Georgia Law Review

Volume 55 | Number 1 Article 4

2020

Whistleblowing in the Compliance Era

Jeffrey R. Boles
Temple University

Leora Eisenstadt
Temple University

Jennifer M. Pacella
Indiana University

WHISTLEBLOWING IN THE COMPLIANCE ERA

Jeffrey R. Boles,[*] *Leora Eisenstadt,*[†] *& Jennifer M. Pacella*[‡]

International events over the last year have propelled the importance of whistleblowers to the forefront. It is increasingly evident that whistleblowers provide immense value to society. Yet, for years, whistleblowers have been victims of retaliation, commonly experiencing threats, discrimination, and employment termination due to their reporting. Against the backdrop of a society heavily defined by compliance-focused initiatives—where organizations and industries construct robust compliance programs, internal policies, and codes of conduct—this Article highlights a significant gap in legal protections for would-be whistleblowers. While compliance initiatives demonstrate that active self-regulation is increasingly a staple of organizational governance, this Article pinpoints the problems that arise when such initiatives extend beyond applicable legal thresholds for retaliation protection. This over-extension leaves vulnerable employees and potential whistleblowers without legal recourse following adverse employment actions, even if they comply with their employers'

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[*] Jeffrey R. Boles is an associate professor and Dorothy S. Washburn Research Fellow at Temple University, Fox School of Business. He is a recognized expert in criminal law, compliance, and ethics.

[†] Leora F. Eisenstadt is an associate professer at Temple University, Fox School of Business. She is an expert in and writes frequently on employment law, discrimination, retaliation, and whistleblowing.

[‡] Jennifer M. Pacella is an Assistant Professor of Business Law and Ethics at Indiana University, Kelley School of Business. She is a leading subject matter expert in whistleblowing law, compliance, and governance, and is often contacted by the media for commentary in these areas.

The authors would like to thank the participants of the ComplianceNet Conference 2019 and the 2019 and 2020 Annual Meetings of the Academy of Legal Studies in Business, as well as the Law Department of the Zicklin School of Business, for their valuable feedback on earlier drafts of this Article. We also thank Dakota M. Coates, our research assistant, for his helpful assistance on this Article. This paper was the recipient of the 2020 Virginia Maurer Distinguished Ethics Paper Award. The authors' names appear in alphabetical order, each having contributed equally to this Article.

internal policies and compliance programs. We examine this gap in legal protections in the context of compliance initiatives in three domains: equal employment opportunity and sexual harassment; securities fraud; and anti-corruption. We then compare these initiatives with the legal and regulatory compliance postures under Title VII of the Civil Rights Act of 1964, the Dodd–Frank Wall Street Reform and Consumer Protection Act, and the Foreign Corrupt Practices Act, respectively, to illustrate how most compliance initiatives fail to mirror the retaliation protections under those statutes. To remedy this gap in protections, we propose complementary solutions under contract and tort law frameworks, coupled with soft law initiatives.

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I. INTRODUCTION

By all accounts, the compliance industry has grown dramatically in the last several decades.[1] In response to various financial scandals, the passage of new legislation, and influential court rulings, both large and small companies have expanded their compliance programs and hired more personnel to combat financial fraud, avoid corruption, and eliminate workplace discrimination and harassment.[2] We now live in a compliance-focused world, where numerous companies proactively implement compliance policies and programs that exceed legal requirements.[3] While this expansion may generally be viewed as a positive development for regulatory compliance, one key population of employees has been made significantly worse off in the process: whistleblowers.[4] In the areas of financial fraud, corruption, discrimination, harassment, and diversity, employees who come forward to report violations of company compliance policies are often left unprotected by law and are vulnerable to retaliatory acts such as termination or demotion.[5] In the rush to build more robust compliance apparatuses, whistleblowers—who serve a vital role in unearthing and preventing inappropriate, dangerous, unethical, and often unlawful behavior—have been left defenseless.[6]

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[1] *See* Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 WASH. L. REV. 947, 953 (2020) (noting that compliance has "emerged as one of the most vibrant sources of employment and research for the legal field as a whole").

[2] *See* Geoffrey Parsons Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 438 (2017) (stating that compliance departments have grown and now must respond to "underlying compliance risks"); Pacella, *supra* note 1, at 955 (noting that "growth of the compliance function has come about largely as a response to the extraordinary complexity in regulation over recent decades"); Alison Leigh Cowan, *Compliance Officers' Day in the Sun*, N.Y. TIMES (Oct. 20, 1991), https://www.nytimes.com/1991/10/20/business/compliance-officers-day-in-the-sun.html (noting that attitudes towards compliance changed after a "scandal at Salomon Brothers" and that compliance officers' "salaries and staffs" grew to comply with "complicated securities laws").

[3] *See* Cowan, *supra* note 2 ("Today, compliance departments at the biggest brokerage firms tend to go well beyond the dictates of law or industry rules.").

[4] *See* discussion *infra* Parts II–IV.

[5] *See* Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 152 (2014) ("Employees risk being labeled unreasonable and left unprotected from retaliation for stepping forward to complain about discrimination . . . .").

[6] *See* discussion *infra* Parts II–IV.

In 1991, *The New York Times* published an article examining the compliance industry's expansion following the collapse of investment bank Drexel Burnham Lambert and the treasury bond "scandal" at Salomon Brothers.[7] Suddenly, the author noted, "the attitude [was] that no amount of compliance policing is too much."[8] She highlighted the growth of compliance departments, the dramatic increase in compliance executives' salaries, and the newly respected positions they began to occupy at banking and other firms.[9]

If the 1990s brought growth and new prestige to compliance departments, the twenty-first century has dramatically intensified that process, bringing a veritable explosion of the industry. By 2005, *The New York Times* reported that, in the wake of scandals at Enron and WorldCom and the subsequent passage of the Sarbanes–Oxley Act (SOX),[10] "[c]ompliance is becoming an industry unto itself."[11] Whereas prior to SOX's passage in 2002, "there was no such thing as a chief compliance officer at most of the roughly 9,000 publicly held corporations in the United States[, n]ow in-house watchdogs . . . are required at all these companies."[12]

The growth of the compliance industry dramatically accelerated again after the Great Recession of 2007 to 2009.[13] Experts largely attributed the recession to a lack of oversight and regulation of financial institutions, and this sentiment culminated in the passage of the Dodd–Frank Wall Street Reform and Consumer

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[7] Cowan, *supra* note 2.

[8] *Id.*

[9] *Id.* ("Compliance officers . . . are now enjoying an elevated status. Today, they often report more directly to top executives and company boards. Their salaries and staffs are growing, and some firms engage in bidding wars to recruit them."); *see also* Pacella, *supra* note 1, at 948 (asserting that the compliance field has established itself as "its own distinct discipline" and that compliance officers' roles have moved "to the forefront"); Miller, *supra* note 2, at 438 ("Compliance officer salaries have greatly increased and compliance departments have exploded in size and importance.").

[10] 18 U.S.C. § 1514A (2018).

[11] Harry Hurt III, *Drop That Ledger! This Is the Compliance Officer*, N.Y. TIMES (May 15, 2005), https://www.nytimes.com/2005/05/15/business/yourmoney/drop-that-ledger-this-is-the-compliance-officer.html (quoting Joseph A. Grundfest, Professor of Law and Business at Stanford Law School).

[12] *Id.*

[13] *See* Pacella, *supra* note 1, at 955 ("The focus on compliance . . . was enhanced in the wake of the financial crisis from 2007 to 2009 . . . .").

Protection Act of 2010 (Dodd–Frank).[14] Dodd–Frank once again required expansion of policies, procedures, and personnel to ensure compliance with the new broad-based financial regulation.[15] *The New York Times* dubbed the law "Dodd–Frank Inc.," referring to the "legions of corporate accountants, financial consultants, risk management advisers, turnaround artists and technology vendors," in addition to the lawyers, who would be hired in the wake of its passage.[16] More recently, many industries see continued increases in compliance efforts related to anti-money laundering (AML), cybersecurity, and predictive analytics.[17]

In addition to regulatory changes in the financial arena, case law and related regulation concerning employment discrimination law and affirmative action spurred an equally dramatic compliance expansion in the equal employment opportunity (EEO) domain, with exponential growth in policies and personnel resembling that of compliance in the finance domain.[18] A pair of U.S. Supreme Court opinions from the late 1990s created an affirmative defense to discrimination and harassment claims that incentivized the creation of elaborate policies and procedures to prohibit discrimination and harassment and respond to related claims that arise.[19] In addition, arising partly in response to affirmative action requirements placed on government contractors and an increasing

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[14] 15 U.S.C. § 78u-6(h) (2018) (providing protection against retaliation for securities laws whistleblowers); *see also* Pacella, *supra* note 1, at 955 (discussing how focus on compliance increased after the financial crisis); James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 14 (2013) (noting that Dodd–Frank prompted an increase in work for compliance officers); GEOFFREY PARSONS MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 137–39 (1st ed. 2014) (discussing other landmarks in the history of compliance).

[15] *See* Pacella, *supra* note 1, at 955 (attributing further post-recession focus on compliance to Dodd–Frank).

[16] Eric Dash, *Feasting on Paperwork*, N.Y. TIMES (Sept. 8, 2011), https://www.nytimes.com/2011/09/09/business/dodd-frank-paperwork-a-bonanza-for-consultants-and-lawyers.html?searchResultPosition=1.

[17] Todd Ehret, *Compliance Job Market Shows Strength in AML and Financial Crime as Other Areas Slow*, REUTERS (Jan. 18, 2017), https://www.reuters.com/article/bc-finreg-compliance-market/compliance-job-market-shows-strength-in-aml-and-financial-crime-as-other-areas-slow-idUSKBN1522WG (noting that "hiring has become more targeted in specific areas" such as AML and cyber security).

[18] *See infra* Section II.A.

[19] *See infra* notes 44–54 and accompanying text.

belief in the business benefits of diversity, the number of compliance personnel dedicated to diversity and inclusion has dramatically grown in the last several years with numerous companies appointing chief diversity officers and expanding their compliance departments to include discrimination, diversity, and related issues.[20] Finally, both the #MeToo and Black Lives Matter movements have catapulted companies' efforts regarding sexual harassment, anti-racism, and workplace culture issues, again leading to renewed attention to EEO compliance personnel, practices, and procedures.[21]

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[20] *See, e.g.*, Bloomberg News, *Kmart Diversity Officer*, N.Y. TIMES (Aug. 14, 2001), https://www.nytimes.com/2001/08/14/business/kmart-diversity-officer.html (announcing a new "chief diversity officer" position at the Kmart Corporation); Mike Isaac, *Pinterest Hires Its First Head of Diversity*, N.Y. TIMES: BITS (Jan. 6, 2016, 12:00 PM), https://bits.blogs.nytimes.com/2016/01/06/pinterest-hires-its-first-head-of-diversity (discussing actions by Pinterest, Twitter, and Facebook to increase personnel and programs dedicated to diversity efforts); *see also* Elizabeth Olson, *150 Executives Commit to Fostering Diversity and Inclusion*, N.Y. TIMES (June 12, 2017), https://www.nytimes.com/2017/06/12/business/dealbook/work-racist-sexism-diversity.html ("[N]ew initiative, C.E.O. Action for Diversity and Inclusion, will announce on Monday that 150 corporate executives have committed to their companies' encouraging their employees to discuss those sensitive topics. Procter & Gamble, New York Life, Accenture, Deloitte U.S. and the Boston Consulting Group are among the companies that have joined the alliance . . . . The group is sponsoring a website, ceoaction.com, which has more than 70 examples of the most effective efforts developed by companies, including flexible work practices and gender equality programs.").

