality). The Board arguably went even further and found that a whistleblower’s protected disclosure did not have to disclose fraudulent conduct at all, as long as it could be seen as “in furtherance of a scheme or artifice to defraud.” Brown, No. 10-050, at 9. The Board did leave open the possibility that a complaint may concern “such a trivial matter” that there is no protected activity. See Sylvester, No. 07-123, at 22.
264 See Sylvester, No. 07-123, at 18.
265 See Johnson v. Siemens Bldg. Techs., Inc., No. 08-032 at 16 (ARB mar. 31, 2011); see also Moberly, Unfulfilled Expectations, supra note 5, at 134-37 (discussing this issue).
266 No. 09-004 (ARB July 8, 2011).
267 See id. at 16. Sarbanes-Oxley’s language states that, in order to receive protection, a whistleblower must report misconduct to “(A) a Federal regulatory or law enforcement
definition of “adverse action” under Sarbanes-Oxley to include reprisals that are “more than trivial,” a standard that likely would cover a broader range of retaliatory actions than the Supreme Court previously found actionable for Title VII claims in Burlington Northern & Santa Fe Railway Co. v. White. The ARB used this new standard to find an adverse action when a company merely released the name of the whistleblower to its employees as part of its internal investigation into the employee’s complaint.

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

Internal Disclosure Channels: In addition to these administrative changes, the conclusion about the important role of people applies to internal company policies as much as statutory whistleblower protections. Sarbanes-Oxley’s structural model and codes of ethics are not enough. Numerous studies suggest that a strong ethical

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269 548 U.S. 53 (2006). The ARB distinguished Burlington Northern and found that the case helped determine the scope of prohibited actions, but was not dispositive because Sarbanes-Oxley clearly prohibits “a very broad spectrum” of retaliatory activity, including non-tangible adverse actions. See Menendez, Nos. 09-002 & 09-003, at 15-16.
270 See Menendez, Nos. 09-002 & 09-003, at 22-26. The ARB supported this conclusion by noting that this breach of confidentiality violated Sarbanes-Oxley Section 301’s requirement that companies provide a confidential, anonymous reporting channel for whistleblowers to report misconduct. See id.
271 No. 09-118 (ARB Sept. 28, 2011).
272 See id. at 15-17.
273 Id.
274 See id.
culture strongly influences employees to report, and that culture is created and perpetuated by people, not necessarily policies and Codes. For example, in the landmark Australian study of public sector whistleblowing, the authors concluded that managers had the most impact on whether employees felt comfortable reporting misconduct. The Ethics Resource Center study similarly demonstrated that companies with a strong ethics program had less wrongdoing, more reporting, and less retaliation. Importantly, the study found that individuals—specifically senior executives and supervisors—drove and influenced the culture more than anything else.

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

The problem with this lesson, of course, is that it is not very satisfactory. We should be uneasy that the actions of whoever is in power could so easily determine the success or failure of a whistleblowing system. Perhaps the United States should begin thinking about how systems and machinery to support whistleblowers can be put in place to survive the inevitable transition of power.

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275 See, e.g., Miceli et al., supra note 120, at 186-88; Linda Klebe Treviño et al., Managing to Be Ethical: Debunking Five Business Ethics Myths [and Executive Commentary], 18 Acad. of Mgmt. Exec. 69, 73 (2004); Gary R. Weaver & Linda Klebe Treviño, Compliance and Values Oriented Ethics Programs: Influences on Employees’ Attitudes and Behavior, 9 Bus. Ethics, Q. 315, 333 (1999); Marcia P. Miceli & Janet P. Near, Blowing the Whistle: The Organizational & Legal Implications for Companies and Employees 158-60, 297 (1992).

276 See Ethics Resource Center, supra note 108, at 21; Miceli et al., supra note 120, at 187 (“In general, the results . . . of prior empirical research support the notion that top managers should create a culture for encouraging good performance that is ethical.”); Treviño et al., supra note 275, at 75-77; Gary R. Weaver et al., Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors, 42 Acad. Mgmt. J. 41, 54 (1999); Miceli & Near, supra note 275, at 161, 167-68, 287.


