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Whistling in the Wind: Why Federal Whistleblower Protections Fall Short of their Corporate Governance Goals

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Teetering on the line between hero and villain, whistleblowers have a remarkably unusual role in contemporary American society. Those who blow the whistle on public sector activities, like Edward Snowden and the Watergate Scandal's "Deep Throat", are often vilified in history as treasonous and unprincipled rogues. In the private sector, however, whistleblowers are seen as moral compasses for corporate behavior, and are even afforded federal protections for speaking out against internal malfeasance. The piecemeal evolution of whistleblower legislation including the Sarbanes–Oxley Act of 2002 and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 created regulatory and enforcement failures that ultimately diminish whistleblower protections, and in turn, thwart corporate governance.

While whistleblower protection is generally a bipartisan issue, proponents and critics disagree on the level of regulation required in order to ensure successful corporate compliance and governance. The Wells Fargo cross–selling scandal of 2016 illustrates that instead of sweeping regulatory changes that the government has pushed in the past, current whistleblower jurisprudence needs to assess administrative, rather than regulatory, reform while engaging in micro–level analyses within

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companies in order to address the issues that cause the whistleblower framework to fail at achieving its corporate governance goals. This note examines challenges and criticisms regarding the relationship between whistleblowers and effective corporate governance and, through Wells Fargo, illustrates the growing need for reform in the administration of whistleblower protections and procedures.[1]

[1] As this note was near the completion of its editorial cycle for publication, the Supreme Court ruled on Digital Realty Trust, Inc. v. Somers. For a discussion of the Digital Realty decision, *see infra* Section III(A)(3).

I. INTRODUCTION

> Being a whistleblower is an extraordinarily lonely existence. You're putting your livelihood at risk, maybe your life, and you can't tell anyone about it. You have to go through every workday as if everything is normal, when in fact you've made a conscious decision to expose illegal actions your company is taking, and you're doing it with the knowledge that the people you work with are going to suffer because of that, and some of them may even go to jail. It's incredibly tough.[2]

Blow the whistle on a wolf of Wall Street, become a scapegoat. In the post–Enron[3] collective consciousness, corporate vigilantes who risk their jobs to protect the public interest and uphold laws are regarded as unsung heroes; yet there remains a persistent ambivalence when it comes to utilizing whistleblowers to promote and ensure corporate governance.[4] Developments in federal whistleblower protections, including provisions of the Sarbanes–Oxley Act of 2002[5] (hereinafter "Sarbanes–Oxley") and the Dodd–Frank Wall Street Reform and Consumer Protection Act

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2 HARRY MARKOPOLOS, NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER 120 (John Wiley & Sons, 2010) (Harry Markopolos is a former securities industry executive who discovered evidence over nine years suggesting that Bernard Madoff's wealth management business, Bernard L. Madoff Investment Securities LLC, was, in fact, a Ponzi scheme. Markopolos alerted the U.S. Securities and Exchange Commission of the fraud in 2000, 2001, and 2005, and supplied supporting documents to no avail. Each time, the SEC ignored him or only gave his evidence a cursory investigation. Madoff was finally uncovered as a fraud in December 2008, when his sons ousted him to the Federal Bureau of Investigation.).

3 *See generally* Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433 (2009); *The Fall of Enron*, http://www.npr.org/news/specials/enron/ (last visited Dec. 20, 2016).

4 *See* Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 240 (2009).

5 *See generally* Sarbanes–Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (2002).

(hereinafter "Dodd–Frank"),[6] merely build castles in the air—making incremental gains for employees but leaving much to be desired in achieving corporate accountability.

In the wake of the 2016 Wells Fargo cross–selling scandal[7] and subsequent retaliation class action suits[8] filed by former Wells Fargo employees, whistleblowers are once again at the forefront of corporate governance discourse. This begs the question: is current whistleblower jurisprudence effectively achieving its goal of acting as a check on financial corporations? The Wells Fargo scandal calls for an opportunity to revisit the legislative intent behind prevailing whistleblower protection laws and anti–retaliation statutes in order to assess the glaring deficiencies in the administration and enforcement of these measures. This comment examines the development and evolution of modern whistleblower jurisprudence in the corporate context, and the quest for corporate governance leading up to the Wells Fargo scandal. Part II of this comment summarizes and explains historical, societal, and contemporary perspectives on corporate whistleblowing and the evolution of whistleblower protections and legislation. Part III considers the role corporate governance plays in the current whistleblower framework and uses Wells Fargo as a lens to analyze the successes and failures of this framework. Part IV suggests practical solutions to facilitate regulatory, administrative, and institutional reform in order to encourage and promote effective whistleblower protections and corporate governance. Part V forecasts the state of whistleblower protections and corporate governance following the transition into the Trump administration. Finally, Part VI offers concluding thoughts.

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6 *See generally* Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u–6 (2010).

7 *See generally* Aaron Back, *Wells Fargo's Questionable Cross–Selling Strategy*, WALL ST. J. (Sept. 9, 2016 2:05 PM), https://www.wsj.com/articles/wells-fargos-questionable-cross-selling-strategy-1473444334/ (Cross–selling is the practice of selling an additional product or service to an existing customer. In late 2016, Wells Fargo was embroiled in controversy when aggressive sales goals resulting in unethical and illegal cross–selling practices were brought to light by whistleblowing former employees.).

8 *See generally* Stacy Cowley, *Wells Fargo Workers Claim Retaliation for Playing by the Rules*, N.Y. TIMES: DEALBOOK (Sept. 26, 2016), https://www.nytimes.com/2016/09/27/business/dealbook/wells-fargo-workers-claim-retaliation-for-playing-by-the-rules.html?_r=0/ (A class of current and former Wells Fargo employees sought to file suit in the Central District of California for being fired or demoted for refusing to participate in illegal cross–selling practices and, thus, falling short of sales goals.).

II. THE RISE AND FALL OF FEDERAL WHISTLEBLOWER PROTECTIONS

A. History

Historically, whistleblowers played a contentious role in society.[9] The term "whistleblower" itself has its origins in 19th century British practice when government, in the form of local unarmed police or "bobbies," would "blow the whistle" to alert citizens and seek help in chasing and apprehending pickpockets and shoplifters.[10] Whistleblowing has since evolved into a sophisticated and complex area of law and regulation. Modern–day whistleblowers "serve the public as jurors, witnesses, military reservists, and volunteer emergency responders, despite the competing demands of their employment."[11] In private sector workplaces, whistleblowers are often described as "citizen employees."[12] Citizen employees are individuals who blow the metaphoric whistle out of a sense of public duty, while potentially risking their jobs, professional relations, or their employer's business.[13] Recent examples of citizen employees blowing the whistle typically start out with an individual either discovering malfeasance on the part of fellow employees or managers, or resisting instructions to commit or assist in wrongful activity.[14] From there, the whistle–yielding individual may report wrongdoing to managerial superiors or enforcement authorities.[15]

Much of the development in whistleblower protection occurred over the last thirty years, but examples of protective employment laws for citizen employees date back to the Civil War era.[16] Congress enacted the 1863 False Claims Act to encourage private citizens to sue on behalf of the government in order to lay bare the fraudulent practices of companies supplying the federal government with deficient goods during the Civil War.[17] More than a century later, legislation has left whistleblowers with

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9 *See generally* Jisoo Kim, *Confessions of A Whistleblower: The Need to Reform the Whistleblower Provision of the Sarbanes–Oxley Act*, 43 J. MARSHALL L. REV. 241, 249–50 (2009).