[21] *See* Sarkis Jebejian, David B. Feirstein, Lauren O. Casazza, Kim B. Nemirow, Shaun J. Mathew, Lisa Madigan & Erica Williams, *#MeToo Compliance — Two Years In, "Wait-and-See" Is No Longer an Option*, KIRKLAND GOVERNANCE UPDATE (Oct. 3, 2019), https://www.kirkland.com/publications/kirkland-governance-update/2019/10/metoo-compliance ("Over the past two years, the #MeToo movement has driven major societal change and reform, exposing areas for improvement in workplace compliance across the country. It has also led to a paradigm shift, turning allegations of workplace sexual misconduct at some companies from isolated HR matters into potential enterprise-level risks similar to the threats of cybersecurity breaches or corruption."); Katie Benner, *SoFi Board Says C.E.O. Is Out Immediately Amid Sexual Harassment Scandal*, N.Y. TIMES (Sept. 15, 2017), https://www.nytimes.com/2017/09/15/technology/sofi-cagney-scandal.html ("SoFi joins the ranks of technology start-ups that have had to contend with serious issues related to workplace culture. Other companies in that category include the blood testing start-up Theranos, the insurance start-up Zenefits and, perhaps most prominently, the ride-hailing company Uber, whose chief executive, Travis Kalanick, stepped down amid a spate of scandals."); Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html (stating that some companies are aligning with the

While the growth of compliance departments and programs is often reactive to litigation, regulation, and statutory changes, current compliance initiatives often "go well beyond the dictates of law or industry rules."[22] For example, anti-corruption initiatives—which aim at creating broad, globally applicable policies—often prohibit more conduct than federal law prohibits.[23] In addition, anti-fraud policies often impose internal reporting duties and other responsibilities on employees, which federal law does not protect.[24] Further, employee handbooks and EEO codes often describe discrimination, harassment and other inappropriate workplace conduct in ways that differ from federal statutes and case law and prohibit behaviors that are not unlawful under Title VII of the Civil Rights Act (Title VII)[25] or other anti-discrimination statutes.[26] From the perspective of risk management and ethical business practices, company initiatives that are more prescriptive than legal mandates are good programs.[27] Compliance departments aiming to create healthy workplace cultures, increase diversity, encourage responsible financial practices, and avoid potential legal liability should craft policies with legal requirements as prescriptive guides, not outside boundaries.

The danger in exceeding legal requirements, however, is to the employee whistleblowers who come forward to report violations of the employers' internal policy. The enormous expansions of compliance infrastructure typically have not included legal protections for whistleblowers.[28] In fact, the opposite may be true. Workers who report violations—whether it is sexual harassment,

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Black Lives Matter movement); Greg Bensinger, Opinion, *Corporate America Says Black Lives Matter. It Needs to Hold Up a Mirror,* N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/opinion/black-lives-matter-corporate-pledges.html (indicating that companies have used Black Lives Matter protests to boast about commitments to diversity).

[22] Cowan, *supra* note 2.

[23] *See infra* Part IV.

[24] *See infra* Part III.

[25] 42 U.S.C. §§ 2000e–2000e-17 (2012) (codifying equal employment opportunities).

[26] *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2018) (prohibiting age discrimination in employment); Americans with Disabilities Act, 42 U.S.C. §§ 12101–17 (2012) (prohibiting disability discrimination in employment).

[27] *See supra* notes 2–4 and accompanying text.

[28] *See infra* Parts II–IV.

bribes, or financial fraud—face an uncertain and decidedly insecure future. Whistleblowers who report conduct prohibited by company policy—but not by law—are left legally unprotected should they experience retaliation, even if internal company policy promises non-retaliation.[29] Additionally, companies often present internal codes as the "law" of the company, making no distinction between "illegal acts" and "company code violations."[30] Average workers who attempt to adhere to their company's code of conduct by reporting violations are often unaware of whether they are reporting violations of law or company code, leaving them legally unprotected.[31]

This Article is the first piece of scholarship to examine the consequences for whistleblowers when compliance programs *exceed* the bounds of law in three areas: EEO compliance, anti-fraud codes, and anti-corruption programs. We analyze protections available under Title VII and related anti-discrimination statutes for those who report discrimination and harassment as well as protections available under SOX, Dodd–Frank, and the Foreign Corrupt Practices Act (FCPA) for those who report financial fraud, bribes, and other forms of corruption.[32] More importantly, we examine the limits of those laws and the extent to which employees coming forward to report compliance code violations are not protected against retaliation under these federal statutes.

It is untenable that no legal recourse exists for workers who diligently adhere to company policy, risk their livelihoods to report bad acts—which the company insists it wants to know about and remedy—and then face demotion, termination, or other adverse actions by a rogue supervisor, manager, or constituent of the organization. To address this problem, we propose several legal and regulatory measures to protect compliance whistleblowers both individually and collectively. Specifically, we propose individual solutions, including contract law alternatives and the tort of wrongful discharge in violation of public policy. We also propose

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[29] *See infra* Sections II.B., III.B., & IV.B. These non-retaliation promises generally are legally unenforceable. *See infra* Section II.B.

[30] *See infra* Section II.B.

[31] *Id.*

[32] 15 U.S.C. §§ 78dd-1 to -3 (2018) (prohibiting certain foreign trade practices by issuers of stock).

forward-looking, collective measures including modifications to the U.S. Sentencing Guidelines for Organizations (the Sentencing Guidelines), the DOJ Evaluation of Corporate Compliance Programs, and the Principles of Federal Prosecution of Business Organizations within the Justice Manual. These reforms are necessary both to protect employees who suffer under this unfair system and to incentivize companies to amend their compliance codes to make promises to whistleblowers legally enforceable.

Whistleblowers provide an unmatched source of information essential to a company's ability to avoid criminal and civil liability and to increase productivity and efficiency.[33] Whistleblowers are vital to society's orderly functioning,[34] and they should be protected by law when providing this service.

II. BLOWING THE WHISTLE ON HARASSMENT AND DISCRIMINATION

Since the late 1990s, companies have been creating ever-larger programs and departments to maintain compliance with anti-discrimination laws and regulations and, more generally, to create diverse workplaces. These programs respond, in large part, to the requirements set forth in Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act, and 42 U.S.C. § 1981,[35] all of which prohibit discrimination in the workplace on the basis of protected characteristics.[36] The need to comply with this group of federal

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[33] *See* Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 674 (2018) ("[P]ublic policy supports the protection of whistleblowers generally, as the information they provide is beneficial to a wide range of societal interests.").

[34] *See id.* at 671–74 (discussing whistleblowers' role in fraud detection and how common law understood that role as furthering public policy).

[35] Section 1981 prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts. 42 U.S.C. § 1981(a) (2012) ("All persons within . . . the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."); *see also* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (finding the scope of § 1981 includes discrimination based on race, ethnic, and physiognomic distinctions).

[36] Protected characteristics under the listed statutes include race, color, sex, religion, national origin, age, and disability. *See* 29 U.S.C. § 623 (2018) (declaring employment discrimination based on age unlawful); 42 U.S.C. § 1981 (2012) (ensuring an equal right to freedom of contract regardless of race); 42 U.S.C. § 2000e-2 (2012) (prohibiting discrimination in employment on the basis of "race, color, religion, sex, or national origin"); 42 U.S.C. §

statutes, an increasing belief in the importance of diversity and inclusion, and—in some companies—affirmative action programs, have spawned an entire industry of professionals and innumerable policies, procedure documents, resources, and best practices guides.[37] Although many of these developments have created much needed change in corporate culture, the resulting situation has left many employees, who report violations of EEO policies, without legal protection and thus subject to termination, demotion, or other adverse action.

A. THE DEVELOPMENT OF THE EEO COMPLIANCE INDUSTRY

The EEO compliance industry, as it has come to be known, has grown in importance over the last thirty years and now plays a central role in many companies.[38] A 2018 study by the Society for Human Resource Management (SHRM) found that ninety-four percent of Human Resources professionals reported that their companies had an existing policy to prevent sexual harassment in the workplace.[39] As of 2016, about sixty percent of *Fortune* 500 companies had implemented diversity programs or hired diversity officers, and a coalition of high-ranking representatives from forty-six companies launched a movement to achieve gender parity in the corporate world by 2030, showing growing dedication to internal

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12101(b)(1) (2012) (creating a "national mandate for the elimination of discrimination against individuals with disabilities").

[37] *See* Brake, *supra* note 5, at 128–34 (2014) (discussing the growth of internal anti-discrimination policies in American workplaces over the past several decades).

[38] *See generally* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009) (tracking how companies' personnel experts have driven the development of equal opportunity in the workplace).

[39] SOC'Y FOR HUMAN RES. MGMT., HARASSMENT-FREE WORKPLACE SERIES: THE EXECUTIVE VIEW 3 (2018), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/Harassment-Free%20Workplace%20Series%20Executive%20View%20Topline.pdf. SHRM invited approximately 18,000 employees—including executives, managers and non-managers—to complete the survey and received responses from employees in over fifteen industries, representing employers of all sizes. *Id.* at 10 (describing the study's methodology); *see also* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 19–20 (2003) (discussing a 1999 SHRM study reporting "that ninety-seven percent of responding employers have written policies against sexual harassment" with procedures and administrative personnel in place to handle claims and investigations).

diversity and inclusion in the American workplace.[40] As Deborah Brake notes:

> Perhaps the most significant development in employment discrimination law in the past two decades is the extent to which internal EEO policies and complaint procedures have become normalized in the American workplace. They are overseen and implemented by compliance personnel with responsibility over EEO matters, including but not limited to the legal requirements of nondiscrimination.[41]

The growth in EEO compliance personnel and policies is largely attributable to judicial decisions that incentivized employer action. The most obvious cause is a pair of U.S. Supreme Court decisions handed down in 1998: *Faragher v. City of Boca Raton*[42] and *Burlington Industries, Inc. v. Ellerth*.[43] Together, these decisions created an affirmative defense to claims of sexual harassment by a supervisor that involves the creation of policies and procedures to prevent and respond to claims of harassment.[44] Ironically, despite an almost complete absence of evidence in social science literature about the effectiveness of policies and procedures in preventing harassment in the workplace, Justice Kennedy opined in *Ellerth* that "the very purpose of Title VII is 'to encourage the creation of antiharassment policies and effective grievance mechanisms.'"[45] As a result—and perhaps based on a misperception on the Court's part—an entire industry developed.

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[40] *See* DIVERSITY BEST PRACTICES, COMMITMENT TO DIVERSITY AND INCLUSION IN THE FORTUNE 500/1000 9, 16 (2017), https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/attachments/2017/07/fortune_500_1000_commitment_0.pdf (discussing these *Fortune* 500 diversity initiatives).

[41] Brake, *supra* note 5, at 128.

[42] 524 U.S. 775 (1998).

[43] 524 U.S. 742 (1998).

[44] *See Faragher*, 524 U.S. at 807 (outlining the elements of the affirmative defense); *Ellerth*, 524 U.S. at 765 (same).

[45] Grossman, *supra* note 39, at 3 (quoting *Ellerth*, 524 U.S. at 764).

Faragher and *Ellerth* both considered the liability of an employer for a supervisor's acts of sexual harassment and the creation of a hostile work environment.[46] *Faragher* involved a lifeguard working for the city of Boca Raton, Florida,[47] while the plaintiff in *Ellerth* was a salesperson for Burlington Industries in Chicago, Illinois.[48] The Court decided both cases on the same day in interrelated opinions.[49] After extensively considering agency principles, the concept of "scope of employment," and prior decisions explaining the bounds of sexual harassment and the role of a supervisory employee,[50] the Court concluded in *Faragher* and *Ellerth* that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[51] Nevertheless, unwilling to create a form of strict liability for supervisory harassment, the Court added an exception to this conclusion, creating an affirmative defense to sexual harassment liability:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[52]

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[46] *See Faragher*, 524 U.S. at 780 (deciding whether employers can be held liable under Title VII for sexual harassment by "a supervisory employee"); *Ellerth*, 524 U.S. at 746–47 (deciding whether victimized employees can recover against their employers for sexual harassment by their supervisors).