278 See Ethics Resource Center, supra note 108, at 35.

279 See id. at 21.

280 Cf. Brown et al, supra note 120, at 267-71 (describing organizational structures that support whistleblowing); Roberts, supra note 119, at 235 (discussing the important of whistleblowing procedures and structures); Australian Standard, Whistleblower Protection Programs for Entities (AS 8004-2003) (recommending certain whistleblowing procedures).
structures could focus more on disclosure and transparency regarding the results of whistleblowing, so that outside agencies and academics can more easily track successes and failures. More and overlapping independent oversight of whistleblower programs also could help bring accountability to whistleblowing systems in order to provide consistency across different administrations.\textsuperscript{281}

**B. Applying a New Model**

In response to the financial crisis in 2008, Congress passed the Dodd-Frank Act,\textsuperscript{282} which (among numerous other reforms) attempted to encourage more whistleblowing from private sector employees.\textsuperscript{283} As noted above, Dodd-Frank contains its own, strongly worded antiretaliation provision and amends Sarbanes-Oxley’s antiretaliation protections to fix weaknesses that had become apparent.\textsuperscript{284} In addition, it utilizes the “bounty model” of encouraging whistleblowing—a radically different approach to whistleblowing than the traditional antiretaliation model typically employed in the private sector.\textsuperscript{285}

The bounty model encourages whistleblowing by financially rewarding whistleblowers with a percentage of the fines or penalties collected as a result of the misconduct reported by the whistleblower.\textsuperscript{286} Before Dodd-Frank, the False Claims Act (FCA) presented the most prominent example of the model.\textsuperscript{287} Under the FCA, a whistleblower who reports fraud against the federal government may collect between fifteen and thirty percent of the amount recovered from the wrongdoer.\textsuperscript{288} Scholars and policymakers generally regard the FCA as the most successful whistleblower

\textsuperscript{281} Cf. Brown, supra note 120, at 269-71, 284-85 (recommending agency oversight of public sector whistleblowing).


\textsuperscript{283} See id. § 748, 124 Stat. at 1739; id. § 922, 124 Stat. at 1841; id. § 1057, 124 Stat. at 2031.

\textsuperscript{284} See supra text accompanying notes 92-99 (noting that, among other things, Dodd-Frank lengthened Sarbanes-Oxley’s statute of limitations from 90 to 180 days and clarified that the Act applied to privately held subsidiaries of publicly traded companies).

\textsuperscript{285} See Geoffrey Christopher Rapp, Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act, 2012 BYU L. REV. 73, 74-75.


\textsuperscript{287} See Callahan & Dworkin, supra note 286, at 281.

\textsuperscript{288} See 31 U.S.C. § 3730(d).
law in the United States.\textsuperscript{289} Indeed, since Congress strengthened the law in 1986, the federal government has recovered more than $30 billion under the law.\textsuperscript{290} Recently, the government has increased its use of the law such that, during the Obama presidency alone, the Department of Justice has collected over 25\% of that total ($8.7 billion).\textsuperscript{291} Twenty-nine states have adopted similar provisions with equivalent success.\textsuperscript{292} Federal law also permits the Internal Revenue Service to pay rewards to whistleblowers who report tax evasion.\textsuperscript{293}

Dodd-Frank expanded the use of the model to include whistleblowers who report fraud against companies, as opposed to the government.\textsuperscript{294} To receive a reward, whistleblowers report securities fraud to the Securities and Exchange Commission (SEC), which will investigate.\textsuperscript{295} If the SEC imposes a fine or penalty above $1 million, then the whistleblower may receive between ten and thirty percent of the penalty after filing a claim with the SEC.\textsuperscript{296}

In one sense, the goal of both the antiretaliation model and the bounty model is the same—encouraging an employee to disclose wrongdoing—although they approach it differently. The antiretaliation model attempts to reduce the fear of retaliation that might keep a person from reporting, while the bounty model attempts to affirmatively reward the person for disclosing.\textsuperscript{297} Despite a similar

\textsuperscript{289} See, e.g., Rapp, supra note 285, at 76; Elizabeth I. Winston, The Flawed Nature of the False Marking Statute, 77 TENN. L. REV. 111, 140 (2009) (calling the FCA “the most vibrant and dominant of all qui tam actions available in the United States today”).