10 HENRI COLT, SILVIA QUADRELLI & LESTER FRIEDMAN, THE PICTURE OF HEALTH: MEDICAL ETHICS AND THE MOVIES 222 (Oxford Univ. Press, 2014); *see also* ROBERTA A. JOHNSON, WHISTLEBLOWING: WHEN IT WORKS – AND WHY 4 (Lynne Rienner Publ'g 2002).

11 Carlson, *supra* note 4, at 238.

12 *Id.* at 237.

13 *Id.* at 237–38.

14 *Id.* at 238.

15 *Id.*

16 Mary K. Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 192 (2007).

17 *Id.* at 192; *see also* False Claims Act 31 U.S.C. §§ 3729–3733 (2000) (The False Claims Act ("FCA") allows a private individual with knowledge of past or present fraud

unpredictable protections.[18] Narrow exceptions declared by courts and legislatures for whistleblowers provide limited reparation against employers' ability to retaliate, and the effectiveness of current anti–retaliation laws and whistleblower protections remain uncertain.[19] For example, Wells Fargo clearly demonstrates the futile prophylactic effect whistleblower legislation has on both retaliation and corporate malfeasance. Regulatory failures that contribute to large–scale corporate scandals, however, are due, at least in part, to restrictive coverage and interpretation by courts and agencies as well as procedural or administrative hurdles that whistleblowers must initially overcome before proceeding with seeking redress.[20]

Currently, over fifty federal statutes exist to protect whistleblowers.[21] Nearly all states have either statutory or common law whistleblower protections, and the parameters of these laws vary considerably depending on the jurisdiction.[22] However, legal protection and the resulting corporate governance remain illusory largely because of the fragmented evolution of whistleblower protections in the corporate context.[23] The recent move toward an enlargement of whistleblower protections and safeguards against employer retaliation is credited to the seismic waves of corporate scandal that shook the financial world in the last 30 years.[24] The development of such laws and legislation was a response to several influences. In particular, mass fraud resulting from unchecked corporate accounting practices on Wall Street played a role in the eventual collapse of some of America's largest corporations in 2001 as well as the financial crisis of 2008—ultimately creating the most devastating economic recession since the Great Depression.[25] "Whistleblower laws reacted not only to particular disasters, but also to a lack of confidence in both private and public bureaucracies . . . [and] whistleblowers played crucial roles in publicizing abuses and regulatory violations."[26] The sheer volume of anti–retaliation laws that emerged in the last three decades illustrate the

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committed against the federal government to bring suit on its behalf. The FCA imposes liability on persons, companies, and contractors who defraud governmental programs, and it was intended to deal with fraudulent contract claims during the Civil War in which contractors provided substandard equipment to the Union Army.).

18 *See* Ramirez, *supra* note 16, at 192–95.

19 Carlson, *supra* note 4, at 240.

20 *Id.* at 240–42.

21 Ramirez, *supra* note 16, at 191.

22 *Id.*

23 *Id.*

24 ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 149 (Edward Elgar Publ'g, Inc., 2012).

25 *Id.* at 149–50.

26 *Id.* at 150.

government's realization that whistleblowers are a "critical component to effective law enforcement in a complex society as insiders [sic] furnish[ing] invaluable assistance in the investigation and prosecution of public corruption and corporate fraud."[27] Endeavoring to root out corporate fraud, Congress passed two key pieces of legislation protecting whistleblowers: the Sarbanes–Oxley Act of 2002, and the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act.

B. The Sarbanes–Oxley Act of 2002: A Response to the Enron Era

"Enron changed everything."[28] In 2001, the collapse of Enron, one of the fastest growing corporations in the US, had devastating effects on the lives of thousands of individuals and created a sense of public distrust toward large corporations.[29] The fall of Enron was followed by the discovery of rampant corporate corruption, which contributed to the bankruptcy of WorldCom in mid–2002.[30] Immediately thereafter, Congress passed the Sarbanes–Oxley Act of 2002,[31] which contained provisions affording anti–retaliation protections to employees reporting violations of federal securities laws at publicly traded corporations.[32] Sarbanes–Oxley was meant "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation,"[33] and, as such, Congress intended for employees, as corporate insiders, to be afforded federal anti–retaliation protection in order to encourage the disclosure of wrongdoing and ultimately prevent future corporate fraud and misconduct.[34] Fittingly, TIME magazine

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27 Ramirez, *supra* note 16, at 191.

28 Chelsea H. Overhuls, *Unfinished Business: Dodd–Frank's Whistleblower Anti–Retaliation Protections Fall Short for Private Companies and Their Employees*, 6 J. BUS. ENTREPRENEURSHIP & L. ISS. 1, 2–3 (2012).

29 *Id.*

30 *Id.*; *see also* Simon Romero & Riva D. Atlas, *Worldcom's Collapse: The Overview; Worldcom Files for Bankruptcy; Largest U.S. Case*, N.Y. TIMES (July 22, 2002) https://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html/.

31 *See generally* Sarbanes–Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (2002).

32 *Id.*; *see also* S. REP. NO. 107–146, at 2–11 (2002) (showing congressional intent for Sarbanes–Oxley to create new protections for employees at risk of retaliation for reporting corporate misconduct).

33 Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014) (citing S. REP. NO. 107–146, at 2–11 (2002)).

34 Sarbanes–Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (2002) (Section 1514A prohibits certain companies from discharging or otherwise "discriminat[ing] against an employee in the terms and conditions of employment because" the employee "provid[es] information . . . or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain criminal fraud statutes,

declared 2002 the year of the whistleblower and gracing the cover were Sherron Watkins (Enron whistleblower), Cynthia Cooper (WorldCom whistleblower), and Coleen Rowley of the FBI as persons of the year.[35]

The Sarbanes–Oxley Act of 2002 was a result of political and economic forces pressuring the legislature to address corporate corruption and eroding financial markets.[36] Sarbanes–Oxley also sought to bolster corporate accountability by expanding criminal penalties and civil liability for fraudsters.[37] The idea that "existing corporate culture failed to promote honest business practices and discouraged employees from reporting dishonest practices"[38] was central to Sarbanes–Oxley, and, to address these concerns, the Act provided a civil cause of action for whistleblowers employed by publicly traded companies.[39] In addition to the whistleblower provision, Sarbanes–Oxley required that there be channels through which employees could report anonymously and directly to the audit committee of the board of directors and that corporate officers, including CEOs, sign off on financial statements.[40] "Congress believed that protecting corporate whistleblowers encouraged disclosures crucial to the preservation of the interests of shareholders, employees, and consumers."[41] Particularly, the Senate drew on the experiences of corporate whistleblowers in drafting the whistleblower protection provisions of the law:

> We included meaningful protection for whistleblowers as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court . . . there is no way that we could have known about [the misconduct of corporate officers] without that kind of whistleblower.[42]

The whistleblower provision of Sarbanes–Oxley started out as one of the most comprehensive private–sector whistleblower laws ever enacted

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any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders."); *see also* S. REP. NO. 107–146, at 2–11 (2002).

35 Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME (Dec. 30, 2002), http://content.time.com/time/magazine/article/0,9171,1003967,00.html/.

36 Ramirez, *supra* note 16, at 196–97.

37 *See id.*

38 *Id.* at 197 (quotations omitted).

39 *Id.*

40 *See* Stephen M. Kohn, *Sarbanes–Oxley Act: Legal Protection for Corporate Whistleblowers,* NWC NAT'L WHISTLEBLOWER CTR, http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 (last visited Dec. 20, 2016).