[47] *Faragher*, 524 U.S. at 780.

[48] *Ellerth*, 524 U.S. at 747.

[49] *See id.* at 764 ("[W]e adopt the following holding in this case and in *Faragher v. Boca Raton* . . . also decided today.").

[50] *Faragher*, 524 U.S. at 793–801.

[51] *Id.* at 807; *Ellerth*, 524 U.S. at 765.

[52] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

One can easily see how the first prong of this affirmative defense gave rise to a greater focus on compliance in the form of personnel hiring and implementation of policies and procedures. The Court noted:

> While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.[53]

These decisions created a set of basic incentives for employers to avoid liability in harassment cases; these incentives generally "fall into two categories: measures to prevent harassment and measures to remedy harassment once it occurs."[54] First, before contemplating the affirmative defense itself, the Court endorsed employers' vicarious liability with no defense should a supervisor's harassment result in "a tangible employment action" against an employee—including termination, demotion, refusal to promote, and the like.[55] This decision, in and of itself, incentivizes employers to spend time, money, and resources on hiring and promoting ethical supervisors—and to train those supervisors to understand harassment law and its requirements.[56] Second, the affirmative defense provides an exception to liability when the employer can demonstrate that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[57] The prevention component of this prong of the defense contemplates the creation of policies prohibiting harassment, the training of management personnel regarding which behaviors the law prohibits, and the hiring of a cadre of trained personnel to update and disseminate these

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[53] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[54] Grossman, *supra* note 39, at 9.

[55] *See id.* (citing *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).

[56] *See id.* ("Employers who face automatic liability for this kind of supervisory conduct have the incentive to be more discriminate in hiring supervisors, to train them more effectively, and to monitor their behavior . . . .").

[57] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

policies.[58] Third, the affirmative defense's mandate to "correct promptly any sexually harassing behavior"[59] promotes the importance of procedures to respond to claims of harassment, trained personnel to investigate and respond to such claims, and an overall environment that is receptive (or at the very least not hostile) to such claims.

As a result of the affirmative defense, many employers publish and regularly update policies on sexual harassment, create procedures for responding to claims, and train personnel in the relevant legal and internal requirements.[60] In addition, although the affirmative defense was created in cases involving supervisory harassment, "lower courts are increasingly using employer policies to mitigate liability in cases involving coworker sexual harassment too."[61] Moreover, "the affirmative defense applies to all forms of harassment covered by discrimination law, not just sexual harassment," which heightens the need to establish compliance programs.[62] As Frank Dobbin has explained, personnel specialists—who once occupied their time negotiating with unions and managing new hires and benefits—have taken up the mantle of EEO compliance with remarkable vigor, creating policies, procedures, and norms to deal with various forms of discrimination.[63]

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[58] *See* Grossman, *supra* note 39, at 11–12 (stating that while courts "differ on the necessary elements of a legally sufficient policy," they generally agree that employers must have a "sufficiently disseminated" policy on sexual harassment).

[59] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[60] Brake, *supra* note 5, at 131 ("[E]mployer policies for handling discrimination complaints are now standard fare in the American workplace.").

[61] *Id.* at 129.

[62] *Id.*

[63] *See* DOBBIN, *supra* note 38, at 2 ("In response to law professor Catharine MacKinnon's campaign to define sexual harassment as job discrimination, [personnel specialists] built harassment grievance procedures and training programs. In response to new ideas about cognition and stereotyping from the social sciences, they devised diversity training programs that would make managers sensitive to their own unconscious biases. Now these privately concocted remedies are everywhere. Job hunters and judges are suspicious of firms that don't have them."). In addition, the Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), also created an affirmative defense to punitive damages if the employer can demonstrate that it acted in good faith by, for example, "'implementing programs or policies to prevent discrimination in the workplace' or other 'prophylactic' measures," thus creating more incentive to increase compliance departments and personnel. Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 480 (2012) (quoting *Kolstad*, 527 U.S. at 545); *see also* Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and*

Finally, with respect to avoiding liability, the incentives to create policies and procedures and to train personnel also emerge from the regulatory agency that investigates anti-discrimination claims: the Equal Employment Opportunity Commission (EEOC). Under Title VII, all claims must initially be filed with the EEOC, which investigates the claims, issues "right to sue" letters, and, in some cases, files claims on behalf of discrimination plaintiffs.[64] The EEOC specifically recommends the creation and implementation of policies,[65] and, as Deborah Brake has noted, "empirical research has found that the EEOC is significantly less likely to find 'cause' for discrimination in charges filed against employers who have EEO policies in place than in charges filed against employers who do not."[66] Both in the courts and before the relevant regulatory agencies, employers that have created and implemented EEO policies "achieve better outcomes . . . than those without them."[67]

Apart from liability considerations, numerous employers have begun implementing diversity and inclusion efforts for business reasons, using many of the same personnel hired to deal with EEO compliance.[68] While some businesses implement diversity efforts to comply with affirmative action requirements for government contractors, many corporate executives have, over time, "become

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Liability in Employment Discrimination, 53 AM. BUS. L.J. 607, 657 (2016) ("An employer can thus avoid [punitive damages] by adopting antidiscrimination policies, mandating diversity education and the like . . . .").

[64] *What You Can Expect After a Charge Is Filed,* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed (last visited Nov. 14, 2020).

[65] *Tips for Small Businesses*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (EEOC), https://www.eeoc.gov/employers/smallbusiness/tips.cfm (last visited Nov. 14, 2020) ("Developing and distributing clear employee policies . . . may: help employees understand and comply with your rules and expectations; help prevent problems that may result in discrimination complaints; and limit your liability should a complaint arise."). The EEOC provides specific tips on creating general non-discrimination policies, harassment policies, reasonable accommodation policies, and leave policies. *Id.*

[66] Brake, *supra* note 5, at 130 (citing C. Elizabeth Hirsh & Sabino Kornrich, *The Context of Discrimination: Workplace Conditions, Institutional Environments, and Sex and Race Discrimination Charges*, 113 AM. J. SOC. 1394, 1424–25 (2008)).

[67] *Id.*

[68] *See* DOBBIN, *supra* note 38, at 138–43 (describing how personnel experts have "rebranded" EEO programs to create diversity and inclusion programs).

cheerleaders for affirmative action" for business reasons.[69] The "business case" for diversity took hold beginning in the 1980s, leading many firms, both large and small, to institute diversity training, workplace culture audits, minority-focused networking and mentoring programs, and diversity task forces.[70] These efforts continue today, requiring significant investments in personnel and organizational architecture.[71]

B. EEO COMPLIANCE AND THE CREATION OF VULNERABLE WHISTLEBLOWERS

The EEO compliance programs described above have asserted power in their organizations and have grown in size within an uncertain legal framework. The federal anti-discrimination laws do not explicitly define discrimination or harassment, and courts themselves often have wide-ranging, disparate views on what constitutes unlawful behavior.[72] This reality has left the door open

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[69] *Id.* at 138 ("A 1986 survey of Fortune 500 companies found that despite enforcement cutbacks, nine out of 10 planned no changes to affirmative action programs and the tenth planned to expand them.").

[70] *Id.* at 140, 143–54. As the CEO of Allstate put it, "It's obvious to us that managing diversity is not just a work force issue: it is a business issue . . . a competitive issue." *Id.* at 157 (alteration in original) (quoting Wayne Heiden, CEO of Allstate); *see also* Rod P. Githens, *Diversity and Incivility: Toward an Action-Oriented Approach*, 13 ADVANCES DEVELOPING HUM. RESOURCES 40, 43 (2011) ("*Competitive advantage arguments* have become a prevalent approach to workplace diversity. Typically, these rationales have been based on attempting (a) to maximize the potential of workers based on the demographic reality that available workers today are more diverse than in the past, (b) to maximize organizational potential in a global economy in which a variety of perspectives are needed to succeed, and (c) to maximize the general and specific ways of thinking and working to encourage more creativity and innovation."); *id.* at 40 ("Workplace diversity issues have become increasingly prominent in the last 15 years as diversity is recognized as a core competitive strength and is seen as more than a compliance goal.").

[71] DOBBIN, *supra* note 38, at 143–54 (discussing the development of corporate diversity programs).

[72] Brake, *supra* note 5, at 133 ("[T]he law's open-ended ban on discrimination [leaves] room for personnel offices and EEO consultants to read their own content into the law."); *see also* 42 U.S.C. § 2000e-2(a)(1) (2012) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

to EEO personnel to fill the vacuum and consequently left whistleblowers largely unprotected by law.[73]

The approach taken by many corporate EEO compliance departments to hostile work environment harassment is a prime example of compliance policies extending beyond legal requirements. The U.S. Supreme Court has recognized that not all inappropriate behavior in the workplace is actionable discrimination and that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[74] But the definition of "severe or pervasive" differs depending on the court hearing the case, the particular facts at issue, and the context in which the behavior occurred.[75] As one Fourth Circuit judge noted, "A hostile work environment . . . normally develops through a series of separate acts, which might not, standing alone, violate Title VII. . . . And whether a hostile work environment exists in fact can be a bit of a moving target; there is no 'mathematically precise test.'"[76] For example, some courts considering single, severe verbal comments would find an unlawful hostile work environment, while others would require significantly greater frequency.[77] Given the range of interpretations of unlawful

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[73] *See* Brake, *supra* note 5, at 134 ("EEO understandings diverge from judicial interpretations of the meaning of discrimination, with poor results for employees under retaliation law.").

[74] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[75] *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81–82 (1998) ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (citations omitted)).

[76] Jordan v. Alt. Res. Corp., 458 F.3d 332, 351 (4th Cir. 2006) (King, J., dissenting) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993)).

[77] *Compare* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 280 (4th Cir. 2015) ("[A] reasonable jury could find that Clubb's two uses of the 'porch monkey' epithet—whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment."), Adams v. Austal, U.S.A., L.L.C., 754 F.3d 1240, 1253–54 (11th Cir. 2014) (concluding that, although a Caucasian supervisor's carving of "porch monkeys" into the aluminum of a ship where the African-American plaintiff worked "was an isolated act, it was severe"), Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 577 (D.C. Cir.

harassment and discrimination by courts, the illegality of particular behavior may depend on the state in which a company resides, the federal circuit that governs the particular geographic area, or even which judge hears the case.[78] In this context, the behavior that employee handbooks and EEO policies choose to prohibit may or may not have any relationship to applicable law.[79]

In addition, while EEO compliance programs have always been concerned with avoiding lawsuits, employee handbooks and workplace policies have begun to cover a wide range of behaviors and promote policies and procedures far beyond those required by law.[80] For example, many workplaces now maintain policies on

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2013) (per curiam) (acknowledging that, where a supervisor "used a deeply offensive racial epithet [the N-word] when yelling at Ayissi-Etoh to get out of the office," that "single incident might well have been sufficient to establish a hostile work environment"), *and* Seawright v. Ga. Dep't of Transp., No. 1:08-CV-0017-CC-CCH, 2009 WL 10668974, at *10 (N.D. Ga. July 7, 2009) (finding "severe or pervasive" conduct based on one "unwanted physical touching of a private body part, as well as a sexually explicit, offensive comment directed at the plaintiff"), *with* Kelly v. Senior Ctrs., Inc., 169 F. App'x 423, 429 (6th Cir. 2006) (finding that use of the N-word and "token black," coupled with three racist jokes did not create a hostile work environment), Mosley v. Marion Cty., 111 F. App'x 726, 728 (5th Cir. 2004) (per curiam) (holding that evidence of three incidents involving racial slurs was insufficient to support a hostile work environment claim), Peters v. Renaissance Hotel Operating Co., 307 F.3d 535, 552 (7th Cir. 2002) (holding that the use of the N-word on one occasion by a Caucasian coworker was insufficient to demonstrate "severe or pervasive" action creating a hostile work environment), Sanders v. Vill. of Dixmoor, 178 F.3d 869, 870 (7th Cir. 1999) (holding that the use of the N-word on one occasion during an altercation was not sufficiently severe or pervasive to create an objectively hostile work environment), *and* Wilson v. Kautex, Inc., No. 1:07-CV-60-TS, 2009 WL 1657463, at *25 (N.D. Ind. June 10, 2009) ("[T]he single sexually suggestive remark, if it was made, is not severe or pervasive enough to have created a hostile work environment.").