\textsuperscript{293} See 26 U.S.C. § 7623(b).

\textsuperscript{294} See Rapp, supra note 285, at 74-75.


\textsuperscript{296} This section outlines Dodd-Frank’s general parameters, but is not meant to be a comprehensive overview of the statute and its detailed regulations. See 15 U.S.C.S. § 78u-6; Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 and 249). Numerous academics and practitioners have written excellent summaries and analyses of the Act’s whistleblower provisions. See, e.g., Rapp, supra note 285, at 85-87; Marc S. Raspani & Bryan S. Neft, Dodd-Frank Opens Doors on Whistleblower Claims for Securities Laws Violations, 13 LAWYER’S J. 4 (2011).

\textsuperscript{297} See Callahan & Dworkin, supra note 286, at 296-301 (noting that “social-psychological literature supports the assumption that financial incentives will motivate new whistleblowers to come forward,” but that this conclusion is subject to numerous limitations depending upon the context); but see Yuval Feldman & Orly Lobel, The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for
goal, they differ sharply in how they address the underlying wrongdoing reported by a whistleblower. Antiretaliation provisions address ex post retaliation but fail to correct the underlying misconduct disclosed. The bounty model, by contrast, corrects, or at least punishes and provides a remedy for, the initial wrongdoing. The reward paid to a whistleblower derives directly from damages caused by the misconduct.

In this way, the bounty model may address the primary weakness the recent financial crisis exposed about Sarbanes-Oxley: the Act did not lead to effective whistleblowing that would remedy wrongdoing. By focusing on the underlying misconduct, the bounty model encourages effective resolution of the problems reported by whistleblowers, which the antiretaliation model simply ignores. In other words, rather than attempting to compensate victims of retaliation, it forces companies to pay for the damages caused by the misconduct disclosed by the whistleblower. A good example of the difference between the two models can found with Citigroup’s different reactions to whistleblowing related to the mortgage crisis. Above, I mentioned Richard Bowen, who reported the widespread mortgage fraud internally, but whose whistleblowing did not alter the company’s practices nor prompt the company to change its certification to the government that the company’s financial status was secure. In fact, Citigroup asserted “the issues raised by Mr. Bowen had no impact on the integrity or propriety of Citi’s financial statements or the accuracy of the certifications signed in connection with Citi’s year-end and quarterly public filings.”

In contrast, in August 2011, a Citi quality assurance manager filed a qui tam whistleblower suit under the False Claims Act, alleging that Citigroup misled the federal government, which then insured mortgage loans that the company knew did not meet appropriate standards for the insurance. Many of the allegations concerned conduct occurring as late as 2011, nearly three years after the crisis exploded that required Citigroup to accept government bailout money and that cost their shareholder’s 94% of the value of their stock. In short order after the government joined the lawsuit, Citigroup settled the claim for $158.3 million and admitted falsely certifying mortgage loans for insurance and not complying with disclosure rules. The whistleblower recently


298 See supra text accompanying note 142.

299 See Lieber, supra note 142.

300 See Citigroup Whistleblower: I have no regrets; Problems Persist, Even After Crisis, at http://investmentwatchblog.com/citigroup-whistleblower-i-have-no-regrets/#.T3tOdY65OGh (Feb. 16, 2012).

301 See id.

302 See id.
claimed that compliance at Citigroup has now changed: “The re-
porting structure of the quality assurance function has changed,
and I do believe the attitude of upper management is ‘we’re going
to do this right.’” In March 2012, two other FCA qui tam whistle-
blower suits were unsealed, both of which allege that substantial
fraud occurred at Countrywide and Bank of America. Additionally,
the United States government settled claims with five lenders
related to mortgage fraud and abuse for $25 billion, which includes
$227 million for whistleblowers who brought FCA qui tam cases.
In contrast to Bowen’s whistleblowing, which failed to change
the alleged fraud occurring at Citigroup, the whistleblowers seeking
bounties forced companies to take responsibility for their wrongdo-
ing. Moreover, the bounty model serves as more substantial en-
couragement for whistleblowers than the antiretaliation model.
First, social science studies demonstrate that employees blow the
whistle because they hope the problem they disclose will be re-
solved. The bounty model dovetails with this motivation by
addressing the underlying misconduct. Second, the model suffi-
ciently compensates whistleblowers for their risk. The antiretaliation
model, at best, provides remedies to whistleblowers that simply return them to the ex ante position they would have
maintained had they not blown the whistle – hardly a positive inducement to risk the retaliation that often accompanies whistle-
blowing. The bounty model potentially puts the whistleblower in
a better place as a result of whistleblowing.309

