The Sarbanes-Oxley Act Section 806: Ten Years Later

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The efforts of Sherron Watkins at Enron and Cynthia Cooper at WorldCom led to revelations of scandal at those institutions and highlighted the importance of the role of the "whistleblower." It was, consequently, legislated into the Sarbanes-Oxley Act (Section 806), the most comprehensive attempt at preventing and detecting corporate fraud among publicly traded companies ever undertaken. The success of a whistleblower program in public firms is determined by the protection afforded the whistleblower under the SOX and this in turn will ultimately determine the Act’s effectiveness. We are approaching the tenth anniversary of this landmark legislation. This paper analyzes the legal issues faced by whistleblowers under SOX as interpreted by the appellate courts and recent legislative changes. In particular, what protection is afforded an employee who stepped forward under Sarbanes-Oxley? Has the anti-retaliation section provided the protection necessary to protect the whistleblowers? How has the whistleblower protection changed under the Dodd-Frank Wall Street Reform and Consumer Protection Act?

**Keywords:** Whistleblower, retaliation, Sarbanes-Oxley, Dodd-Frank

The flood of corporate accounting scandals and the demise of Enron, resulting in the loss of tens of thousands of jobs, prompted Congress to enact the Corporate and Criminal Fraud Accountability Act of 2002, known as the Sarbanes-Oxley Act and generally referred to as SOX (Public Law No. 107-204, 116 Stat.745). In general terms, the act applies only to publicly traded stock companies and imposes criminal liability on management, board of directors, and accounting firms by requiring them to certify the accuracy of the financial information they provide (Kleckner, 2004). A key provision of that act, and an essential component for
the Act’s effectiveness relies on employees to act as whistleblowers (Kleckner, 2004). There are two provisions relating to whistleblowing under the Act. Under Section 301, Audit Committees of publicly traded companies are required to set up an anonymous process for employees to alert the committee as to any financial wrongdoing (SOX §301). The Audit Committee must also have a process for the “receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters…” (SOX §301). The second provision deals with protections provided whistleblowers. Under SOX Section 806, the anti-retaliation provision, whistleblowers who provide information on wrongful accounting activity to a “Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee…” are protected. Also protected is any act taken by the employee “to file, cause to be filed, testify, participate in or otherwise assist in a proceeding filed or about to be filed... (regarding) a violation of any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders” (SOX §806). It should be noted that the employee must comply with the legal parameters set forth in that statute, which will be treated later in this article (SOX §806(a)).

Without whistleblowers it would be difficult, if not impossible, to stop corrupt corporate behavior from reaching the level of fraud that occurred at Enron, Adelphia, WorldCom, or Tyco. It is extremely difficult to police corporations from outside the organization. The individuals involved in the major accounting scandals prior to SOX were very creative in developing financial statements that would not only pass muster with the SEC and stock analysts, but also with their independent auditors as well. In addition, in some cases the independent auditors were aware of a potential fraud and yet did not act. Without a conscientious employee coming forward it would be a nearly impossible task (Gray, 2006). Yet, while it is laudable for an employee to expose coworkers and superiors engaging in illegal or unethical practices, it comes at great cost to the whistleblower. Careers have been lost over disclosure (McMasters, 2006). Prevailing
corporate culture in America requires employees who wish to be promoted and accepted at work, to be team players. Team players do not report on the “coach,” managers or team members during a game. Uncovering the fraudulent act is not at the heart of the problem, mustering the courage to face the employment consequences of whistleblowing is. If the “tone at the top” is one which actively promotes and enforces ethical behavior, then exposing illegal acts would be welcomed at the firm and would be welcomed by the firm’s management or Board. When illegal activity, however, is condoned or even perpetrated by top management as the court ruled in Enron, whistleblowers face a major fight to protect their job. While SOX promises protection, has it delivered the protection it promises and how is it perceived by potential whistleblowers? Ultimately, the real question is, will it protect the public from fraud committed at publicly traded companies?