[78] *See* cases cited *supra* note 77.

[79] Brake, *supra* note 5, at 143–44 ("For example, harassment policies often incorporate the definition from the 1980 EEOC guidelines: [']Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.['] This language encompasses a much broader category of conduct than what a court would necessarily find to be actionable." (footnote omitted)).

[80] *See, e.g.*, DOBBIN, *supra* note 38, at 197–201 (describing the use of "grievance procedures" for sexual harassment claims before the courts endorsed the approach); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2090 (2003) ("A huge (and growing) literature warns companies that they should go beyond the dictates of the law to curtail broad forms of sexual conduct—including conduct that does not satisfy the legal definition of sexual

diversity sensitivity training, implicit bias, inappropriate language, dress in the workplace, intra-office romantic relationships, and broad statements of commitment to fairness and collegiality—all of which go far beyond the bounds of the law.[81]

These all-encompassing EEO policies impact the culture of the workplace, the ways in which employers and employees behave, and—most importantly for our purposes here—workers' and managers' perceptions of antidiscrimination laws' protections.[82] Most employees do not review caselaw or the changing interpretations of federal anti-discrimination laws.[83] Most workers (including managers) do not have any real knowledge of federal anti-discrimination statutes or how courts interpret those provisions.[84] They do, however, have easy access to employee handbooks and other company policies and are often required to sign forms affirming their receipt of such policies and agreeing to adhere to them.[85] As Brake stresses, "Internal policies and training

harassment and that does not necessarily undermine gender equality on the job—in order to avoid liability for sexual harassment.").

[81] *See* Brake, *supra* note 5, at 118 ("Employer EEO policies, however, go far beyond legalistic definitions of discrimination to reach a much broader range of practices. Encompassing sexual harassment, racial harassment, diversity management, affirmative action efforts, and broad promises of respect, fairness, and collegiality, employer policies far exceed the minimum of what discrimination law requires."); *see also* Schultz, *supra* note 80, at 2093–94 ("First, in the name of preventing sexual harassment, many companies are adopting broad prohibitions on sexual conduct that does not rise to the level of actionable harassment under Title VII . . . . Second, companies are enforcing these policies by disciplining and firing employees who violate them . . . . Third, some companies are banning, discouraging, or otherwise moving to control sexual relationships between their employees—even when those relationships are consensual . . . . Crucially, companies are taking these steps to prohibit sexual conduct without examining whether that conduct undermines gender equality . . . .").

[82] *See* Brake, *supra* note 5, at 133 ("[E]mployer policies have had a marked effect on the culture of the workplace, including on how employees perceive equal opportunity and what it means to discriminate.").

[83] *Cf.* Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487, 490 (2016) (mentioning "workers' lack of legal knowledge" concerning labor laws).

[84] *See id.* at 489 ("[W]orkers lack accurate information about their rights on the job. Workers here are like used car buyers, and their legal ignorance about their workplace rights can cause them to strike bad employment deals where they accept sublegal wages or tolerate unlawful working conditions.").

[85] With the proliferation of mandatory arbitration clauses in employee handbooks and courts' requirements for their enforcement, employers have more diligently sought after

programs now likely play a bigger role in setting norms and behavior in the everyday workplace than the external law. . . . [B]y 'operationalizing' antidiscrimination law, human resources staff and other EEO compliance personnel have greatly influenced how people understand workplace discrimination."[86] As a result, a significant mismatch exists between what the law requires and what employees believe is unlawful. This is particularly true when those employees report conduct under EEO policies, as will be discussed below.[87]

The often dramatic disconnect between substantive legal requirements, employee handbooks, and EEO policies is partly responsible for creating a vulnerable class of discrimination and harassment whistleblowers.[88] This disconnect, in conjunction with two court-created doctrines interpreting provisions of the anti-discrimination laws, creates the problem.[89] The "Objectively Reasonable Belief" and "Notice Requirement" doctrines impact retaliation protections for those who report discriminatory behavior in the workplace and leave many employees who come forward without legal protection against retaliation.[90]

The "Objectively Reasonable Belief" doctrine—endorsed in the U.S. Supreme Court's 2001 decision in *Clark County School District v. Breeden*—dictates that for retaliatory conduct to be unlawful, the complaining party must have an objectively reasonable belief that the practices he or she opposed (which, in turn, gave rise to the

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employee signatures to affirm receipt and acceptance of the handbook and its policies. *See* Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 120 (2010) (noting that employees have been discharged for refusal to sign employee handbooks).

[86] Brake, *supra* note 5, at 134 (quoting DOBBIN, *supra* note 38, at 4–6).

[87] *Cf.* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012) (describing findings in psychology research showing that "even when there is substantial evidence of traditional invidious discriminatory intent (including so-called direct evidence) most people will decline to make attributions to discrimination").

[88] *See* Brake, *supra* note 5, at 116 ("[R]etaliation law has failed to come to terms with the EEO workplace, leaving employees vulnerable if they raise discrimination complaints through these processes.").

[89] *See id.* at 118 (stating that these "[t]wo doctrines in particular pose problems for employees who use their employer's EEO policies to complain internally").

[90] *See id.* at 118–120 (explaining the clash between these two doctrines with the role of employer policies in shaping discrimination protections for employees).

retaliation) were unlawful.[91] When deciding whether that belief was "objectively reasonable," the court does not consider the "good faith" of the whistleblower but rather looks to how a court would view the reported behavior and whether a court would consider those behaviors to be unlawful discrimination.[92] The doctrine has been adopted by every circuit in the country.[93]

Imagine, for example, the following scenario: Wendy, a long-term employee, approaches her HR representative to complain about a sexist comment made by her supervisor in the workplace. The representative agrees that the comment is unacceptable—in fact, it violates company policy prohibiting insensitive comments in the workplace. The HR representative promises to investigate and follows up by approaching the supervisor and others to ask about the incident. The supervisor claims that Wendy is mistaken about the comment but promises to follow up with her to "make sure they are okay." This meeting goes poorly, ending in even greater tension between the supervisor and Wendy. Three weeks later, when upper management begins to pressure the supervisor to cut costs, the supervisor takes the opportunity to terminate Wendy, who he now feels uncomfortable supervising. He consults with HR and feels comfortable proceeding with the termination because he understands that it is highly unlikely that any court will uphold a retaliation claim under these circumstances.[94]

Under the "Objectively Reasonable Belief" doctrine, Wendy likely would find her complaint to HR unprotected and her termination lawful. Under existing case law, one biased comment likely "does

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[91] 532 U.S. 268, 270–71 (2001) (per curiam) (describing the doctrine).

[92] *Id.*; *see also* Satterwhite v. City of Houston, 602 F. App'x 585, 588 (5th Cir. 2015) (holding that the employee-plaintiff did not have a reasonable belief that his supervisor's comment created a hostile environment and that he could not have reasonably believed that his supervisor's actions were prohibited by Title VII). *But see* Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1473 (2007) (arguing for protection "unless the defendant could establish that the plaintiff was acting in bad faith at the time she made the complaint").

[93] *See* Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1129 n.7 (2007) ("[S]ince *Breeden*, courts within all United States circuits have adopted the objectively reasonable standard.").

[94] *See* Leora Eisenstadt & Deanna Geddes, *Suppressed Anger, Retaliation Doctrine, and Workplace Culture*, 20 U. PA. J. BUS. L. 147, 150–51 (2018) (discussing a similar hypothetical).

not create an unlawful hostile work environment,"[95] so Wendy cannot reasonably think that the supervisor's comment constituted unlawful discrimination that would necessitate retaliation protection.[96] This is so even if Wendy's employee handbook or the company's EEO policy specifically prohibits racist, sexist, discriminatory, or otherwise insensitive comments in the workplace and communicates a "zero tolerance" policy for such comments.[97] The *Breeden* Court established judicial understandings of discrimination as the standard for determining an "objectively reasonable" complaint, rather than the company's applicable policy.[98] Moreover, Wendy's complaint is unprotected (meaning her termination is lawful) even if that same EEO policy specifically encourages—or even requires—employees who observe or experience prohibited conduct to come forward and assures those employees that they will not face retaliation for doing so.[99] Regardless of the company's policy itself, when an employee comes forward to report prohibited conduct, she may find herself unprotected by the laws to which the company policy refers.[100] If the

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[95] *Id.* at 152 (citing *Breeden*, 532 U.S. at 271).

[96] *Id.* (citing *Satterwhite*, 602 F. App'x at 588).

[97] *See* Brake, *supra* note 5, at 118 ("[T]he lower courts have developed a body of law that creates stark dilemmas for employees who use employers' internal channels for complaining about discrimination—that is, employees who follow the employer's rules and norms for trying to resolve problems internally first.").

[98] *Id.* at 116 ("[T]he EEO workplace is barely visible in the world that the Supreme Court has conjured when it has addressed claims alleging retaliation for challenging discrimination . . . retaliation law has failed to come to terms with the EEO workplace, leaving employees vulnerable if they raise discrimination complaints through these processes.").

[99] *See* Michele M. Hoyman & Jamie R. McCall, *Sexual Harassment*, *in* HANDBOOK OF HUMAN RESOURCE MANAGEMENT IN GOVERNMENT 487 (Stephen E. Condrey ed., 3d ed. 2010) (encouraging provisions in EEO policies that recommend or require employees to report harassing behaviors without regard to their severity or pervasiveness, noting that "because fear or shame has probably led to a significant underreporting of various forms of sexual harassment, training sessions should encourage victims to come forward when genuine problems exist").

[100] *See, e.g.*, Hill v. Guyoungtech USA, Inc., No. 07-0750-KD-M, 2008 WL 4073638, at *9 (S.D. Ala. Aug. 26, 2008) (rejecting the plaintiff's retaliation claim because she could not have had an "objectively reasonable belief" that the behavior about which she complained was unlawful). In *Hill*, the court acknowledged:

> [The plaintiff] was required to attend an employee orientation before she began work and she received the Employee Handbook . . . . At the time she received the handbook, [the plaintiff] understood that there was a policy against harassment

conduct she is reporting is prohibited by company policy but would not—in the eyes of the courts in her jurisdiction—be viewed as unlawful discrimination, the whistleblower is not protected against retaliation by the employer and may legally be confronted with informal denial of opportunities, "icing out" by supervisors and co-workers, demotion in responsibilities or pay, and even termination.[101]

While the "Objectively Reasonable Belief" doctrine is largely the cause of this vulnerable EEO whistleblower problem, a second doctrine—known as the "Notice Requirement"—shares some blame. This doctrine requires "that employee opposition to discrimination be expressed in terms that are clear and specific enough to put the employer on notice that the complaint is about discrimination in particular and not more generalized concerns about workplace fairness."[102] Under the "Notice Requirement," an internal complaint that does not specifically allege discriminatory conduct may not be protected against retaliation. For example, an oft-cited Third Circuit case rejected a retaliation claim based on a letter to HR in which the plaintiff complained about being passed over for a promotion after many years of service.[103] The plaintiff's letter complained: "In view of my 21 years of experience in this field . . . I am quite puzzled as to why the position was awarded to a less qualified individual."[104] After he was terminated a short time after

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> and understood she was required to contact Human Resources if she felt she was being harassed. The parties do not dispute that [the plaintiff] followed company procedures when she reported [the] conduct . . . .