303 See id. (quoting whistleblower Sherry Hunt).
304 See Amy Biegelsen & Emma Schwartz, New Whistleblower Cases Alleged Continued
Bank Fraud, at www.iwatchnews.org/2012/03/09/8359/new-whistleblower-cases-allege-
continued-bank-fraud (March 9, 2012).
305 See Rick Rothacker, Whistleblowers Reap Millions In U.S. Mortgage Suits, at
http://www.reuters.com/article/2012/03/14/settlement-whistleblowers-
idUSL2E8EE0KM20120314 (March 14, 2012).
306 See Terance D. Miethe & Joyce Rothschild, Whistleblowing and the Control of Or-
ganizational Misconduct, 64 SOC. INQUIRY 322, 333-37 (1994) (providing survey results
demonstrating that a primary reason employees do not disclose misconduct is because the
employee believes that nothing will be done to correct the problem); see also Miceli & Near, supra note 275, at 65-66; Terry Morehead Dworkin & Elletta Sangrey Callahan,
Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society,
29 AM. BUS. L.J. 267, 302 (1991); Karen L. Hooks et al, Enhancing Communication To Assist in
307 See Callahan & Dworkin, supra note 286, at 296-301; Rapp, supra note 285, at 119;
Gonzalez, supra note 286, at 339-41; Dyck et al., supra note 138, at 2215.
308 See Stewart J. Schwab, Wrongful Discharge and the Search for Third-Party Effects, 74
puts an employee “at best . . . in the same position had he not” acted in the public inter-
est); see also Dyck et al., supra note 138, at 2250-51.
309 See Rapp, supra note 285, at 118-20.
Finally, the Dodd-Frank version of the bounty model directs whistleblowers to external regulators in the SEC, which addresses another problem exposed by the financial crisis: Sarbanes-Oxley did not change the manner in which employees reported wrongdoing. As I noted above, and in contrast to my prediction that Sarbanes-Oxley’s structural model would lead to more reports to independent audit committees, employees continued to disclose problems most often to their supervisor, who could block and filter those reports before they reached people who could address the problem. By encouraging external reports directly to government regulators, Dodd-Frank may help solve this problem.

However, reporting to outside regulators will work only if the SEC actually responds to the reports. Although it is too early to examine the agency’s willingness to take these reports seriously, one might be skeptical about the program given recent history with another government bounty program related to taxes. In 2006, Congress strengthened the tax bounty whistleblower program, which provides rewards for individuals who report tax evasion and fraud. Yet, despite receiving over 1,300 whistleblower reports since then, the Internal Revenue Service has approved, at most, a “small” number of awards. A GAO report in 2011 criticized the