Unfortunately, SOX was not successful in preventing the cause of the collapse of the financial markets in 2008. Congress found that the financial system was not being properly regulated and certain aspects were not being regulated at all. As a result Congress, through the Dodd-Frank legislation, made major revisions to strengthen accountability and transparency. It also increased the role of whistleblowers to come forward, by providing financial incentives awarded by the Securities Exchange Commission.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 (“Dodd-Frank”), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the Commission with information about possible securities violations. (SEC 17 CFR Parts 240 and 249, p.1 2011)
Whistleblowing and Employment Law

To understand the perils of whistleblowing, it is necessary to understand the legal environment of the employment relationship. The United States legal system evolved from English common law. In general, the employment relationship as it developed in the United States is regulated by state common law and is treated as being “at will,” meaning that either side may end the relationship at any time with or without cause. This employment relationship can be altered by individual contract or through a collective bargaining agreement in the case of unionized employees, but remains at will unless affirmatively changed by the parties. Consequently, an employee who blows the whistle is vulnerable to an employer who may easily exercise his or her right to terminate the employee.

There are some statutory exceptions to the at will relationship. For example, at the federal level an at will employee cannot be terminated on the basis of race, color, religion, national origin, or gender (Civil Rights Act, 1964). At the state level many states protect workers who file worker compensation claims or who take off time from work to fulfill jury duty (Bennett-Alexander & Hartman, 2009). When statutory protection is lacking, the courts have in rare cases acted in the interest of justice by invoking its equitable powers (Bennett-Alexander & Hartman, 2009). In such situations, the court rules that it is against public policy not to protect an employee’s job for doing what the government or society expects such as reporting for jury duty or reporting for military duty. In many cases state governments have stepped in to fill that gap by codifying the protection. Currently, forty-two states have enacted some type of anti-retaliatory discharge statute, but these protections generally do not cover financial fraud reporting (Baynes, 2002). Courts have rarely protected employee whistleblowers on equitable grounds. Thus an employee contemplating disclosure of an accounting fraud must seriously weigh the risks of being terminated.

Complicating retaliation cases is the fact that not all whistleblowers have pure intentions. An allegation of fraud can have a devastating affect on the individual accused of the wrongdoing or in some cases on the
corporation itself. Regardless of the protection offered, the whistleblower is also on trial to prove that his or her intentions were sincere (Chiara, 2005).

SOX ANTI-RETAIATION LEGISLATION

SOX needs whistleblowers for the Act to be truly effective in ending large scale corporate malfeasance. However, the question remains: will employees come forward? At risk are the employee’s career and the financial security that the job provides. It is often said that an employee who reveals wrongdoing has already consciously or unconsciously decided to move on in their career. Sometimes an employee will reveal wrongdoing by others to avoid being implicated themselves at some later point. In any event, the determining factor as to whether or not the fraud reported is the employee’s perception of the options available for whistleblowing and the perceived protections that the law affords the employee after disclosure. The remainder of this paper will begin with a discussion of SOX and court interpretations of its protection and then discuss the changes implemented by Dodd-Frank.

To review, SOX Section 806 protects employees of publicly traded corporations from retaliation by their employer or its agents. Specifically, a public company may not “discharge, demote, suspend, threaten, harass, or in any manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee…” (SOX §806). To be protected, Sarbanes-Oxley requires that the employee “reasonably believes” that he or she has uncovered a violation of law (Collins v. Beazer Homes USA, Inc., 2004). Employees not protected by SOX are protected only if there are state laws specifically covering their particular situation or, as mentioned earlier, a judge in a rare moment is compelled out of fairness to invoke equitable principles of the Court for job protection.

To be covered under SOX the disclosure must be made to a federal regulatory or law enforcement agency, any member or committee of Congress or any person with supervisory authority of the employee
(or such person working for the employer who has the authority to investigate, discover, or terminate misconduct) (SOX §806). Employees are also covered when they “file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed… relating to an alleged violation of… any rule or regulation…” of the SEC (SOX §806).

Most firms would prefer that whistleblowers report inappropriate activities to the wrongdoer’s supervisor to keep its problems out of the public eye. An anonymous tip line can be used, although in many situations it may be impossible because of the size of the company or because knowledge of an activity pinpoints the identity of the tipper. When corruption occurs at top management level, whistleblowers are inclined to go outside of the firm to report incidents of wrongdoing directly to government authorities. An option that does not afford SOX protection is reporting the corruption to the press where there is the possibility of remaining anonymous, depending on the disclosure made. (Chiara 2005).