Id. at *4. This acknowledgment that the plaintiff was following company policy by reporting the conduct had no impact on the court's decision that plaintiff lacked an "objectively reasonable belief" and thus that her termination was lawful. *Id.* at *9.

[101] *See, e.g.*, Van Portfliet v. H&R Block Mortg. Corp., No. 8:05-CV-1474-T-TGW, 2007 WL 2773995, at *5 (M.D. Fla. Sept. 21, 2007), *aff'd per curiam*, 290 F. App'x 301 (11th Cir. 2008) (acknowledging that the plaintiff reported harassment to HR but that did not impact the conclusion that no retaliation occurred because of a lack of "an objectively reasonable belief" that the underlying conduct was unlawful); *see also* Brake, *supra* note 5, at 142 & n.164 (providing a lengthy list of cases in which the courts apply the "objectively reasonable belief" doctrine to retaliation based on reports of "isolated or sporadic offensive comments" and noting that "[i]n none of these cases do the courts consider how the plaintiffs' beliefs are influenced by employer policies on harassment").

[102] Brake, *supra* note 5, at 157.

[103] *See* Barber v. CSX Distrib. Servs., 68 F.3d 694, 696–97 (3d Cir. 1995).

[104] *Id.* at 697.

lodging this complaint, the plaintiff filed a suit claiming, among other things, that he was the victim of age discrimination under the ADEA, and he included a retaliation claim alleging that his position was eliminated in response to his letter to HR.[105] The Third Circuit concluded, in regards to the retaliation claim, that:

> [Plaintiff's] letter to Human Resources complains about unfair treatment in general and expresses his dissatisfaction with the fact that someone else was awarded the position, but it does not specifically complain about age discrimination. Accordingly, the letter does not constitute the requisite "protected conduct" for a *prima facie* case of retaliation.[106]

The employee used the proper channels to complain. He phrased his complaint in terms of unfairness and specifically referenced his years of service and experience.[107] Nonetheless, because he did not explicitly highlight the age difference between himself and the person who was chosen to fill the position, he did not provide the employer with sufficient notice that he was, in fact, complaining about age discrimination. As a result, his actions were not protected conduct that would afford him retaliation protection.[108]

The "Notice Requirement" makes some sense, as Deborah Brake acknowledges, since management must be able to identify a complaint as being related to discrimination and not merely a general complaint about company policy or practices in order to frame its response and refrain from unlawful retaliation.[109] However, given the way in which EEO policies are presented, "[t]he problem is that, as some courts have applied it, the requirement of employer knowledge demands a more precise terminology than employees use when they follow employer policies to voice their concerns about discrimination."[110]

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[105] *Id.* at 698–702 (discussing plaintiff's age discrimination and retaliation claims).

[106] *Id.* at 701–02.

[107] *See supra* note 104 and accompanying text.

[108] *Barber*, 68 F.3d at 702 ("[The plaintiff's] letter is just too vague to support a finding that his job was eliminated because he engaged in behavior that was protected under the ADEA.").

[109] Brake, *supra* note 5, at 157 (noting that "[e]mployers must be able to comprehend the nature of the complaint").

[110] *Id.* at 157–58.

As described above, EEO policies tend to be broad, all-encompassing approaches to creating healthy workplace cultures. They ban unlawful conduct alongside merely inappropriate behavior, and they "often address equal opportunity and nondiscrimination in broad terms of professionalism, respect, and fairness."[111] Employees may in turn be tempted to follow that lead and convey their complaints about unequal treatment or harassment as concerns about fairness or inappropriate conduct, thinking they are complaining about conduct that the employer's policies specifically prohibit. This gap between employee expectations based on EEO policies and the realities of retaliation protection under federal anti-discrimination laws again leaves complaining employees without legal recourse. While the decision to adopt broad EEO policies on its face appears to be a pro-employee approach, it ends up creating vulnerable whistleblowers.

III. BLOWING THE WHISTLE ON SECURITIES FRAUD

The securities law industry is another area in which employees are vulnerable to retaliation even though the requirements of their companies' internal compliance policies and programs exceed the protections of the federal securities laws. This dilemma exists largely because two of the most notable securities-related whistleblower programs effectively limit the universe of protected persons to those reporting violations of either the enumerated federal securities laws or the rules and regulations squarely within the jurisdiction of the Securities and Exchange Commission (SEC).

A. THE RISE OF THE ANTI-FRAUD & SECURITIES REGULATION COMPLIANCE INDUSTRY

The passage of SOX and Dodd–Frank greatly facilitated the rise of the compliance industry in anti-fraud and securities regulation. Each statute created an expansive regime of binding regulations for organizations falling under the SEC's governance.[112] It is commonly believed that one of the first facilitators of the compliance industry

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[111] *Id.* at 158.

[112] *See supra* notes 10–17 and accompanying text.

was the U.S. Sentencing Commission's 1991 amendments to the Federal Sentencing Guidelines, which implemented the "Organizational Sentencing Guidelines" to create reduced penalties for organizations that adopted effective compliance programs and to impose punishment-like probation for organizations with no such program in place.[113] The Organizational Sentencing Guidelines include several considerations for courts in determining whether a compliance program is effective, including whether the program contains high-level oversight, communication of a program's procedures to all employees, disciplinary actions for violations, and the use of monitoring, auditing, and reporting systems.[114]

Since 1991, the compliance industry in the field of securities regulation and anti-fraud has continued to grow dramatically.[115] In the early 2000s, the demise of major corporations like Enron and WorldCom—and the various accounting and financial scandals that accompanied such corporate failures—led Congress to enact SOX in 2002.[116] SOX focuses heavily on internal controls, requiring that "companies and their gatekeepers"—including attorneys and accountants—"establish and maintain an adequate system of internal controls and procedures for financial reporting."[117] In light

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[113] *See, e.g.*, Robert C. Bird & Stephen Kim Park, *Organic Corporate Governance*, 59 B.C. L. REV. 21, 45 (2018) (discussing how the Federal Sentencing Guidelines prompted companies to focus on and invest in compliance initiatives); David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 318 (2016) (noting that the 1991 inclusion of the Organizational Sentencing Guidelines in the Federal Sentencing Guidelines "ushered in a new era for corporate compliance programs" by "offer[ing] corporations an opportunity for a reduced sentence if they are convicted of a federal crime").

[114] *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2012) [hereinafter U.S. SENTENCING GUIDELINES] (listing characteristics of an effective compliance and ethics program); *id.* § 8C2.5(f)(1) (decreasing culpability in sentencing if the criminal offense occurred at a time when the organization had an effective compliance and ethics program in place).

[115] *See* Hess, *supra* note 113, at 318 (discussing the vast developments in compliance since 1991).

[116] Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 901 n.275 (2014) (recounting the statement of one legislator that SOX, as legislation, "would have lost momentum without WorldCom and the other scandals that followed Enron" (quoting Spencer S. Hsu & Kathleen Day, *Senate Vote Spotlights Audit Reform and Sarbanes*, WASH. POST, July 15, 2002, at A1)).

[117] Matt A. Vega, *The Sarbanes–Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 438 (2009).

of these developments, the post-SOX era helped pave the way for a shift from more traditional, government-dictated regulatory models to "new governance" models defined by internal reporting, self-reporting to government, and heightened self-regulation.[118] In this way, corporate tides began turning in favor of widespread, preventative practices aimed at avoiding fraud and securities violations in the first instance, rather than reacting after the problem has already occurred.[119] This prospective approach naturally led to enhanced collaboration among the government and the governed entities.[120] These developments also contributed to a greater emphasis on internal reporting, thereby positioning internal whistleblowers to "become part of the corporate monitoring system" by "provid[ing] a visible mechanism for employee reports to reach the ears of those who can remedy the misconduct."[121]

Following the SOX era, the Great Recession spurred the passage of Dodd–Frank.[122] It was a massive regulatory undertaking aimed at promoting national financial stability by improving transparency and accountability in the financial system.[123] In addition to the introduction of widespread financial regulatory reforms, Dodd–Frank's strong whistleblower protection program created a new reward program to incentivize whistleblowers to come forward with valuable information about fraud and securities violations.[124] Pursuant to Dodd–Frank's bounty program, the SEC will award voluntary whistleblowers a bounty of between ten and thirty percent of the total monetary sanctions imposed for "original

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[118] *See* Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 498–99 (2016) (discussing the post-SOX shift to "new governance" models).

[119] *See id.* at 499 (discussing the shift from post hoc, adversarial enforcement to a focus on "ensuring compliance with the law" beforehand).

[120] *See id.* ("[N]ew governance is built on . . . administrative governance in which various stakeholders, both private and public, collaborate to implement and ensure effective compliance with the law . . . .").

[121] Richard E. Moberly, *Sarbanes–Oxley's Structural Model To Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1132.

[122] *See supra* notes 13–16 and accompanying text.

[123] *See generally* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in relevant part at 15 U.S.C. § 78u-6 (2018)).

[124] 15 U.S.C. § 78u-6(b)(1) (2018) (stating that the government will "pay an award . . . to [one] or more whistleblowers who voluntarily provided original information to the [SEC] that led to [a] successful enforcement . . . action").

information" that leads to a "successful enforcement" action.[125] The structure of this program incentivizes internal reporting through effective compliance programs, as the SEC has heavily encouraged whistleblowers to first report violations through internal compliance channels, which the agency will favorably consider when calculating the bounty the whistleblower will receive.[126] Dodd–Frank's bounty program has been very successful, resulting in the SEC awarding approximately $387 million to sixty-seven whistleblowers from the inception of the program in 2011 to the end of the 2019 fiscal year.[127]

These developments have greatly facilitated the vast growth of the securities and anti-fraud compliance industry. While "compliance" in the pre-SOX era largely focused on ethics and was managed by HR departments with minimal visibility, SOX's preventative regulations and requirements—as enforced by the SEC—increased the importance of corporate compliance officers.[128] These developments essentially "forced" companies to hire actual compliance officers who could avoid or properly respond to violations by creating a position with enhanced resources, greater power, and increased access to chief executive officers and corporate boards.[129] Additionally, the SEC has required corporations that commit violations to develop stand-alone compliance departments with a designated chief compliance officer, resulting in a considerable

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[125] *Id.* § 78u-6(b)(1)(A)–(B) (outlining the possible range of awards).

[126] *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,301 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (stating that the SEC has "further incentivize[d] whistleblowers to utilize their companies' internal compliance and reporting systems").

[127] U.S. SEC. & EXCH. COMM'N, 2019 ANNUAL REPORT TO CONGRESS WHISTLEBLOWER PROGRAM 9 (2019), https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf (providing statistics on SEC awards to whistleblowers under the program).

[128] *See* Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 178 (2015) (detailing the shift in compliance efforts and growing importance of compliance officers post-SOX).

[129] *Id.* ("After SOX, forced by the SEC to hire compliance officers in response to violations, companies were more likely to hire high-profile people with more power and access to CEOs and corporate boards.").

trend of compliance departments that do not overlap with other departments of the entity.[130]

As a result, the compliance industry in this sector has boomed and financial institutions have spent heavily on compliance initiatives in the decade since the Great Recession, creating compliance personnel and officers who now enjoy enhanced prestige, who extensively collaborate with other departments, and who have the opportunity to provide insight on the entity's strategic decisions.[131] Along with the independent compliance department, the most common anti-fraud controls that have strengthened the compliance industry include the external audit of financial statements, the adoption of codes of conduct, and internal audit departments.[132] As of 2017, at least ninety-four percent of organizations had directly included compliance requirements in their internal policies and procedures that were accessible to all employees.[133]

While statutes like SOX and Dodd–Frank have contributed to the steady rise of the compliance industry in the anti-fraud and securities context, these laws and their judicial interpretations have simultaneously limited which employees are eligible for retaliation

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[130] *See* Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 74–75 (2014) (explaining the rise of compliance departments that are separate from the legal department).