41 VAUGHN, *supra* note 24, at 152.

42 *Id*. (quoting Senator Patrick Leahy regarding Report of the Conference Committee).

in the United Stated.[43] It provides a cause of action to employees of publicly–traded companies who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they reasonably believed constituted mail fraud, wire fraud, bank fraud, securities fraud, or any violation of Securities and Exchange Commission ("SEC") rules and regulations relating to fraud against shareholders.[44]

C. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010: A Response to the Financial Crisis of 2008

Paving the way for whistleblower and retaliation protection in subsequent federal statutes, Sarbanes–Oxley heralded a decade of congressional enactment of private–sector whistleblower laws, but despite its implementation, regulatory failures contributed, in large part, to the financial crisis of 2008.[45] Following the market collapse of 2008, Congress sought to amend and fortify regulation of the financial industry with reinvigorated zeal in order to ascertain what bred toxic corporate culture, provide the public with a sense of security, and prevent similar disasters in the future.[46] One of the factors that Congress scrutinized as a facilitator, if not the instigator, of the collapse was unchecked corporate behavior and lack of governance and compliance metrics.[47] Generally, corporate governance is "[a] set of principles by which companies are directed and controlled",[48] and the parties responsible for ensuring effective and adequate corporate governance include a company's employees, managers, directors, shareholders, and the less recognized and often ignored whistleblowers.[49]

In 2010, Congress rolled out Dodd–Frank as a sweeping regulatory solution to the nation's financial crisis.[50] One of the major premises of Dodd–Frank's enactment was "[t]o promote the financial stability of the United States by improving accountability and transparency in the

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43 *Id.* at 152.
44 Sarbanes–Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (2002).
45 VAUGHN, *supra* note 24, at 153.
46 Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd–Frank Act of 2010*, 43 LOY. U. CHI. L. J. 427, 428 (2012).
47 *Id.* (quotations omitted).
48 *Id.*
49 *Id.* (quotations omitted).
50 Megan O'Malley, *Whistleblower Protections, Retaliation Issues, and Investigative Issues Arising Under the Sarbanes–Oxley Act and the Dodd–Frank Act*, at 5 (July 31, 2015), https://www.americanbar.org/content/dam/aba/events/labor_law/am/2015/omalley.authcheckdam.pdf (last visited Apr. 15, 2018).

financial system."[51] As part of its comprehensive program to ensure corporate accountability and compliance, Dodd–Frank expanded the whistleblower protection provision in Section 806 of Sarbanes–Oxley by: extending the statute of limitations, creating an independent right for whistleblowers to sue in federal court, and creating measures to ensure that protections were non–waivable by employees.[52] Dodd–Frank also created whistleblower incentive programs with the SEC and the Commodity Futures Trading Commission ("CFTC"), both of which rewarded whistleblowers with a share of any money the government recovered from their tip.[53]

D. Where are we now: Wells Fargo Slips through the Cracks

In each of the biggest financial frauds in modern history, employee whistleblowers tried to warn others of what was to come, with no avail. Sherron Watkins of Enron[54] wrote a now infamous letter to then CEO Kenneth Lay, warning that "I am incredibly nervous that we will implode in a wave of accounting scandals,"[55] which had a striking resemblance to a former Wells Fargo employee's letter to CEO John Stumpf from 2007: "[l]eft unchecked, the inevitable outcome shall be one of professional and reputational damage, consumer fraud and shareholder lawsuits, coupled by regulatory sanctions."[56]

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51 Jennifer M. Pacella, *Inside or Out? The Dodd–Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 726 (2014) (citations omitted).

52 O'Malley, *supra* note 50, at 6–10.

53 S. REP. NO. 111–176, at 110–12 (2010).

54 *See* Frank Pellegrini, *Person of the Week: Enron Whistleblower Sherron Watkins*, TIME (Jan. 18, 2002), http://content.time.com/time/nation/article/0,8599,194927,00.html/; *see also* C. William Thomas, *The Rise and Fall of Enron*, JOURNAL OF ACCOUNTANCY (Apr. 1, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html/ (The Enron scandal, publicized in October 2001, eventually led to the bankruptcy of the Enron Corporation, an American energy company based in Houston, Texas, and the de facto dissolution of Arthur Andersen, which was one of the five largest audit and accountancy partnerships in the world. In addition to being the largest bankruptcy reorganization of its time, Enron has been noted as the biggest audit failure in modern American history.).

55 Letter from Sherron Watkins, Vice President of Corp. Dev., Enron Corp., to Kenneth Lay, Chief Exec. Officer, Enron Corp. (August 2001) (on file with U.S. Dep't of Justice), https://www.justice.gov/archive/enron/exhibit/03-15/BBC-0001/Images/9811.001.PDF/.

56 Matt Egan, *Letter Warned Wells Fargo of 'Widespread' Fraud in 2007 – Exclusive*, CNN MONEY (Oct. 18, 2016, 11:23 AM), http://money.cnn.com/2016/10/18/investing/wells-fargo-warned-fake-accounts-2007/index.html?iid=hp-stack-dom/ (Former Wells Fargo CEO John Stumpf testified under oath that he was never notified of illicit cross–selling issues until 2013. Soon thereafter, however, a 2007 letter addressed to Stumpf surfaced, in which a Wells Fargo employee warned of widespread wrongful sales practices and "routine deception and fraudulent exploitation of our clients.").

In 2013, the Economist named banking institution Wells Fargo "[t]he big winner from the financial crisis[,]" owing its success to a "prosaic" practice of serving customers.[57] While these customers were still in the dark about the truth behind Wells Fargo's sales practices, rumblings of fraud and malfeasance were sounding amongst employees and falling on deaf ears. Until recently. A mere three years later, Wells Fargo's narrative quickly shifted from its rise to stardom to its fall from grace. The financial crisis' big winner is now a "school for scoundrels,"[58] where the prosaic practice of serving customers was just a thinly veiled attempt to hide insatiable corporate greed.

Wells Fargo built its reputation eschewing complex financial instruments and Wall Street, and focusing instead on individual savings and checking accounts as well as loans for ordinary consumers.[59] The bank owed its growth and success to fostering relationships with customers through "cross–selling" new accounts—the same practice that left Wells Fargo fraught with scandal.[60] CEO John Stumpf's mantra was "eight is great," which set a target for employees to get eight Wells Fargo products into the hands of each customer—whether it be savings and checking accounts, credit cards, mortgages, or car loans.[61] As the sales directives became too demanding to satisfy, employees began to find a different way to meet the bottom line—eventually more than 2 million accounts were opened by Wells Fargo employees without customers' consent or knowledge, most of which were not discovered by customers until after news of the scandal broke.[62] Those who complained of sales goals or fraudulent cross–selling tactics were often fired for failing to meet the target.[63] In the wake of the scandal at least 5,300 Wells Fargo employees were fired for ethics violations that included setting up illicit accounts without customers' knowledge in order to meet sales objectives.[64] The biggest losers, however ended up being the whistleblowers: employees who were fired or demoted for playing by the rules, staying honest, and

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57 *Wells Fargo: Riding High*, ECONOMIST (Sept. 14, 2013), http://www.economist.com/news/finance-and-economics/21586295-big-winner-financial-crisis-riding-high/.

58 Jana Kasperkevic, *'School for Scoundrels': Wells Fargo cuts not Enough for Outraged US Congress*, Guardian (Sept. 29, 2016, 2:07 PM) https://www.theguardian.com/business/2016/sep/29/wells-fargo-clawbacks-outraged-us-congress/.

59 *See Wells Fargo: Riding High*, *supra* note 57.