To make a prima facie case for unjust retaliation, the employee must allege that “(1) he engaged in protected activity; (2) the employer had knowledge of the protected activity; (3) complainant suffered an unfavorable employment action; and (4) circumstances exist to sufficiently suggest the protected activity was a contributing factor in the employment decision” (Chiara, 2005). A protected activity is the employee’s disclosure of events where fraud has occurred or is occurring (Chiara, 2005). It is protected even if, after investigation, the whistleblower was incorrect as long as he or she reasonably perceived that the activity was fraudulent. It might be a memo to a supervisor or a confidential letter to a government agency. An employee who has been retaliated against by an employer must “file a complaint with the Secretary of Labor within 90 days after the date on which the violation occurs” (Emphasis added) (SOX §806). Once filed, the department has 60 days to determine if the complaint has merit and 180 days to complete its investigation. The Secretary can then proceed to a hearing. If the deadlines are not met by the Secretary, the claimant can proceed with a civil suit in court. However, the claimant can file a case in federal district court only if the complaint
was filed with the U.S. Secretary of Labor within the statutory ninety days after retaliation occurs, and the complainant was not the cause of the Secretary being unable to investigate and issue a final decision within 180 days of receipt of the claim (Collins v. Beazer Homes USA, Inc., 2004). The Secretary of Labor has appointed the Occupational Safety and Health Administration (OSHA) as its official designee to receive complaints under SOX.

For those protected by SOX the relief granted is fairly encompassing. “An employee prevailing in any action under the subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.” Compensatory damages include “reinstatement with the same seniority status that the employee would have had, but for the discrimination… back pay, with interest; and …special damages … including litigation costs, expert witness fees, and reasonable attorney fees.” Relief does not include punitive damages, nor is the plaintiff entitled to a jury trial (Murray v. TXU Corporation, 2005).

**SOX Anti-retaliation Effectiveness**

The application and interpretation of law is the jurisdiction of the courts. As with all new legislation and procedures, judges need to interpret the legislative intent and set the boundaries. Of the reported cases under SOX, the results have been mixed with the scales tipping mostly in favor of the employer. From the outset OSHA and the courts were not favorable to whistleblowers, narrowly defining what is protected and what particular procedures were required. In simple terms, if the court could find an opportunity to deny protection, it would do so. While courts often apply strict standards in the application of an Act, the consequences of strict application of SOX actually undermined its effectiveness. The anti-retaliation section of SOX was meant to be a cornerstone of the Act as the watchdog to insure that public companies and their managers stay in compliance. Newspaper articles about whistleblowers that have lost their careers and, in many instances, their lawsuits discourage others from coming forward.
Much has now been written about the lack of effectiveness of section 806 of SOX and its legal shortcomings. Earle and Madek (2007) stated “One of the major conclusions suggested by available evidence is that whistleblowers are not actually protected in any sense that they can be secure in their position while pressing their claims. One need only examine the Welch case to see the price one whistleblower paid while pursuing his claim” (Earle, 2007). In *Welch v. Cardinal Bankshares* (2006), the Administrative Law Judge originally ordered the company to reinstate Welch pending final outcome of the case. The Federal District Court vacated the order of reinstatement. In the proceeding, the court held that it would be improper to allow Welch, the whistleblower, to return to work pending outcome of his case (Welch v. Cardinal Bankshares, 2006). Welch, the CFO of the company, over the objections of the employer, insisted that his personal attorney be present at all meetings attended by Welch regarding the company investigation of accounting fraud. The court ruled that the company was justified in terminating him as uncooperative during the company’s investigation (Welch v. Cardinal Bankshares, 2006).

A review of some court decisions and administrative decisions reveals the true complexity of determining when an employee is actually protected. The first two SOX retaliation cases to reach Federal District Court were *Murray v. TXU Corporation* and *Willis v. VIE Financial Group, Inc.* (Murray v. TXU Corporation, 2005; Willis v. VIE Financial Group, Inc., 2004). Both cases dealt with legal procedural issues. Ultimately the court ruled in favor of Murray and allowed the retaliation suit to move forward (Murray v. TXU Corporation, 2005). In *Willis v. VIE Financial Group, Inc.* (2004), the plaintiff filed a complaint with OSHA alleging retaliation. He was subsequently terminated by the employer. The Court allowed the case to proceed only on the issue of whether the threat of termination and loss of job responsibilities constituted a violation of the Act. The third retaliation case was *Collins v. Beazer Homes U.S.A., Inc.* (2004) where an employee reported finding fraud within her employment probationary period. The company asserted its rights to terminate her during that probationary period. The Court denied the
defendants motion to dismiss the complaint. The Court ruled that a trial was needed as to whether the company acted in retaliation for the disclosure or in retaliation to Collins’ allegations of fraud (Collins v. Beazer Homes USA, Inc., 2004). These cases demonstrate the legal complexity of bring such actions.