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310 See Dodd-Frank Act § 922, 15 U.S.C.S. § 78u-6(a)(6) (defining “whistleblower” as an individual or individuals who provide “information relating to a violation of the securities laws” to the SEC).
311 See Moberly, Structural Model, supra note 5, at 1141-49.
312 See ETHICS RESOURCE CENTER, supra note 225, at 5; Moberly, Structural Model, supra note 5, at 1121-25 (describing executive blocking and filtering of whistleblower disclosures).
313 Despite heavy pressure from corporate interests, the SEC regulations to implement the Dodd-Frank whistleblower bounty program do not require internal reporting before reporting to the SEC. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,301 (June 13, 2011) (noting that “[c]ommentators were sharply divided” on this topic); Edward Wyatt, S.E.C. Adopts Its Revised Rules for Whistle-Blowers, N.Y. TIMES, May 25, 2011, at http://dealbook.nytimes.com/2011/05/25/s-e-c-adopts-final-rules-for-whistle-blowers/ (noting opposition by the United States Chamber of Commerce and other business interests); Peter J. Henning, A Greater Incentive for Whistle-Blowers, N.Y. TIMES, May 26, 2011, at http://dealbook.nytimes.com/2011/05/26/dealing-with-the-s-e-c-s-new-whistleblower-program/ (asserting that the internal reporting rules were the focus of a “lobbying battle”). However, the regulations include incentives for internal reporting. See Securities Whistleblower Incentives and Protections, supra, 76 Fed. Reg. 34,325; 17 C.F.R. § 240.21F-4(c)(3). For example, if the whistleblower reports internally and the company self-reports to the SEC, the whistleblower will be eligible for any financial reward. See 17 C.F.R. § 240.21F-4(c)(3).
315 The IRS refuses to release publicly the number of awards because of privacy concerns. See GOVERNMENT ACCOUNTABILITY OFFICE, supra note 314, at 1-2. In a 2011 Report, the GAO reported that a “small” number of awards had been made out of more than 1,300
IRS’s administration of the system, concluding that the IRS takes too long to process claims, lacks effective internal control on the review process, and fails to communicate with whistleblowers and with Congress.\(^{316}\) Whistleblower advocates assert that cumbersome regulations, delays, and lack of support from the high-ranking administrators in the IRS and the Treasury Department have created a dysfunctional system.\(^{317}\) Similarly to the dysfunction with OSHA’s administration of Sarbanes-Oxley’s antiretaliation protections, administrative recalcitrance can undermine the bounty model as well.

Moreover, the SEC specifically has a checkered past when dealing with whistleblowers.\(^{318}\) Although the SEC received copies of every Sarbanes-Oxley whistleblower complaint filed with OSHA over the last decade,\(^{319}\) the agency admitted that it never followed up on these complaints even though they often included evidence of corporate securities misconduct.\(^{320}\) The SEC already administers a whistleblower bounty program under the Insider Trading and Securities Enforcement Act of 1988,\(^{321}\) and had issued rewards under that program totaling less than $200,000 as of the middle of 2010.\(^{322}\) Furthermore, and perhaps most damning, the agency and the Department of Justice ignored specific whistleblower tips regarding numerous problems before the financial crisis. For example, for years before Bernard Madoff’s ponzi scheme fell apart

whistleblower submissions. See id. Journalists have reported that the IRS has made only one award that has become known publicly. See Laura Saunders, IRS Whistleblower Program Faulted, at http://online.wsj.com/article/SB10001424053111904103404576560792189138236.html (Sept. 9, 2011); Michael Hudson, IRS red tape, old guard slow whistleblowing on corporate tax cheats, at, http://www.iwatchnews.org/2011/06/22/4979/irs-red-tape-old-guard-slow-whistleblowing-corporate-tax-cheats (June 22, 2011).

\(^{316}\) See GOVERNMENT ACCOUNTABILITY OFFICE, supra note 314, at 8-20.


\(^{318}\) See Rapp, supra note 285, at 136-39 (detailing reasons “why the SEC is likely to remain a roadblock to whistleblowers seeking bounties” under Dodd-Frank).


\(^{320}\) See Moberly, Unfulfilled Expectations, supra note 5, at 79, 148-49; see also Rapp, supra note 285, at 126-29 (detailing cases in which SEC failed to utilize Sarbanes-Oxley whistleblower tips).


\(^{322}\) See Dave Ebersole, Blowing the Whistle on the Dodd-Frank Whistleblower Provisions, 6 OHIO ST. ENTREP. BUS. L.J. 123, 125 (2011) (citing SEC & EXCH. COMM’N, OFFICE OF INSP. GEN., ASSESSMENT OF THE SEC’S BOUNTY PROGRAM, REP. NO. 474, 5 (Mar. 29, 2010)). In late July 2010, the SEC announced that it awarded $1 million to a whistleblower whose disclosures led to a $28 million settlement with the hedge fund Pequot Capital Management. See Henning, supra note 313.
publicly, a whistleblower repeatedly warned the SEC that Madoff’s investment fund engaged in fraud.\textsuperscript{323}

That said, perhaps Dodd-Frank will change the SEC’s approach to whistleblowers, because the statute institutionalized whistleblowing in the agency by creating an Office of the Whistleblower.\textsuperscript{324} The Office includes a Chief, a Deputy Chief, five attorneys, and a paralegal, and it operates from a fund of more than $450 million, which also will be used to pay whistleblower rewards.\textsuperscript{325} During the first seven weeks the program operated, it received 334 reports,\textsuperscript{326} the quality of which was “remarkably high,” according to a former SEC official.\textsuperscript{327} Because the regulations only became effective in August 2011,\textsuperscript{328} the SEC has not had time to issue an award as of April 2012.