60 *Id.*

61 *Id.*

62 Mike Mullen, *Wells Fargo's employees tried to warn us about their executives*, CITY PAGES (Nov. 2, 2016), http://www.citypages.com/news/wells-fargos-employees-tried-to-warn-us-about-their-executives/399523211.

63 *Id.*

64 *Id.*

falling short of unachievable sales goals.[65] The big winner of the financial crisis turned out to be another Wall Street wolf scapegoating its citizen employees.

III. FITTING CORPORATE GOVERNANCE INTO THE CURRENT WHISTLEBLOWER FRAMEWORK

> I turned over everything I knew to the SEC. Five times I reported my concerns, and no one would listen until it was far too late . . . .[66] I don't know how I could have been more explicit. I gave them a roadmap and a flashlight . . . [but] they didn't go where I told them to go.[67]

While Harry Markopolos was not a Madoff Investment Securities employee, he uncovered and blew the whistle on Madoff's $65 billion dollar Ponzi scheme on several occasions.[68] The SEC's reluctance to consider evidence and documentation of fraud that was brought forth by a quantitative financial specialist highlighted the fact that whistleblowers and corporate fraud were not being taken seriously. Hence, while the framework for whistleblowers to report corporate malfeasance is arguably in place, administrative and legal hurdles often make whistleblower retaliation a uniquely difficult issue to resolve.

A. Statutory Interpretation: Internal v. External Reporting

One of Dodd–Frank's most significant expansions of Sarbanes–Oxley's whistleblowing provisions was in allowing employees to proceed directly to court to sue if their employers retaliated against them for reporting corporate misconduct.[69] While both Acts shield whistleblowers from retaliation, they differ in important respects. Sarbanes–Oxley applies to all "employees" who report misconduct to the SEC, any other federal agency, Congress, or an internal supervisor;[70] Dodd–Frank, on the other hand, defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the

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65 Cowley, *supra* note 8.
66 MARKOPOLOS, *supra* note 2, at 3.
67 *Frontline: The Madoff Affair*, Interview with Harry Markopolos (PBS television broadcast May 12, 2009).
68 *Id.*
69 Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u–6 (2010).
70 Sarbanes–Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1) (2002).

Commission."[71] A whistleblower so defined is eligible for an award if original information provided to the SEC leads to a successful enforcement action.[72] Additionally, the SEC's regulations implementing Dodd–Frank provisions contain two discrete whistleblower definitions: for purposes of the award program, Rule 21F–2 requires a whistleblower to "provide the Commission with information" relating to possible securities–law violations.[73] For purposes of the anti–retaliation protections, however, the Rule does not require SEC reporting.[74]

As such, courts were reluctant to reach a consensus on whether or not Dodd–Frank necessarily mandated reporting misconduct to the SEC in order to proceed with a whistleblower claim. Ultimately, conflicting views of the SEC rule as it pertains to Dodd–Frank's whistleblower protections resulted in a circuit split, which was recently resolved by the Supreme Court in *Digital Realty Trust, Inc. v. Somers*.[75] The fractured interpretation of internal versus external reporting leading up to *Digital Realty* began in 2013 with the Fifth Circuit's decision in *Asadi v. G.E. Energy (USA), LLC*.[76]

1. Asadi v. G.E. Energy (USA), LLC

In *Asadi*, the Fifth Circuit scaled back protections guaranteed to those who internally reported violation of securities laws directly to their employers, rather than to the SEC.[77] Breaking away from the prevailing jurisprudence interpreting the scope of the Dodd–Frank anti–retaliation protections to extend to internal whistleblowers, *Asadi* held that employees who made internal reports within their company, rather than directly to the SEC, were not covered under Dodd–Frank's whistleblower protections.[78]

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71 15 U.S.C. § 78u–6(a)(6).
72 *Id.* at § 78u–6(b)–(g).
73 17 C.F.R. § 240.21F–2(a)(1).
74 *See* § 240.21F–2(b)(1)(i)–(ii).
75 *See* 138 S. Ct. 767 (2018).
76 *See* 720 F.3d 620 (5th Cir. 2013).
77 *Id.* at 625.
78 *Id.* (Khaled Asadi filed a complaint alleging that his employer, G.E. Energy, violated Dodd–Frank's whistleblower protection provision by terminating him after he made an internal report of a possible securities law violation. The U.S. District Court for the Southern District of Texas granted GE Energy's motion to dismiss for failure to state a claim, and the Fifth Circuit affirmed, holding that Asadi was not a "whistleblower" under Dodd–Frank because the plain language of the Dodd–Frank whistleblower protection provision creates a private cause of action only for individuals who provide information to the SEC.).

The *Asadi* decision discussed two conflicting provisions of Dodd–Frank that led to subsequent conflicting interpretations of its protections.[79] Subsection (h) of Section 78u–6 of Dodd–Frank provides protections from retaliation to whistleblowers who "provid[e] information to the SEC" and "initiat[e], testif[y] in, or assis[t] any investigation or judicial or administrative action" of the SEC based on this information; or (iii) "in making disclosures that are required or protected" under specified federal laws, including those under the SEC's jurisdiction.[80] Ultimately, *Asadi* held that the text of Dodd–Frank does not address internal reporting at all.[81] Instead, it only addressed SEC reporting procedures under Sarbanes–Oxley.[82]

2. Berman v. Neo@Ogilvy

Following *Asadi*, the Second Circuit created a circuit split via *Berman v. Neo@Ogilvy* by holding that an employee fired after reporting securities violations internally to his employer could seek remedies under Dodd–Frank.[83] The court in *Berman* ultimately did not resolve the tension between the definitional section of subsection 21F(a)(6) and subdivision (iii) of subsection 21(F)(h)(1)(A), but rather held that it created sufficient ambiguity as to the coverage of subdivision (iii) to oblige the court to give Chevron deference to the SEC's rule.[84]

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79 *Id.* at 623.

80 *Asadi*, 720 F.3d at 624.

81 *Id.* at 625.

82 *Id.*

83 *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (Daniel Berman worked as finance director at media agency Neo@Oglivy. During the course of his employment, Berman discovered fraudulent accounting practices, and reported them internally. Berman was later terminated in April of 2013. In October of 2013, Berman reported the suspected fraudulent practices to the SEC and, under the purview of Dodd–Frank, pursued a whistleblower retaliation lawsuit against his former employer. The United States District Court for the Southern District of New York granted summary judgment dismissing Berman's claims, holding that, in light of the "whistleblower" definition in Dodd–Frank, only those discharged from employment for reporting alleged violations to the SEC were protected. The Second Circuit reversed and remanded the case, holding that Berman may pursue retaliation remedies under Dodd Frank Section 21F, despite having reported the wrongdoing only internally, but not to the SEC, before his termination.).

84 *Id.* at 148 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984)) (The Chevron Doctrine refers to judicial deference given to administrative actions. In *Chevron*, the Supreme Court set forth a legal test as to when the court should defer to the agency's answer or interpretation, holding that such judicial deference is appropriate where the agency's answer was not unreasonable, so long as Congress had not spoken directly to the precise issue at question. According to *Chevron*, when a legislative delegation to an administrative agency on a particular issue or question is implicit rather than explicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency.).

3. Digital Realty Trust, Inc. v. Somers

Faced with fractured case law and inconsistent outcomes from two Courts of Appeals, the Supreme Court granted certiorari to resolve this conflict in *Digital Realty Trust, Inc. v. Somers*.[85] In *Digital Realty*, the Supreme Court narrowed the definition of "whistleblower" under Dodd–Frank and ruled that whistleblowers are only protected against retaliation from employers under Dodd–Frank if they report allegations of an employer's securities law violations to the SEC.[86] As a result of *Digital Realty*, whistleblowers who report alleged violations through an employer's internal compliance program without also reporting to the SEC will no longer be able to avail themselves of Dodd–Frank's protections against retaliation.