As more cases filtered through the judicial system, potential whistleblowers and their attorneys were still discovering what is and is not protected by SOX. In the 2006 Leon, M.D. v. IDX Systems Corporation case, the court concluded that it was within the Court’s discretion to terminate the case and to impose a fine on the plaintiff for the destruction of evidence. In Carnero v. Boston Scientific Corporation (2006) the Court ruled that there is no protection afforded a foreign citizen working for a foreign subsidiary who reported financial billing irregularities to the parent company, BSC, about its Latin American subsidiaries. The U.S. Court of Appeals ruled that he was not covered by SOX nor did he have sufficient connection with the parent corporation to invoke state law protection. In a blow to whistleblowers, the U.S. Court of Appeals in Bechtel, United States Department of Labor v. Competitive Technologies, Inc. held that a District Court does not have the authority to enforce an order by the Secretary of Labor reinstating a whistleblower pending investigation of the complaint (Bechtel, United States Department of Labor v. Competitive Technologies, Inc., 2006). This higher Court ruled similarly to the Welch case noted above.

Several lower court decisions also provide insight on whistleblower cases. Filing a valid claim of fraud does not guarantee the whistleblower his job, where in trial it is admitted that he was cited many times for doing a poor job (Sussberg v. K-mart Holding Corporation, 2006). In order to be protected, an employee must be engaged in activity protected by SOX. In the case of an in house attorney who was appointed to the position of company compliance officer and complained that the compliance program was not strong enough, the court held that she was not protected by SOX because she was not engaged in any protected activity because there was no allegation of actual or perceived SOX violations (Bishop v. PSC Administration (USA), Potash Corporation
of Saskatchewan, 2006). An employee can rely strictly on state law for protection (Melendez v. Kmart Corporation, 2006). An employee who assists a whistleblower, but does not actually speak-up himself, is also protected under SOX (Mahoney v. Keyspan Corporation, 2007). Reporting violations of the Food and Drug Administration for failing to implement a mandated good manufacturing practices program is not protected by SOX since complainant could not show any harm to shareholders Livingston v. Wyeth, Inc. (2008). Finally, courts have often opted for less than full compensation for a successful claimant.

In many cases, the Court sided with employer’s right to terminate for company rule violations over whistleblower protection. In JDS Uniphase Corporation v. Jennings (2007) the Court ruled that whistleblowers have no right to take home employee records against company policies even if the purpose was to protect the evidence from destruction. Employers soon realized that it could force employees to sign employment agreements waiving rights under SOX and requiring predispute arbitration in lieu of filing a complaint with OSHA. Court enforcement of these provisions negated any SOX protection to whistleblowers (Guyden v. Aetna, Inc. (2008) and Hill v. Ricoh Ams. Corp. (2010)).

The short statute of limitations also presents a major problem for the Act’s effectiveness. An employee must file a complaint with OSHA within the first ninety days of a covered retaliatory act. Ninety days from the date of the actual violation is much too short of a statute of limitations. Sometimes retaliation comes in a form other than dismissal from work. If retaliation is gradual, it is difficult to determine when the 90 day time period began. Many retaliation suits against employers are summarily dismissed as a result of these procedural failures, regardless of whether they are caused by uninformed employees or their attorneys. Failure to file bars any further action by the employee against the employer. Only a misstep by the employer can open the door for an employee to file a complaint beyond the initial retaliation action. “The Sarbanes-Oxley 90 day filing period begins to run when the employer makes and reasonably communicates the discriminatory adverse employment decision to the employee” (McClendon v. Hewlett-Packard Company, 2005). “Each separate and discrete discriminatory act
starts a new clock for the filing of an administrative claim” (*McClendon v. Hewlett-Packard Company*, 2005). In that case McClendon was removed as project manager after he alleged improprieties, however, it was not until a month later that he was reassigned to a new job at a lower pay. The court held that this second action appeared to constitute an adverse employment act starting the 90 day clock anew (*McClendon v. Hewlett-Packard Company*, 2005).

**THE CALL FOR CHANGE**

During the five year period after enactment, media coverage of whistleblowers was not favorable, reporting the plight of individual whistleblowers, their job loss, and financial hardships that followed. Many researchers argued for changes to SOX. Earle and Madek recommended five changes to the statute and regulations. Their recommendations sum up what others have proposed as well:

1. Move enforcement of the whistleblower provision to the SEC… (which deals with) security laws and accounting practices.
2. Amend the law to extend the statute of limitations.
3. Grant preliminary reinstatement more regularly.
4. Add a financial incentive for whistleblowing akin to that available in qui tam cases.
5. Require disclosure in annual reports to shareholders and to the IRS of SOX whistleblower complaints that are filed.