[131] *See* Miller, *supra* note 2, at 437–38 (explaining the growing influence of the compliance field and the increase in prestige and power of compliance officers within organizations); *see also* Steve Culp, *Four Major Trends For Compliance Professionals in 2019*, FORBES (Apr. 17, 2019, 1:24 PM), https://www.forbes.com/sites/steveculp/2019/04/17/four-major-trends-for-compliance-professionals-in-2019/#54a29cd367ad (describing how firms are pursuing lower-cost and technology-based compliance functions due to "[h]igh employee costs (and high attrition rates)" of compliance personnel).

[132] *See generally* ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE (2016), https://www.acfe.com/rttn2016/docs/2016-report-to-the-nations.pdf (analyzing 2410 cases of occupational fraud investigated between January 2014 and October 2015 to assess total and average losses, common types of fraud, fraud detection methods, and fraud risks).

[133] NICOLE STRYKER, KPMG, THE COMPLIANCE JOURNEY: BOOSTING THE VALUE OF COMPLIANCE IN A CHANGING REGULATORY CLIMATE 3 (2017), https://assets.kpmg/content/dam/kpmg/pa/pdf/compliancejourney-survey-2017.pdf (finding that compliance policies are almost universal in major organizations surveyed).

protection.[134] Given that SOX and Dodd–Frank are securities-focused, the vast number of organizational compliance programs that impose reporting requirements on employees extending beyond the anti-fraud and securities realm effectively exclude such employees from the protections of SOX and Dodd–Frank.[135]

B. WHISTLEBLOWER IMPACT OF ANTI-FRAUD & SECURITIES REGULATION COMPLIANCE POLICIES

To illustrate the problem of inconsistent protections for whistleblowers, it is helpful to examine the internal compliance programs of a handful of notable *Fortune* 500 public companies. These programs prescribe behavior on an internal level that is neither mandated nor protected by law. For example, Facebook's Code of Conduct, which broadly applies to all Facebook personnel—including directors, officers, and employees, as well as agency workers, contractors, consultants, "and others working on Facebook's behalf"—mandates internal reporting to specified individuals if personnel "learn about or suspect a violation" of the Code of Conduct, any other Facebook policy, or any law.[136] Failure to report according to this code "may result in disciplinary action for employees and termination of employment/[one's] relationship with Facebook."[137] Although Facebook's Code of Conduct does nominally prohibit retaliation for good faith reporting of potential violations, the Code does not elaborate on how Facebook would enforce such protections, how an employee may seek redress, or what remedies are provided.[138]

While Facebook's anti-retaliation policy, like that of most other companies, is not limited to reporting violations of only the federal

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[134] *See* Pacella, *supra* note 118, at 505 (noting that "case law has been divided on the question of whether internal whistleblowers are guaranteed retaliation protections under Dodd–Frank").

[135] *See id.*; Dig. Realty Tr. v. Somers, 138 S. Ct. 767, 777–78 (2018) (holding that the anti-retaliation provision of Dodd–Frank does not extend employees who report violations internally but who do not report directly to the SEC).

[136] *Code of Conduct,* FACEBOOK paras. 1, 11 (June 10, 2019), https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/2019/Code-of-Conduct-(June-10-2019).pdf.

[137] *Id.* para. 11.

[138] *Id.* para. 12.

securities laws, one further limitation under SOX and Dodd–Frank that withholds protection from whistleblowers is that both statutes require an employment relationship between the employee-whistleblower and the employer-retaliator.[139] Both SOX and Dodd–Frank explicitly state that retaliation against an employee-whistleblower "*in the terms and conditions of employment*" is unlawful, and subsequent regulations and case law interpreting the two statutes have adhered to the plain statutory language by requiring a formal employment relationship for whistleblower protection eligibility.[140] In contrast, Facebook's anti-retaliation policy extends to individuals outside of an official employment relationship, given its broad applicability to consultants, contractors, and others generally "working on Facebook's behalf."[141] Therefore, anyone working with Facebook who is not an employee, but who nonetheless must adhere to the Code of Conduct, will have no *legal* recourse if retaliated against for whistleblowing.[142]

Similarly, Apple Inc.'s "Business Conduct Policy" is binding not only on all employees—including senior management and the board of directors—but also on all "independent contractors, consultants, and others who do business with Apple,"[143] thereby extending beyond the traditional employment requirement of SOX and Dodd–Frank. This policy requires all of these individuals to report internally any violations of the company's policies or legal or regulatory requirements; the "[f]ailure to do so may result in disciplinary action."[144] Apple also includes a blanket non-retaliation provision to protect individuals adhering to its policy, but the policy

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[139] *See* Eisenstadt & Pacella, *supra* note 33, at 675 (describing how SOX and Dodd–Frank require "a formal employment relationship for retaliation protection eligibility").

[140] *See id.* at 675–86 (explaining how both SOX and Dodd–Frank protections require a formal employment relationship and how courts and policymakers have strictly interpreted this language); *see also* 18 U.S.C. § 1514A (2018) (detailing the civil protections under SOX for whistleblowers against employer retaliation); 15 U.S.C. § 78u-6(h) (2018) (providing that, under Dodd–Frank, no employer may discriminate against an employee-whistleblower, and any whistleblower alleging retaliation may seek judicial relief).

[141] *See Code of Conduct, supra* note 136, para. 1 (stating that Facebook's internal code applies outside of the traditional employer–employee relationship and promises protection against retaliation for whistleblowing).

[142] *See supra* notes 135, 139–141 and accompanying text.

[143] *Business Conduct: The Way We Do Business Worldwide*, APPLE 2 (Oct. 2015), https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/business_conduct_policy.pdf.

[144] *Id.* at 15.

does not elaborate on how employees may enforce their rights thereunder or what remedies may be available to them.[145] Like Facebook's policy, the universe of potential whistleblower disclosures pursuant to Apple's policy far exceeds what would be eligible for protection under either SOX or Dodd–Frank.

Amazon's Code of Business Conduct and Ethics contains a brief section pertaining to employee reporting.[146] Unlike the policies of Facebook and Apple, which require internal reporting, Amazon's policy does not make this mandatory; the company's legal department has internal guidelines for "employees who *wish* to report violations of the Code of Conduct."[147] The policy then states that the company "will not allow retaliation against an employee for reporting misconduct by others in good faith."[148] But, like the other companies discussed, it does not specify how such a policy would be enforced.[149] If an employee opts to make an internal report, the policy then requires that they "cooperate in internal investigations of potential or alleged misconduct."[150] This provision is potentially problematic in that it discourages employees from reporting (when doing so is already optional) because it fails to ensure the whistleblower's anonymity or confidentiality. This gap in protection creates vulnerability to subsequent retaliation that may result from the employee's involvement in investigations that the company undertakes after receiving the report. As is visible from these examples, internal reporting—a component so fundamental to any effective code of ethics, compliance program, or internal policy—is neither required nor universally protected under the law.

In addition to its bounty program, Dodd–Frank created significant retaliation protections for whistleblowers by providing

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[145] *See id.* ("Apple will not retaliate—and will not tolerate retaliation—against any individual for reporting a concern in good-faith with the Business Conduct Helpline.").

[146] *Code of Business Conduct and Ethics*, AMAZON, https://ir.aboutamazon.com/corporate-governance/documents-charters/code-business-conduct-and-ethics (last visited Nov. 14, 2020).

[147] *Id.* (emphasis added).

[148] *Id.*

[149] *See id.*

[150] *Id.*

them a judicial remedy in federal court against their retaliator(s).[151] Whistleblowers who experience retaliation are eligible to sue directly in federal court within a six-year statute of limitations after the date that the retaliation allegedly occurred.[152] Under this program, whistleblowers are protected from retaliation when they (1) provide information to the SEC; (2) testify or assist in SEC investigations or related actions; or (3) "mak[e] disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 . . . , [the Securities Exchange Act of 1934, 18 U.S.C. § 1513(e) (retaliating against a witness, victim, or informant)], [*or*] *any other law, rule, or regulation subject to the jurisdiction of the [SEC].*"[153]

None of these three categories of protected activity include any type of whistleblower disclosure that falls within a company code of conduct, compliance program, or internal reporting policy. Such internal policies are beyond the scope of any of the federal laws specifically mentioned or any SEC rule or regulation. The "securities laws" are defined explicitly as the following: the Securities Act of 1933, the Securities Exchange Act of 1934, the Sarbanes–Oxley Act of 2002, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Securities Investor Protection Act of 1970.[154] Unless an internal policy requires reporting only possible violations of these specific laws or other laws falling within the SEC's jurisdiction, the protections of Dodd–Frank do not apply.

Case law interpreting Dodd–Frank clearly states that eligibility for retaliation protections under the statute must arise from the whistleblower having reported on an issue that directly pertains to possible violations of the securities laws.[155] One notable case

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[151] *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (2018) ("An individual who alleges discharge or other discrimination in violation of [this Act] may bring an action under this subsection in the appropriate [U.S.] district court . . . for the relief provided . . . .").

[152] *See id.* § 78u-6(h)(1)(B).

[153] 15 U.S.C. § 78u-6(h)(1)(A)(i)–(iii) (2018) (emphasis added).

[154] 15 U.S.C § 78c(a)(47) (2018).

[155] *See, e.g.*, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778, 781 (2018) (noting that employees who report information "bearing no relationship whatever to the securities laws" are "ineligible to seek relief under § 78u–6(h)"); Zillges v. Kenney Bank & Tr., 24 F. Supp. 3d 795, 801 (E.D. Wis. 2014) (deeming a whistleblower ineligible to make a claim under Dodd–Frank because he "ha[d] not alleged or shown that his disclosure relate[d] to a violation of federal securities laws"); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 997–98

interpreting the Dodd–Frank anti-retaliation provisions involved a whistleblower who internally reported his CEO's suspected violations of Financial Industry Regulatory Authority (FINRA) rules, an act that the whistleblower believed would constitute a protected disclosure subject to the SEC's jurisdiction.[156] The court rejected the whistleblower's retaliation claim under Dodd–Frank by narrowly interpreting the statute and honing in on the language protecting "*disclosures that are required or protected*" under the laws specified above.[157] Because the FINRA rules contained only a general obligation to adhere to an honor code, rather than an identifiable duty to disclose, the court denied retaliation protections to the whistleblower, holding that "[m]erely alleging the violation of a law or rule under the SEC's purview is not enough; a plaintiff must allege that a law or rule in the SEC's jurisdiction explicitly requires or protects disclosure of that violation."[158] Thus, a suspected violation of a specific SEC rule is insufficient; the pertinent SEC rule must mandate reporting.[159] Although this interpretation is even narrower than a plain reading of the statute as it limits the types of protected disclosures under Dodd–Frank, subsequent cases interpreting the statute's protections have followed the same reasoning.[160] In light of this established precedent, employees who are retaliated against for adhering to an internal compliance program or policy simply have no opportunity to seek redress under Dodd–Frank.

(M.D. Tenn. 2012) (rejecting Dodd–Frank protections for a whistleblower who reported violations of the FCPA because it is "not subject to the jurisdiction of the SEC").

[156] *See* Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *6 (S.D.N.Y. May 4, 2011).

[157] *Id.* (quoting 15 U.S.C. § 78u6(h)(1)(A)(iii)).

[158] *Id.*

[159] *Id.* ("The Dodd–Frank Act protects whistleblowers who fulfill an existing duty to disclose, but it does not protect those who report violations of SEC laws or regulations that do not impose such a duty. Here, the FINRA rules cited by Plaintiff do not impose a duty to disclose.").