B. Administration: Enforcement and Reporting Procedures

Whistleblower laws arise from and are applied in different contexts, making it difficult to easily characterize and dissect these laws.[87] Because enforcement of whistleblower laws is not left exclusively to courts, administrative bodies are crucial in enforcing whistleblower protections; the investigation of corporate misconduct disclosures and employer retaliation allegations are largely left to administrative agencies.[88] However, institutional failures, particularly within the financial world, highlight weaknesses within the administrative agencies that are charged with enforcing whistleblower laws.

1. Financial Industry Regulatory Authority ("FINRA")

Although the SEC is the ultimate regulator of the securities industry, organizations like The Financial Industry Regulatory Authority

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85 *See* 138 S. Ct. 767 (2018).

86 *Id.* at 776. (Paul Somers served as Vice President of real estate investment trust, Digital Realty Trust, Inc., from 2010 to 2014. Somers was allegedly terminated by Digital Realty shortly after he reported suspected securities violations to senior management. Somers did not alert the SEC of his termination, nor did he file an administrative complaint within 180 days of his termination, rendering him ineligible for relief under Sarbanes–Oxley. Somers brought suit in the United States District Court for the Northern District of California alleging a whistleblower retaliation claim under Dodd–Frank. Digital Realty moved to dismiss that claim, arguing that "Somers does not qualify as a 'whistleblower' under [§ 78u–6(h)] because he did not report any alleged law violations to the SEC." 119 F.Supp.3d, at 1094. The District Court denied the motion, holding that Rule 21F–2 did not necessitate recourse to the SEC prior to gaining "whistleblower" status under Dodd–Frank. Finding the statutory scheme ambiguous, the court accorded deference to the SEC's Rule under the Chevron doctrine.).

87 VAUGHN, *supra* note 24, at 1.

88 *Id.* at 2.

("FINRA") act as non–governmental private regulators of member brokerage firms and exchange markets.[89] Termination of employees within member firms must be reported to FINRA, requiring that "when a registered representative leaves a firm for any reason, the firm must file a form U5, which is the Uniform Termination Notice for Securities Industry Registration for self–regulatory organizations (SROs) including FINRA and states/jurisdictions."[90] The Form U5 must be submitted within 30 days of the registered representative leaving the firm and generally is required to be filed electronically. Firms are also required to provide the registered representative with a copy of their Form U5 within 30 days.[91]

The U5 is a form in the banking industry that essentially acts as a permanent report card from all former employers. Several former employees alleged that Wells Fargo used its U5 reporting power to retaliate against those who tried to blow the whistle on the bank's fraudulent activities.[92] Through U5's, the bank essentially branded whistleblowing employees with a scarlet letter, potentially damaging future career prospects.[93] To investigate these claims, three Democratic senators asked FINRA for data on Wells Fargo's U5 filings. The responses they received "paint[ed] a disturbing picture," and the U5 forms "confirm[ed] that Wells Fargo had ample information about the scope of fraudulent sales practices" long before it reached settlements with the Consumer Financial Protection Bureau.[94] As a result of these revelations, FINRA launched an extensive sweep of broker–dealer cross–selling.[95]

2. Occupational Safety and Health Administration ("OSHA")

The breakdown in whistleblowing reporting and regulation procedures does not stop at FINRA. Because Dodd–Frank extends its whistleblower protections to workers who report violations of financial consumer protection laws to their employer, the bureau, or any other federal, state or

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89 *About FINRA*, FINRA, https://www.finra.org/about (last visited Jan. 2, 2017).

90 *Terminate an Individual's Registration*, FINRA, http://www.finra.org/industry/terminate-individuals-registration (last visited Apr. 1, 2018).

91 *Id.*

92 *Id.*

93 *Episode 732: Bad Form, Wells Fargo*, NPR (Oct. 28, 2016 10:19 PM), http://www.npr.org/sections/money/2016/10/28/499805238/episode-732-bad-form-wells-fargo (transcript of podcast episode discussing Wells Fargo scandal).

94 Stacy Cowley, *Wells Fargo Faces Scrutiny for Black Marks on Ex–Employee Files*, NY TIMES: DEALBOOK (Nov. 3, 2016), http://www.nytimes.com/2016/11/04/business/dealbook/wells-fargo-faces-scrutiny-for-black-marks-on-ex-employee-files.html?_r=0.

95 *Finra in Cross–Sell Crackdown*, BARRON'S (Oct. 28, 2016), http://www.barrons.com/articles/finra-in-cross-sell-crackdown-1477654006.

local authority,[96] the law provides procedures for a covered employee to file a retaliation complaint with the secretary of labor, and the Occupational Safety and Health Administration (hereinafter "OSHA") is responsible for processing those complaints.[97] In March of 2016, OSHA laid out the final rules and procedures for employees making whistleblower retaliation claims under Dodd–Frank.[98] The final rule established conclusive procedures and time frames for the handling of retaliation complaints under the CFPA, including procedures and time frames for employee complaints to OSHA.[99]

Among the bevy of Wells Fargo whistleblowers that emerged after the scandal, one prominent case was that of former Wells Fargo general manager Claudia Ponce de Leon; Ponce de Leon was among at least four other former Wells Fargo employees who filed whistleblower retaliation complaints in December 2011 with OSHA, alleging termination for telling superiors about employees opening unauthorized accounts.[100] Nearly five years later, Ponce de Leon still has not been interviewed by OSHA investigators.[101] According to OSHA records, Ponce de Leon's retaliation complaint against Wells Fargo for reporting potential misconduct was one of several dozens filed against the bank over the last 14 years.[102] Government regulators are still not meeting targets set by law—a problem that was also flagged in a critical internal report issued in September 2015.[103] OSHA had yet to close out 34 of the 91 complaints it has received since fiscal year 2002 from Wells Fargo employees alleging they faced retaliation after reporting potential wrongdoing.[104] "It's absolutely outrageous that whistleblowers contacted OSHA as early as 2009 about

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96 Aaron Vehling, *OSHA Sets Rules For Dodd–Frank Whistleblowers*, LAW360 (Mar. 16, 2016, 8:06 PM), http://www.law360.com/articles/772351/osha-sets-rules-for-dodd-frank-whistleblowers.

97 *Id.*

98 29 C.F.R. § 1985 (2016).

99 *Id.*

100 Sarah N. Lynch, *Wells Fargo complaints show flaws in federal whistleblower program*, REUTERS (Oct. 13, 2016 6:32 PM), http://www.reuters.com/article/us-wells-fargo-accounts-whistleblower-idUSKCN12D2M0/.

101 *Wells Fargo Employees Have a History of Suing the Bank*, FORTUNE (Sept. 29, 2016), http://fortune.com/2016/09/29/wells-fargo-employees-sue/; *see also* Liz Wagner & Mark Villarreal, *Former Federal Investigator Says Government Didn't Investigate Wells Fargo Whistleblower Cases*, NBC BAY AREA, http://www.nbcbayarea.com/news/local/Former-Federal-Investigator-Says-Government-Didnt-Investigate-Wells-Fargo-Whistleblower-Cases-397518261.html (last visited Jan. 2, 2017).

102 *Wells Fargo Employees Have a History of Suing the Bank*, FORTUNE (Sept. 29, 2016), http://fortune.com/2016/09/29/wells-fargo-employees-sue/.