Dworkin (2007) reasoned that Congress should create rewards to encourage whistleblowing as a means of securing legal compliance. Ramirez (2007) went one step further promoting enactment of an omnibus whistleblower statute. “A unified omnibus provision should require a frontal assault on whistleblower protection generally and limit the ability of special interests to mount stealth attacks on particular strands of whistleblower protection” (Ramirez , 2007). She ended her law review article by prophetically writing “When the next reform moment arises,
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reformers must be ready to strike” (Ramirez, 2007). That moment came only a year later with the collapse of the financial markets in 2008.

**Dodd-Frank 2010**

In the wake of a $64 billion Ponzi scheme that eluded government regulators, the financial meltdown of 2008, and government bailouts of banks, financial institutions, and the auto industry, Congress needed to take drastic measures to restore public confidence. “To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes,” Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) on July 21, 2010. This response by Congress was similar to its response to the crash of 1929 when Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, to restore public trust. Among many other changes, Dodd-Frank added financial incentives for whistleblowers to come forward and enhanced retaliation protection. (Harvard Law Review, 2011).

From a Congressional point of view, the fact that SOX 806 was significantly strengthened by Dodd-Frank is proof that the law was not working as well as was expected when enacted in 2002. Dodd-Frank corrected many of the problems that arose for whistleblowers under SOX. Specifically, it increases the statute of limitations from 90 days to 180 days from the date of the violation or after the date on which the employee becomes aware of the violation (Dodd-Frank, 2008). It provides for private cause of action with a jury when the Secretary of Labor fails to resolve the matter within 180 days (Dodd-Frank, 2008). It specifically provides that a prevailing employee shall be entitled to all relief necessary to make the employee whole including reinstatement, seniority status, back pay with interest, and special damages which include litigation costs, expert witness fees, and reasonable attorney’s fees (Dodd-Frank, 2008). To counteract employer preemptive employment agreements the

Act invalidates any agreement waiving any of these rights or requiring predispute arbitration (Dodd-Frank, 2008). All of these changes were meant to rectify the unfavorable Court rulings in prior SOX cases and employer actions to restore protections for whistleblowers. In addition, Dodd-Frank included a bounty payment system for whistleblowers as an incentive to come forward.

To be entitled to a bounty, the monetary sanction brought by the SEC resulting from the disclosure must exceed $1,000,000; information provided by the whistleblower must be original from independent knowledge or analysis; and it must not already be known by the SEC from another source and not derived from any judicial hearing, administrative hearing, government report, news media, or audit (unless the whistleblower is the source of that information) (Dodd-Frank, 2008). In addition, the whistleblower must either initially file a fraud claim with the SEC or file with the SEC within 120 days after reporting the fraud to the employer (Dodd-Frank, 2008). Failure to do so, forfeits a claimant’s right to any bounty.

The financial bounty system mentioned above to induce individuals to report fraud to the SEC assumes whistleblowers will be motivated by financial rewards. This is an area of continuing research. Money may not be the motivating factor (Wiener, 2010). Only time will tell whether such a financial incentive program will be able draw valuable tips. In the case of IRS collections regarding tax fraud and False Claims Act suits regarding fraud on government contracts, monetization has helped to dramatically increase the recovery rate on each of those programs (Whistleblower Office, 2009).

After ten years, the same question still remains. Will SOX and Dodd-Frank succeed in stemming corporate fraud? Will Dodd-Frank protect whistleblowers enough to encourage potential tipsters to come forward? In the short two years that have passed since adoption of Dodd-Frank the number of fraud reports reported to the SEC has risen dramatically. Since enactment of Dodd-Frank new concerns are beginning to surface.

SOX proponents argue that the Dodd-Frank financial reward for reporting directly to the SEC undermines existing corporate compliance
programs. Giving a potential whistleblower an alternative as to where to report fraud undermines successful compliance programs. A whistleblower who files a complaint within the firm must be aware that only SOX protection as it currently exists is invoked. The employee has foregone the increased protection afforded and possible financial rewards provided under Dodd-Frank unless they also file with the SEC. By filing directly with the SEC, a complainant is protected under Dodd-Frank and receives full protection and if the requirements are met, the possibility of receiving a 10%-30% reward. (Harvard law review, 2011). In making this change Congress opted for transparency with the SEC over the mixed results that occurred under SOX. It is important to note that Dodd-Frank did not end the SOX scheme, but only added an alternative for whistleblowers. (Harvard law review, 2011). The benefit of in house complaints is that a company can take steps to achieve compliance without incurring an additional financial burden.