[160] *See* Asadi v. G.E. Energy (USA), LLC, Civil Action No. 4:12-345, 2012 WL 2522599, at *6 (S.D. Tex. June 28, 2012), *aff'd*, 720 F.3d 620 (5th Cir. 2013) (relying on *Egan* to hold that only whistleblower protections that are "*required or protected*" by the laws specified in Dodd–Frank are eligible for retaliation protections (quoting 15 U.S.C. § 78u-6(h)(1)(A)(iii)); *Nollner*, 852 F. Supp. 2d at 994 (stating that the "anti-retaliation provision . . . only protects disclosures that are 'required or protected' by laws, rules, or regulations within the SEC's jurisdiction").

The U.S. Supreme Court's 2018 decision in *Digital Realty Trust, Inc. v. Somers*[161] also disincentivizes whistleblowers from making internal reports, which are key components of nearly all compliance programs and internal policies. In this decision, the Court ruled that only those who report to the SEC directly—as opposed to supervisors or internal reporting channels at their workplace—may seek retaliation protections under Dodd–Frank.[162] This decision resulted from a circuit court split about the perceived tension between two particular subsections of Dodd–Frank.[163] First, subsection (a)(6) defines a "whistleblower" as "any individual who provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]."[164] Second, subsection (h) prohibits retaliation against "a whistleblower" who engages in protected activity, which, as noted above, includes "making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 . . . and any other law, rule or regulation subject to the jurisdiction of the [SEC]."[165] In light of this direct reference to disclosures under SOX, which specifically provides retaliation protection for whistleblowers who report only internally,[166] a reasonable argument exists that Dodd–Frank's language is ambiguous. The U.S. Supreme Court did not find the language ambiguous and instead gave effect to Dodd–Frank's plain language, which defines a whistleblower as someone who makes a

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[161] 138 S. Ct. 767 (2018).

[162] *See id.* at 778 ("Somers did not provide information 'to the Commission' before his termination, § 78u–6(a)(6), so he did not qualify as a 'whistleblower' at the time of the alleged retaliation. He is therefore ineligible to seek relief under § 78u–6(h).").

[163] *See id.* at 776 (discussing this circuit split). *Compare Asadi*, 720 F.3d at 623 (holding by the Fifth Circuit that Dodd–Frank's "whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC"), *with* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) (finding that the statute's language was "sufficiently ambiguous" to defer to the SEC's interpretation that whistleblowers who report to their employers are "entitled to pursue Dodd–Frank remedies for alleged retaliation").

[164] 15 U.S.C. § 78u-6(a)(6) (2018).

[165] *Id.* § 78u-6(h)(1)(A).

[166] Under SOX, employees who report to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)" are protected from retaliation as whistleblowers. 18 U.S.C. § 1514A(a)(1)(C) (2018).

report directly to the SEC and is retaliated against for that external report.[167]

The *Digital Realty Trust* decision not only confirms that whistleblowers who are retaliated against for reporting pursuant to their internal company policies are not protected, but it also effectively prompts whistleblowers to turn to SOX for retaliation protection, given that SOX directly protects internal reporting.[168] SOX's whistleblower program, enacted in 2002, provides retaliation protections for employees of publicly-traded companies who report information to either "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) *a person with supervisory authority over the employee* (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[169] Under the third prong, whistleblowers who report internally are eligible for SOX's protections. However, SOX's whistleblower protections are far less robust than those of Dodd–Frank. Unlike Dodd–Frank's provision allowing whistleblowers to sue employers in federal court for redress,[170] SOX provides whistleblowers an administrative remedy through the Occupational Safety and Health Administration (OSHA): the aggrieved whistleblower must file a complaint with the Secretary of Labor within 180 days of the alleged retaliation.[171]

Also, while SOX protects internal whistleblowers, it applies only to employees of public companies,[172] significantly narrowing the range of employee-whistleblowers eligible to seek protection for relying on internal compliance programs. To be eligible for retaliation protections under SOX, a whistleblower must disclose information that the whistleblower "reasonably believes constitutes

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[167] *Dig. Realty Tr.*, 138 S. Ct. at 776–78, 782 ("The statute's unambiguous whistleblower definition, in short, precludes the [SEC] from more expansively interpreting that term.").

[168] *See supra* note 166.

[169] 18 U.S.C. § 1514A(a)(1)(A)–(C) (2018) (emphasis added).

[170] *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (2018) ("An individual who alleges discharge or other discrimination in violation of [this Act] may bring an action under this subsection in the appropriate [U.S.] district court . . . for the relief provided . . . .").

[171] 18 U.S.C. § 1514A(b)–(c) (2018).

[172] *Id.* §1514A(a) (stating that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934" may retaliate against an employee-whistleblower).

a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the [SEC], or any provision of Federal law *relating to fraud against shareholders* . . . ."[173] These enumerated SOX sections—1341, 1343, 1344, and 1348—are statutory references to mail fraud, wire fraud, banking fraud, and securities fraud, respectively.[174] While these various types of fraud may appear broad and arguably capture provisions that may come under an organization's general compliance program, most judicial and administrative decisions interpreting the SOX whistleblower program have construed this provision narrowly. Such decisions have commonly held that a whistleblower report of non-compliance with internal company procedures, even if it may constitute fraud, "does not carry with it the force of law" as would a statement or public information that has been made available to the SEC or to shareholders.[175] In sum, an employee may dutifully follow his company's compliance code, adhering to suggestions or mandates to report suspected fraud and, nonetheless, find himself the subject of lawful retaliation in the form of termination, demotion or other adverse actions. The broad mandates of compliance codes coupled with the exceptionally narrow protections for whistleblowers under federal law create this perverse and surprising situation.

IV. BLOWING THE WHISTLE ON CORRUPTION

The anti-corruption compliance industry joins its EEO and securities peers in leaving employees vulnerable to potential retaliation. Internal compliance policies and anti-corruption

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[173] *Id.* § 1514A(a)(1) (emphasis added).

[174] *Id.*; *see also* 18 U.S.C. §§ 1341, 1343, 1344, 1348 (2018) (discussing statutory elements of mail, wire, banking, and securities fraud).

[175] Allen v. Admin. Review Bd., 514 F.3d 468, 478 (5th Cir. 2008) (quoting Ganino v. Citizens Utils. Co., 228 F.3d 154, 163 (2d Cir 2000)); *see also* Bishop v. PCS Admin. (USA), Inc., No. 05 C 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006) (finding the plaintiff's claim did not explain how the compliance program at issue violates SOX provisions or other "SEC regulation[s] related to fraud"); Wengender v. Robert Half Int'l Inc., No. 2005-SOX-59, 2006 WL 3246887, at *11 (Dep't of Labor Mar. 30, 2006) (recommended decision) (holding SOX protections are applicable only to "fraud against shareholders," rather than "general allegations of fraud"); Marshall v. Northrup Gruman Synoptics, No. 2005-SOX-0008, 2005 WL 4889013, at *2 (Dep't of Labor June 22, 2005) (recommended decision) (holding SOX protections are only applicable to "fraud against shareholders").

programs often extend beyond the protections that applicable federal laws provide. This Part demonstrates how this issue of employee retaliation exposure manifests in the anti-corruption corporate compliance domain. Shortcomings in compliance efforts pertaining to the FCPA and domestic commercial bribery laws expose employees to workplace retaliation without legal recourse.[176]

A. THE DEVELOPMENT OF THE ANTI-CORRUPTION COMPLIANCE INDUSTRY

Mirroring similar developments in the EEO, anti-fraud, and securities regulation domains, the anti-corruption compliance industry is flourishing, with growing numbers of in-house compliance professionals and professional services firms providing companies with anti-corruption compliance services.[177] The recent expansion of the compliance department within BNP Paribas exemplifies this growth: in 2014, 1732 employees were in this department, but the number rose to 3770 just three years later.[178] A specialized online job board for anti-corruption compliance professionals—which announces jobs to "an engaged audience of over 120,000 anti-corruption and compliance professionals each month"—also highlights the industry's expansion.[179]

Largely responsible for fueling this growth, the contemporary anti-corruption enforcement model between government and corporate entities relies on a combination of internal compliance programs and whistleblower engagement.[180] As centerpieces in

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[176] *See* 15 U.S.C. §§ 78dd-1 to -3 (2018) (codifying the FCPA).

[177] *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 993–99 (2009) (describing the development of the compliance industry in this area).

[178] Sarah Butcher, *How Compliance Jobs in Investment Banks Fell Down to Earth*, EFINANCIALCAREERS (Feb. 7, 2019), https://news.efinancialcareers.com/uk-en/3000112/compliance-jobs-banking (noting the growth of BNP's compliance division).

[179] *About*, THE FCPA BLOG: JOB BOARD, https://www.fcpablogjobs.com/pages/3325-about (last visited Nov. 14, 2020).

[180] *See* Steven R. Salbu, *Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense*, 55 AM. BUS. L.J. 475, 478 (2018) (stating that "recognition is growing that to eradicate bribery, cooperation between corporations and the government is vital"); *see also* ORG. FOR ECON. CO-OPERATION & DEV., CORRUPTION: A GLOSSARY OF INTERNATIONAL STANDARDS IN CRIMINAL LAW 22 (2008), http://www.oecd.org/daf/anti-bribery/41194428.pdf (defining corruption as the "abuse of public or private office for personal gain").

compliance programs, anti-corruption policies and reporting procedures capture a company's express commitment to conduct business legally and ethically and to hold accountable those who violate its policies.[181] In its "Model Anti-Corruption Policy," CREATe Compliance Inc., an Ethisphere Institute subsidiary, summarizes prevalent advice for companies drafting such polices: "Each company should create an anti-corruption policy which is appropriate to its size, organization, complexity, risk profile and business relationships, and which is compliant with local laws and laws with international reach."[182]

Anti-corruption policies typically convey a zero-tolerance approach to bribery and other forms of corruption in connection with any company-related activity,[183] and companies often encourage employees to raise suspected violations of these policies.[184] With an all-encompassing scope, anti-corruption policies may prohibit more conduct than the law prohibits. Alongside such expansive policies, company guarantees of non-retaliation are typically not enforceable under the law.[185] Thus, an employee who observes what appears to be corrupt conduct in the workplace and reports such conduct in good faith, following the procedures outlined in the respective

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[181] *See* Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89, 113–21 (2012) (discussing effective compliance procedures in an international anti-bribery context).

[182] *Model Anti-Corruption Policy*, CREATE COMPLIANCE INC., https://ethisphere.com/wp-content/uploads/Model-Policies-7.2.18.pdf (last visited Nov. 14, 2020). The Ethisphere Institute is a for-profit company that "brings together leading global companies to define and codify best practices for ethics and compliance, and helps to advance business performance through data-driven assessments, benchmarking, and guidance." ETHISPHERE, https://ethisphere.com/old-home/ (last visited Nov. 14, 2020).

[183] *See* Bethany Hengsbach, *Foreign Corrupt Practices Act Compliance: Issues for Public and Private Companies*, *in* GOVERNMENT CONTRACTS COMPLIANCE at *5 (2011), 2011 WL 2117934 ("When developing an FCPA compliance program, it is important for a company to institute a zero tolerance policy for bribery and corruption--one that sets an appropriate tone at the top of the company, so that the company's employees are aware that it does not tolerate bribery in any form.").

[184] *See, e.g.*, ASIA-PACIFIC ECON. COOPERATION, APEC CODE OF CONDUCT FOR BUSINESS (2007), http://publications.apec.org/Publications/2007/09/APEC-Anticorruption-Code-of-Conduct-for-Business-September-2007 ("The [anti-corruption] [p]rogram should encourage employees and others to raise concerns and report suspicious circumstances to responsible enterprise officials as early as possible.").