103 *Id.*

104 *Id.*

potential fraud at Wells Fargo, and yet these government bureaucrats failed to do their job."[105]

a. Overburdened and Under–resourced

Federal OSHA is a small agency.[106] In conjunction with state partners, OSHA currently employs approximately 2,100 inspectors responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation—which translates to about one compliance officer for every 59,000 workers.[107] OSHA has 10 regional offices and 90 local area offices and a budget of $552,787,000 for the 2016 fiscal year.[108]

Based on these scarce numbers alone, OSHA has been continuously challenged in its ability to conduct investigations in a timely manner.[109] In 2009, U.S. Government Accountability Office ("GAO") examined the processing times for whistleblower claims and challenges OSHA faced in administering the program.[110] At that time, the GAO found that OSHA faced two key challenges—it lacked standardized procedures for adequately ensuring the quality and consistency of investigations.[111] Additionally, investigators reported a lack of resources, such as the requisite training, legal assistance, and equipment that is necessary to do their jobs.[112] The GAO made recommendations intended to improve the Whistleblower Protection Program and enhance oversight and the Department of Labor pledged to take action and address most of the recommendations, however results and improvement remain to be seen nearly a decade later.[113]

b. Success Rates

University of Nebraska–Lincoln's Professor Richard E. Moberly conducted numerous empirical studies on corporate whistleblowing, all of which indicated that there is overall a low success rate in whistle blower

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105 *Id.*

106 *Commonly Used Statistics*, U.S. DEP'T OF LABOR, O.S.H.A., https://www.osha.gov/oshstats/commonstats.html (last visited Jan. 5, 2017).

107 *Id.*

108 *Id.*

109 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO–09–106, WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY 1, 18–19 (2009).

110 *Id.* at 4.

111 *Id.*

112 *Id.* at 32–33.

113 *Id.*

claims filed with OSHA under Sarbanes–Oxley.[114] The study showed that during the first three years of Sarbanes–Oxley's implementation, there was only a 3.6% success rate for whistleblower claims during the initial administrative process and only a 6.5% success rate for appeals.[115] The study pointed to "administrative recalcitrance and adjudicative hamstringing" as the main causes of such low success rates for whistleblowers, and included "improper application by OSHA of SOX's favorable burden of proof to the claimant's detriment, lack of increased OSHA personnel to handle the massive influx of retaliation cases post–SOX, OSHA's lack of expertise to investigate complex financial fraud cases, and rulings by administrative law judges that narrowly interpret SOX's protections" as a non–exhaustive list of reasons for such dismal results.[116] These data–based findings assist in identifying the provisions and procedures of the Act that do not work as Congress intended and suggest potential remedies for these statutory and administrative deficiencies.

c. Litigation: Jumping through Hoops

i. Arbitrating Entangled Claims

Section 922 of Dodd–Frank contains key provisions exempting whistleblower claims from mandatory arbitration due to the reality of employers seeking to avoid civil suit in federal court under Sarbanes–Oxley by mandating arbitration agreements in employment contracts.[117] However, as part of its overall goal to protect whistleblowers and encourage corporate governance, Section 922(c) of Dodd–Frank invalidates any "agreement, policy form, or condition of employment, including a pre–dispute arbitration agreement" that has the effect of waiving rights and remedies available to Sarbanes–Oxley whistleblowers.[118]

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114 *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes–Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67, 91–95 (2007) (Professor Moberly conducted an empirical study of all Department of Labor Sarbanes–Oxley determinations during the first three years of the Act's implementation. The results consisted of over 700 separate decisions from administrative investigations and hearings, of which a detailed analysis demonstrated that administrative decision makers strictly construed, and in some cases misapplied, Sarbanes–Oxley's substantive protections to the significant disadvantage of employees.).

115 *Id.* at 67.

116 *See* Richard Moberly, *Sarbanes–Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 29 (2012).

117 O'Malley, *supra* note 50.

118 *Id.* at 7.

Dodd–Frank's ban on pre–dispute arbitration agreements opens the door to other questions regarding entangled claims that can be brought under either Sarbanes–Oxley or Dodd–Frank. Some courts have held that where a common nucleus of operative facts exists between a claim brought under Sarbanes–Oxley and another claim, then Sarbanes–Oxley, as amended by Dodd–Frank, bars arbitration of either claims however Courts have not reached a consensus on the matter.[119] The question of whether these claims are arbitrable is significant because of the disagreement among federal courts on whether Sarbanes–Oxley and Dodd–Frank claims and protections overlap for employees who only report securities violations internally.

ii. Establishing a Prima Facie Retaliation Case and the Trouble with Burden–Shifting

Should a whistleblower choose to directly take his or her claim to court, her or she must then overcome significant hurdles in order to establish a prima facie retaliation claim. The burden–shifting mechanism applied in employment discrimination and retaliation claims poses a near–impossible challenge to plaintiffs when alleging the elements of such claims.[120] In addition to the administrative issues involving whistleblower protections, there remains an inherent Catch–22 with establishing a prima facie retaliation claim under Dodd–Frank. Employees need to demonstrate that the protected activity was a contributing factor in the adverse action. The employer, however, can defend by demonstrating through clear and convincing evidence that it would have taken the same action absent the protected activity.

Burden–shifting mechanisms are particularly troublesome for corporate governance because they act as a way for employers to insulate themselves and avoid liability. To remedy this—there should be an allowance for a de facto finding of the "contributing factor" element in cases involving companies that are under investigation for fraudulent or unethical business practices. Alternatively, involvement in a pending investigation related to the employees' whistleblowing claim could bar employers from showing that the employee would have been fired regardless. While Dodd–Frank also provides a private right of action for employees who have suffered retaliation, problems establishing a prima

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119 *Id.; see also* Laubenstein v. Conair Corp., No. 5:14–CV–05227, 2014 WL 6609164, at *3 (W.D. Ark. Nov. 19, 2014).

120 O'Malley, *supra* note 50.

facie claim get in the way of withstanding dismissal and hinder achieving effective corporate governance and compliance.[121]

d. Compensation: Incentivizing Corporate Governance for the Citizen Employee

The Dodd–Frank Act also creates numerous incentives for whistleblowing, including a bounty paid to eligible whistleblowers who voluntarily provide the SEC with original information leading to a successful enforcement action in which the SEC recovers monetary sanctions in an amount of $1 million.[122] Section 922 of the Dodd–Frank Act provides "powerful" monetary incentives for whistleblowers to report securities law violations to the SEC. Pursuant to section 21F, "whistleblowers" who "voluntarily" provide the Commission with "original" information about violations of securities laws shall be awarded a share of between 10% and 30% of monetary sanctions ultimately imposed by the Commission where the sanctions exceed $1 million.[123] However, the Wells Fargo scandals illustrate the futility of this provision in certain scenarios.