Dodd-Frank opponents argue that this is just another illusory compliance program (Rapp, 2012). The $1 million SEC recovery threshold is much too high. In setting a threshold amount the government wanted to limit bounties to significant fraud claims (Dodd-Frank, 2008). A review of the past ten years of recovery by the SEC reveals a problem. Adjusting for the $2.3 billion recovered against WorldCom, the average recovery by the SEC is only $890,000 (Rapp, 2012). If Dodd-Frank were in place many of the whistleblowers would not have received any compensation. Add to this the fact that very few claims are currently being prosecuted by the SEC renders the financial reward system practically useless. It is out of the whistleblowers control once the papers are filed with the SEC.

Serious questions also arise as to whether the SEC has the expertise and capacity to handle these cases. Harry Markopolos filed five complaints over a nine year period regarding Bernie Madoff’s Ponzi scheme only to have it then sit in files at the SEC. His twenty-one page report outlined how Madoff was operating his scheme. It was only after Madoff finally confessed that he was charged and prosecuted (Neal, 2011). Clearly the increased number of complaints has overwhelmed the SEC and prompted
President Obama to allot an extra $300 million to the SEC budget to handle the complaints (Jones, 2011). With an increased load, deciphering which tips to further investigate will continue to be a problem.

In the drafting of Dodd-Frank, Congress looked at a very successful model, the False Claims Act (FCA) or as amended, Fraud Enforcement and Recovery Act (FERA, 2009). The FCA dates back to the civil war when Congress decided to pay up to 50% to informants who revealed fraud against the government on military contracts. It authorized qui tam suits, private suits brought on behalf of the government. It is equivalent to a shareholder derivative suit. Under current law a whistleblower could report the fraud to the Department of Justice. The Department has the option of dismissing the complaint, exercising its rights to investigate and, if founded, prosecute an action against the defrauding company. If the government wins the suit it would pay the whistleblower a percentage based on the judgment amount, not the actual recovery. If the government declines to pursue the matter the whistleblower is free to file suit on behalf of the Government. If successful the tipster/plaintiff was entitled to 30% of the amount collected (Neal, 2011). Congress chose to incentivize the process for Dodd-Frank claims, but not authorize qui tam suits. Congress yielded to lobbying pressure that it would be too costly to businesses to continue to defend these suits. Perhaps it was too quick to dismiss this as a possibility. “Since 1986, total recoveries under the FCA have totaled nearly $24 billion, the majority resulting from qui tam actions” (Neal, 2011). Yet, when compared to an existing bounty program administered by the SEC, the Insider Trading and Securities Fraud Enforcement Act of 1988, which provided financial rewards insider trading, the success rate is dismal. In two decades, seven payments were made to five informants totally a meager $159,537 (Neal, 2011). Had Harry Markopolos been able to file a qui tam suit against Bernie Madoff in 2000, the Ponzi scheme investment losses would have been limited to $300 million. The lack of any action by the SEC allowed that scheme to mushroom to $64 billion (Neal, 2011).

There are those who argue that the creation of yet another whistleblower statute represents a piecemeal approach that has never
worked (Wiener, 2010). Having one law with uniform standards applied equally would make it easier for the government to promote and encourage higher public participation (Wiener, 2010). There is strong precedence for uniform rules. The adoption of the Administrative Procedures Act unifying the procedures for all administrative agencies was very successful. Currently each sector has their own law with their own particular set of rules and unique court interpretations. Individuals want clear rules and an understanding of where they stand before jeopardizing their jobs and careers.

**CONCLUSION**

The fact that Dodd-Frank was enacted is evidence of failure of Section 806 of SOX in protecting whistleblowers and preventing fraud. It is too early to determine if Dodd-Frank will be successful in correcting the deficiencies of SOX. It appears to have addressed many of the legal hurdles raised by the courts in SOX cases. Cases are just filtering into the court system and it is still too soon to draw any conclusions. Unless drastic changes are made at the SEC to enable effective handling of fraud complaints or structural changes are made to allow qui tam suits it appears that not much has changed since 2002 to prevent fraud.
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