Additionally, Dodd-Frank may support the structural model by reinvigorating corporate internal reporting systems. Corporate interests predicted the opposite result when the SEC promulgated its regulations for Dodd-Frank, because the agency rebuffed corporate efforts to require whistleblowers to report internally before reporting to the SEC.\textsuperscript{329} However, some early evidence indicates that corporations have strengthened their internal systems out of fear that the Act’s financial rewards will entice employees to report to the SEC. One recent survey found that employees internally reported fraud at an “all-time high” rate during the fourth quarter of 2011.\textsuperscript{330} This was the third straight quarter of “new all-time highs,” and the CEO of the company responsible for the survey speculated that companies responded to Dodd-Frank by reempha-

\textsuperscript{323} See Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the H. Comm. on Financial Services, 111th Cong. 102 (2009) (statement of Harry Markopolus) (stating that “as early as May 2000, I provided evidence to the SEC’s Boston Regional Office that should have caused an investigation of Madoff. I re-submitted this evidence with additional support several times between 2000–2008, a period of nine years. Yet nothing was done.”); Christine Hurt, Evil Has a New Name (and a New Narrative): Bernie Madoff, 2009 Mich. St. L. Rev. 947, 954 n.45; Arnold, supra note 143, at 441–42.

\textsuperscript{324} See Dodd-Frank Act § 924(d); SEC: Office of the Whistleblower, at http://www.sec.gov/whistleblower (last visited Apr. 9, 2012).


\textsuperscript{326} See SEC & EXCH. COMM’N, supra note 325, at 5.


\textsuperscript{329} See sources cited supra note 313.

sizing antiretaliation policies and communicating more effectively with employees.\footnote{331 See id.}

The application of the bounty model to the private sector will be important to evaluate over the coming years. If successful, it might be worth exploring whether it can be applied more broadly. For example, one scholar proposed using the model for safety and health whistleblowers.\footnote{332 See Gonzalez, supra note 286, at 348-49.} Such proposals, as well as Dodd-Frank itself, result directly from Sarbanes-Oxley in two ways. First, Sarbanes-Oxley opened the door to more creative thinking about using whistleblowers as part of the nation’s law enforcement strategy. Sarbanes-Oxley raised our consciousness of the important role whistleblowers can play in detecting misconduct. Second, Sarbanes-Oxley’s grand failures led to even further experimentation and a move away from relying almost exclusively on the antiretaliation model. In particular, Sarbanes-Oxley’s failure in preventing the subprime mortgage crisis paved the way for Dodd-Frank’s remarkable use of the bounty model to encourage whistleblowers more effectively.

\textbf{CONCLUSION}

Sarbanes-Oxley initiated a decade of impressive growth in the development of formal whistleblower provisions, such as including whistleblower protection in significant federal legislation and mandating the widespread use of codes of ethics and whistleblower hotlines. Despite these successes, Sarbanes-Oxley’s failures may teach the Act’s most significant lesson: that the antiretaliation and structural whistleblower models, while necessary, do not sufficiently protect and encourage whistleblowers. The Act failed to protect victims of retaliation adequately and it did not prevent or remedy the underlying misconduct disclosed by whistleblowers. The experience with Sarbanes-Oxley over the last decade teaches that individual players in the system, such as organizational supervisors, government administrators, and adjudicatory decision makers, impact whistleblowers as much as, if not more than, any formal legal provisions, and can undermine the protections they appear to provide. Moreover, the failure of whistleblowers to prevent the recent financial crisis exposed the limitations of the antiretaliation and structural models.

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

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

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