Critics argue that the bounty program is fundamentally flawed because it attempts to "combat corporate opportunism by encouraging employee opportunism."[124] Because the SEC does not require corporate whistleblowers to report violations internally to their employer first to be eligible for a bounty, critics argue that the financial incentives discourage internal reporting.[125] However, in reality, mandating internal whistleblowing would likely dissuade whistleblowers from coming forward altogether. The SEC's approach credits "incentivizing–rather than requiring–internal reporting" as more likely to promote compliance by corporations. [126]

The Dodd–Frank Act's additional whistleblower retaliation protections, though sound in theory, are ultimately unworkable in practice. In most modern fraud cases, the involvement and pleas of whistleblowers are typically brought to light ex post. High–profile corporate frauds all seem to follow a similar pattern. Misconduct is discovered first, followed by the long–ignored warnings of whistleblowers. This directly undermines the whistleblowing protection afforded by Dodd–Frank Act and its

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121 Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u–6 (2010).
122 15 U.S.C. § 78u–6.
123 *Id.*
124 Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd–Frank Act "Bounty Hunting"*, 45 CONN. L. REV. 483, 483 (2012).
125 *Id.* at 508–09.
126 *Id.* at 502.

purpose in encouraging compliance and corporate governance. The whistleblower provision was meant to facilitate a more ex ante approach to governance, where whistleblowers are given an avenue that they can utilize in order to be heard and prevent companies' fraudulent or unethical practices from reaching the point that Wells Fargo has. While whistleblowers act as a corporate moral compass and are essential in revealing and preventing corporate fraud and understanding the truth behind sophisticated corporate and securities fraud,[127] offering bounty incentives to those who risk their careers to improve toxic corporate practices will ultimately be rendered useless in facilitating corporate governance until the ambiguity is reporting and administrative procedures is addressed and improved.

IV. HOW TO FIX IT

The challenges in encouraging whistleblowers illustrate the pervasive issue of regulatory capture as it relates to the financial industry.[128] Reports over the last decade present a mixed perspective as to the effectiveness of federal regulation regarding the protection of whistleblowers.[129] In 2003, the National Advisory Committee on Occupational Safety and Health (hereinafter "NACOSH") charged that OSHA had a "dismal record" of protecting whistleblowers and pointed to the declining number of complaints being filed with the agency as evidence that workers' confidence in OSHA's ability to protect them was waning.[130] Other concerns voiced included the increased responsibility that Congress was giving to OSHA to enforce whistleblower protection in areas beyond safety and health, starting with Sarbanes–Oxley in 2003 and additionally, Dodd–Frank in 2010.[131]

OSHA currently only employs 88 investigators working out of 10 regional offices to handle whistleblower claims nationwide—OSHA is a small agency given the size of its mission.[132] There is a need for expansion, with more personnel handling retaliation claims. Additionally, OSHA should liaise with agencies such as the Securities and Exchange Commission, Consumer Financial Protection Bureau, Federal Trade Commission, and National Labor Relations Board in reviewing Dodd–

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127 Overhuls, *supra* note 28, at 4.

128 Timothy P. Glynn, *Taking Self–Regulation Seriously: High–Ranking Officer Sanctions for Work–Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279, 287 (2012).

129 Gerald E. Calvasina, Richard V. Calvasina & Eugene J. Calvasina, *The Dodd–Frank Act and Whistleblower Protection*, 3 ALLIED ACAD. INT'L CONF., Oct. 2011 at 1–2.

130 *Id.*

131 *Id.*

132 *Commonly Used Statistics*, *supra* note 106.

Frank and Sarbanes–Oxley related claims. Alternatively, compliance and auditing investigations could be outsourced to neutral third–party companies as well.

The GAO's 2009 report suggested that better data and improved oversight would help ensure quality and consistency of whistleblower protection programs.[133] Based on the GAO's findings, the Department of Labor lacked reliable information on processing times and, as a result, could not accurately report how long it took to investigate and close a case or decide on certain appeals.[134] OSHA does not have an effective mechanism to ensure that the data are accurately recorded in its database, and GAO's file reviews revealed that the key dates are often inaccurately recorded in the database or cannot be verified due to a lack of supporting documentation.[135] At the appeals level, the reliability of information on the processing times is mixed.[136] At all levels of the whistleblower program, GAO found that increasing caseloads, case complexity, and accommodating requests from the parties' legal counsel affect case processing times.[137] While OSHA administers whistleblower statutes, its main area of expertise is on general labor and employment matters. Securities fraud, being a complex area of law, requires a sophisticated understanding of financial and accounting practices that OSHA investigators generally do not have. OSHA would function most effectively at administering whistleblower laws and helping achieve corporate governance if it provided the requisite training, background, or experience to its investigators in order to assess these claims. Additionally, expanding OSHA's limited scope of authority to include the power to subpoena companies to submit documents or order witnesses to testify would create a greater compliance culture within companies.[138]

In 2009, the GAO found that many of OSHA's shortcomings could be attributed to that fact that it did not "routinely conduct independent audits of the program to ensure consistent application of its policies and procedures."[139] Although OSHA developed a field audit program to remedy this, the GAO found several deficiencies in the program.[140] For example, the auditing process did not operate independently, which is an important aspect in ensuring fair and effective auditing.[141] In 2010, the

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133 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 18–19.
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 Kim, *supra* note 9, at 253–54.
139 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 34.
140 *Id.*
141 *Id.*

GAO followed up with another report on OSHA's Whistleblower Protection Program, finding that sustained management attention was needed to address long–standing program weaknesses.[142]

Evidently, OSHA has struggled with ongoing scrutiny of its ability to handle the responsibilities conferred to it through Sarbanes–Oxley and Dodd–Frank. The lack of an efficient administrative apparatus in place for handling whistleblower claims largely contributes to the breakdown and inability to ensure proper protection that would meaningfully contribute to corporate governance. If, for instance, OSHA was better–equipped to handle the administration of the Whistleblower Protection Program, employees may feel more empowered to make reports knowing that they will be taken seriously and their claims would be handled expediently. However, the lack of resources and lengthy processing times often lead to individuals, including many who were connected with Wells Fargo, to feel discouraged and often withdraw their claims altogether. This ultimately does little to help with corporate governance in situations like the Wells Fargo debacle because these complaints are ignored, often for years, and by the time they are given any attention the instances of fraud and malfeasance being complained about may already be public knowledge.

A. Collaboration

Most recently, in 2014 the GAO released its latest report on OSHA's Whistleblower Protection Program, suggesting that opportunities exist for OSHA and the Department of Transportation, in particular, to strengthen collaborative mechanisms.[143] While this report was specifically aimed at the automotive industry and transportation workers, many of the deficiencies can also be seen and improved upon in the financial industry as well. The GAO generally works to encourage the idea of collaboration between agencies. The 2014 report in fact stated "[i]n our past work, we concluded that collaboration is critical when meaningful results that the federal government seeks to achieve require the coordinated efforts of more than one federal agency."[144] However, OSHA's role with respect to whistleblowing in the financial context is particularly unique from other contexts and makes interagency collaboration more complex. In the financial context, OSHA focuses on the retaliation issue rather than the evaluation of whistleblower disclosures, which is passed off to the SEC

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142 *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO–10–722, WHISTLEBLOWER PROTECTION PROGRAM: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG–STANDING PROGRAM WEAKNESSES 1 (2009).

143 U.S. GOV'T ACCOUNTABILITY OFF., GAO–14–286, WHISTLEBLOWER PROTECTION PROGRAM: OPPORTUNITIES EXIST FOR OSHA AND DOT TO STRENGTHEN COLLABORATIVE MECHANISMS 26 (2009).

144 *Id.* at 12.

and the Consumer Financial Protection Bureau ("CFPB").[145] Therefore, OSHA is not entirely at fault for the administrative allocation of handling whistleblower cases.

Obviously, former–Wells Fargo employees and whistleblowers who speak out in general are concerned with employer retaliation and having adequate procedures in place to deal with retaliation would make people more willing to come forward. However, before delving into the role retaliation plays in whistleblower protections, it makes sense to first make OSHA more efficient in dealing with these complaints thereby improve regulatory compliance more generally. Interagency collaboration may create more accountability and various outlets for aggrieved whistleblowers to seek. For example, a cursory glance at the OSHA Whistleblower Investigations Manual shows that there are clearly technical issues as to whether the whistleblower's original complaint related to violations of the relevant statutes, which is a matter about which the SEC would have technical expertise that OSHA might not have, therefore warranting the argument for interagency collaboration.[146]

B. Compensation

The Wells Fargo context, in particular, illustrates an all–too–common situation in which Dodd–Frank's bounty provision fails to encourage good business practices and effective corporate governance.[147] This incentive is rendered completely irrelevant in many cases because the whistleblowers' claims are ignored or mishandled by OSHA at the very outset, foreclosing the possibility of ever receiving bounty payment.[148] Additionally, the ambiguity surrounding internal and external reporting in order to receive Dodd–Frank protections creates another hurdle for employees to overcome before having the bounty option available to them, thus discouraging reporting and further hindering corporate oversight.

Settlements in particular are also often a problematic variable in the context of whistleblowing and corporate governance. The utilization of whistleblowers to facilitate corporate governance relies heavily on the fact that the revelation of corporate malfeasance will act as a deterrent and help encourage a culture of compliance within companies. However, because settlements are often not made public and decided out of court, companies often benefit from quietly settling and not having whistleblower

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145 *Commonly Used Statistics*, *supra* note 106.

146 *See generally* U.S. DEP'T OF LABOR, O.S.H.A. Directive CPL 02–03–007, *Whistleblower Investigations Manual* (Jan. 28, 2016), https://www.whistleblowers.gov/directives/CPL_02-03-007_annotated.pdf.

147 *Id.*

148 Lynch, *supra* note 100.

allegations publicized, as was the case with numerous Wells Fargo whistleblowers leading up to 2016.[149]

C. Corporate Culture and Internal Policy Implementation

Clearly, there is also a need for top–down reform in practices dealing with corporate compliance strategies. Wells Fargo CEO John Stumpf's congressional hearing proved that Congress' attempt at facilitating such reform through Sarbanes–Oxley and Dodd–Frank failed when Stumpf pleaded ignorance as to what was going on and blamed low–level employees for the company's transgressions.[150] Corporate culture starts at the top and a development of a code of conduct or ethics and its implementation by a board would raise institutional and investor awareness. Similar to the United Kingdom's Financial Conduct Authority,[151] Sarbanes–Oxley and Dodd–Frank need an ancillary enforcement organization that will ensure guidance for employees on both senior and lower levels regarding their "duties of responsibility." This organization or committee should independently conduct compliance audits of both corporations and administrative bodies like OSHA supplemented by supervisory reviews on multiple levels for large financial corporations. Additionally, employees need to be fully aware of different avenues of relief and protection they have in the workplace. This includes having a detailed training on the reporting procedures under Sarbanes–Oxley and Dodd–Frank, as well as of respective company conduct and ethics policies in order to further build transparency and trust.

Working at large institutions dilutes transparency and trust, especially when employees are unaware of what is happening at the top. Appointing strong compliance officers at all levels will give employees a stronger sense of transparency, trust, and oversight. This also works hand–in–hand with the idea of collaboration, which calls for more cooperation between companies like Wells Fargo and agencies like OSHA and the SEC. More OSHA or regulatory personnel interacting with and being available to employees would create a better sense of comfort amongst those who are considering whistleblowing, while also simultaneously creating a safer company culture.

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149 *See generally* Guitron v. Wells Fargo Bank, N.A., No. C 10–3461 CW, 2011 U.S. Dist. LEXIS 86091, at *1 (N.D. Cal. Aug. 4, 2011).

150 Bill Chappell, *WATCH: Wells Fargo CEO John Stumpf Faces House Panel Over Fake Accounts*, NPR: THE TWO–WAY (Sept. 29, 2016, 10:37 AM), http://www.npr.org/sections/thetwo-way/2016/09/29/495914359/wells-fargo-ceo-john-stumpf-faces-house-panel-over-fake-accounts.

151 *FCA proposes new measures to maintain firms' focus on culture*, FINANCIAL CONDUCT AUTHORITY (Sept. 28, 2016), https://www.fca.org.uk/news/press-releases/fca-proposes-new-measures-maintain-firms-focus-culture.

V. A FORECAST ON WHISTLEBLOWER PROTECTIONS AND CORPORATE GOVERNANCE UNDER THE TRUMP ADMINISTRATION

The dismantling of Dodd–Frank has been highly anticipated since the election of President Trump.[152] Earlier this year, for instance, Senate passed a bipartisan measure to remove dozens of banks from under the purview of Dodd–Frank.[153] Many view the Financial CHOICE Act, a bill sponsored by Congressman Jeb Hensarling, as a possible successor to Dodd–Frank.[154] The Financial CHOICE Act in its current form, however, does not alter either the whistleblower reward programs or the enhanced whistleblower protections of Dodd–Frank.[155] Even if the whistleblower reward programs survive, the designation of resources to these programs and the amount of payouts will likely decline.[156] Many commentators in the securities industry have theorized that the SEC is poised to decrease corporate sanctions and possibly become more hostile towards whistleblowers under the new leadership President Trump appoints.[157]

Whistleblower protections, even if repealed under Dodd–Frank would still be available through Sarbanes–Oxley and state laws, although less robust.[158] The scope of covered employees would likely diminish and the longer statute of limitations as well as private right to a federal cause of action would no longer be available.[159] Additionally, depending on who President Trump selects for appointment to federal and administrative judge positions, we may begin to see a shift towards more stringent applications of whistleblower protection laws.[160] One thing, however, is certain: the realm of financial regulation and corporate governance is set to sail into uncharted territories under the Trump administration

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152 Alexis Ronickher, *What Does Trump's Presidency Mean for Dodd–Frank Whistleblowers?*, KATZ, MARSHALL & BANKS, LLP (Jan. 19, 2017), http://www.kmblegal.com/WHISTLEBLOWER-BLOG/WHAT-DOES-TRUMPS-PRESIDENCY-MEAN-DODD-FRANK-WHISTLEBLOWERS.

153 Sylvan Lane, *Senate passes bipartisan bill to roll back Dodd–Frank*, THE HILL (Mar. 14, 2018) http://thehill.com/policy/finance/378491-senate-passes-bipartisan-bill-to-roll back-dodd-frank/.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 Ronickher, *supra* note 152.

160 *Id.*

VI. CONCLUSION

The role of the corporate whistleblower has long been revered yet viewed with skepticism in modern American society. Despite attempts at affording protections to whistleblowers, safeguards have been an acknowledged yet often overlooked issue in American history. Within the private sector, the whistleblower plays an imperative role in facilitating corporate governance and yet the protections current statutes afford whistleblowers are insufficient and seldom achieve compliance or encourage good corporate behavior. While regulation like Sarbanes–Oxley and Dodd–Frank provide redress to whistleblowers, the administration of such regulations and the apparatus in place to enforce them has been largely ineffective. Additionally, the *Digital Realty* decision may potentially undercut corporations' internal compliance programs. Institutional failures and under resourced agencies make it particularly difficult for both whistleblower protections and corporate governance to coexist harmoniously—ultimately seeming destined for failure. Rather than reforming legislation, agencies such as OSHA must look internally to improve the handling of whistleblower claims if there is truly any corporate governance to be achieved. The nature of financial fraud and corporate malfeasance is inherently dependent on the fast–paced dynamic nature of the financial industry, and thus, the institutions in place for handling whistleblower complaints should be designed to react as such. Until then, as long as we keep putting corporate governance on the backburner, the wolves of Wall Street will keep winning and the expense of whistleblowers.