[185] *Cf. supra* Sections II.B & III.B.

company's anti-corruption policy, may be exposing herself to retaliation by her employer without any legal recourse or remedy.

The United States' enactment in 1977 of the seminal FCPA, which "mak[es] it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business,"[186] ignited a global movement to combat illicit corporate dealings with foreign government officials and led to the creation and development of the anti-corruption compliance industry.[187] The FCPA addresses international corruption through its anti-bribery provisions, which prohibit covered individuals and business entities from bribing foreign government officials in order to obtain or retain business.[188] Moreover, the FCPA's accounting provisions operate in tandem with the anti-bribery provisions to (1) impose certain recordkeeping and internal controls requirements on covered entities and (2) prohibit knowingly falsifying books and records or circumventing or failing to implement a system of internal controls.[189] Sharing enforcement authority, the SEC and the Department of Justice (DOJ) continue to treat the FCPA as a high-priority enforcement area.[190]

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[186] *Foreign Corrupt Practices Act: An Overview*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last updated Feb. 3, 2017).

[187] *See* Jordan, *supra* note 181, at 93 (noting that the FCPA is "the oldest and premier foreign bribery law that has served as a template for other foreign bribery laws throughout the world").

[188] 15 U.S.C. § 78dd-1(a) (2018).

[189] 15 U.S.C. § 78m(a)–(b) (2018) (mandating registered securities issuers to file records with the SEC and prohibiting knowing falsification of these records); *see also* S. REP. NO. 95-114, at 3 (1977) ("In the past, corporate bribery has been concealed by the falsification of corporate books and records. [The accounting provision] removes this avenue of coverup, reinforcing the criminal sanctions which are intended to serve as the significant deterrent to corporate bribery. Taken together, the accounting requirements and criminal prohibitions . . . should effectively deter corporate bribery of foreign government officials.").

[190] *See SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified Nov. 17, 2020) (listing the SEC's FCPA enforcement actions by calendar year); *Enforcement Actions*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-fraud/related-enforcement-actions (last updated July 2, 2020) (listing DOJ's FCPA enforcement actions by calendar year); *see also* Adam Pollock & Sarah Bayer, *Whistleblowers and the FCPA under the Trump Administration*, N.Y.L.J. (June 12, 2019, 11:10 AM), https://www.law.com/newyorklawjournal/2019/06/12/whistleblowers-and-the-fcpa-under-the-trump-administration/?slreturn=20190712151711 ("Contrary to the

B. ANTI-CORRUPTION COMPLIANCE AND WHISTLEBLOWERS

Whistleblowers play a critical role in FCPA compliance and enforcement efforts.[191] Assistance from whistleblowers who know of potential FCPA violations "can be among the most powerful weapons in the law enforcement arsenal" because these whistleblowers know the circumstances and individuals involved, which otherwise may be shrouded in secrecy.[192] They can help government agencies identify potential violations "much earlier" than otherwise possible, thereby minimizing potential harms to investors, preserving capital market integrity, and holding corrupt actors accountable more swiftly.[193]

While the FCPA contains neither anti-retaliation provisions nor any other whistleblower protections or private rights of action,[194] SOX and Dodd–Frank feature certain provisions that may protect whistleblowers who report FCPA violations.[195] These statutes may provide federal protection against employer retaliation for whistleblowers who report FCPA violations, though uncertainty exists as to their applicability given recent court decisions.[196]

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expectations of many who thought that enforcement of the [FCPA] would dissipate with the arrival of the Trump administration, it is very much alive.").

[191] *See* Amy Deen Westbrook, *Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act?*, 75 WASH. & LEE L. REV. 1097, 1106 (2018) ("Whistleblowers are critical to compliance with and enforcement of the FCPA."); Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635–36 (2008) (highlighting employees' "unique" abilities to detect and prevent wrongdoing).

[192] CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 82 (2012) [hereinafter FCPA RESOURCE GUIDE], https://www.justice.gov/criminal-fraud/file/1292051/download.

[193] *Id*.

[194] Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 998 (M.D. Tenn. 2012) ("[T]he FCPA does not itself protect whistleblowers: it contains no anti-retaliation provisions and affords no private cause of action.").

[195] FCPA RESOURCE GUIDE, *supra* note 192, at 82 ("The Sarbanes–Oxley Act of 2002 and the Dodd–Frank Act of 2010 both contain provisions affecting whistleblowers who report FCPA violations.").

[196] *See* Ryan Rohlfsen & Andrew Kaplan, *Catnip for Whistleblowers: The Status of SOX Whistleblower Protections in FCPA Cases*, ROPES & GRAY (Mar. 27, 2019), https://www.ropesgray.com/en/newsroom/alerts/2019/03/Catnip-for-Whistleblowers-The-Status-of-SOX-Whistleblower-Protections-in-FCPA-Cases (discussing the effects of recent decisions upon FCPA whistleblower protections).

The combined strength of the FCPA, SOX, and Dodd–Frank serves as a formidable tool for the DOJ and SEC to combat corruption across industries.[197] Among its major elements, SOX extends whistleblower protections for employees of publicly traded companies by providing reinstatement, back pay, and other compensation remedies for employees who experience retaliation in connection with reporting possible securities law violations.[198] As discussed earlier in this Article, SOX's section 806 specifically prohibits such companies from retaliating against an employee who lawfully reports "any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders . . . ."[199]

Reporting an FCPA books-and-records violation would seemingly constitute protected SOX conduct, as the FCPA is an amendment to, and codified within, the Securities Exchange Act of 1934[200] and also is an apparent "law relating to fraud against shareholders."[201] Thus,

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[197] *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 117 (2010) ("[SOX] created a situation in which corporate executives can now be held personally accountable for any misleading financial information hidden behind the numbers of financial statements. Combined with FCPA, SOX creates a double-edged sword for the SEC to wield in the battle against corruption."); Bradley J. McAllister, *The Impact of the Dodd–Frank Whistleblower Provisions on FCPA Enforcement and Modern Corporate Compliance Programs*, 14 BERKELEY BUS. L.J. 45, 46 (2017) ("The FCPA, SOX, and Dodd–Frank work in conjunction to create a patchwork of laws that predominate over corporate compliance for [publicly] traded companies.").

[198] 18 U.S.C. § 1514A(c) (2018) (outlining the available remedies under SOX). Congress included the anti-retaliation provisions "to prevent employers from discouraging employees with knowledge of improper financial reporting and accounting practices from reporting." Westbrook, *supra* note 191, at 1121.

[199] 18 U.S.C. § 1514A(a)(1). SOX also prohibits retaliation against employee whistleblowers as an obstruction of justice. 18 U.S.C. § 1513 (2018) (prohibiting relatiation against informants); *see also* Sarah O'Rourke Schrup, *Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 1512(c)(1)*, 102 J. CRIM. L. & CRIMINOLOGY 25, 25–26 (2013) (describing how SOX affected the federal obstruction of justice statute).

[200] *See* Wadler v. Bio-Rad Labs., Inc., No. 15-cv-02356-JCS, 2017 WL 1910057, at *5 (N.D. Cal. May 10, 2017) ("[T]he FCPA is an amendment to the Securities and Exchange Act of 1934 and is codified within it."), *aff'd in part, vacated in part*, 916 F.3d 1176 (9th Cir. 2019).

[201] 18 U.S.C. § 1514A(a)(1); *see also* Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN L. REV. 1, 4 (2005) (arguing that the SOX whistleblower provision covers information disclosures related to bribery of public

an employee who lawfully reports an alleged FCPA violation is arguably engaging in protected activity under SOX section 806. However, the Ninth Circuit recently disagreed with this view: in *Wadler v. Bio-Rad Labs., Inc.*, it held that the FCPA's anti-bribery and books-and-records provisions are not "rules or regulations of the SEC" under SOX section 806.[202] *Bio-Rad* involved the company's former general counsel, Sanford Wadler, who believed that Bio-Rad employees in China had violated the FCPA and that the company's "senior management was likely complicit"; accordingly, he notified the company's chief executive and the audit committee of its board of directors.[203] The company later fired Wadler.[204] In addressing the merits of the issue raised on appeal, the court reasoned that "rule or regulation" of the SEC refers only to administrative rules or regulations and does not encompass statutes such as the FCPA.[205] Through the court's narrow reading of what constitutes a "rule or regulation" of the SEC, complaints of FCPA violations do not constitute protected activity under SOX. Thus, the Ninth Circuit narrowed the scope of whistleblower protections available under SOX and limited whistleblower protections available to employees who face retaliation for reporting FCPA violations.[206]

While the Ninth Circuit's *Bio-Rad* decision curbed SOX's protections for whistleblowers who face retaliation for reporting FCPA violations, employees are better positioned to receive protection under Dodd–Frank. With Dodd–Frank's passage in

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officials, including foreign officials). *But see* Gupta v. Johnson & Johnson, Case No. 2010-SOX-54, 2011 WL 121916, at *5 (Dep't of Labor Jan. 7, 2011) ("[A] violation of the FPCA is not within the scope of SOX.").

[202] Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176, 1186 (9th Cir. 2019) ("[W]e hold that § 806's text is clear: an FCPA provision is not a 'rule or regulation of the [SEC].'" (second alteration in original) (quoting 18 U.S.C. § 1514A(a)(1) (2018))).

[203] *Id.* at 1182.

[204] *Id.* at 1184.

[205] *Id.* at 1186 ("[T]he more natural and plain reading of these words together and in context is that they refer only to administrative rules or regulations. That the phrase 'rule or regulation' is used in conjunction with an administrative agency, the SEC, suggests that it encompasses only administrative rules or regulations.").

[206] *See, e.g.*, Rohlfsen & Kaplan, *supra* note 196 (analyzing the effects of the *Bio-Rad* decision); Steve Pearlman & Pinny Goldberg, Wadler v. Bio-Rad *Poses Noteworthy Whistleblower Questions*, LAW360 (Mar. 8, 2019, 1:28 PM), https://www.law360.com/articles/1135086/wadler-v-bio-rad-poses-noteworthywhistleblower-questions (evaluating the consequences of *Bio-Rad*).

2010,[207] Congress strengthened the FCPA's enforcement power while imposing detailed regulations on the financial services industry to detect and prevent fraud and corruption.[208] As the legislative history indicates, Congress enacted Dodd–Frank in part to provide more stringent measures to protect whistleblowers than SOX provides.[209] As described above, Dodd–Frank addresses whistleblower protections and incentives through, inter alia, its anti-retaliation provision[210] and its grant of authority to the SEC to administer a bounty program to eligible individuals.[211] However, these robust protections do little for whistleblowers adhering to compliance programs and internal policies, because, as discussed earlier in this Article, the U.S. Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*[212] excludes from Dodd–Frank's protections whistleblowers who report internally but not to the SEC.[213] Thus, as evident in the Ninth Circuit's holding in *Bio-Rad*, whistleblowers who follow a company's compliance program or code of conduct to report an apparent FCPA violation internally are not covered under Dodd–Frank when facing employer retaliation unless such whistleblowers also reported to the SEC.[214]

In light of these shortcomings surrounding Dodd–Frank and SOX, employees who witness corrupt workplace conduct and report such behavior may be exposing themselves to retaliation and

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[207] *See supra* note 123.

[208] *See* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 622–23 (5th Cir. 2013) (discussing reforms of the U.S. financial regulatory system through the enactment of Dodd–Frank).

[209] *See* S. REP. NO. 111-176, at 114 (2010) (amending 18 U.S.C. § 1514A to clarify that "subsidiaries and affiliates of issuers [in addition to the issuers themselves] may not retaliate against whistleblowers"); 156 CONG. REC. S5873 (daily ed. July 15, 2010) (statement of Sen. Cardin) (amending SOX "to extend whistleblower protections to employees of nationally recognized statistical rating organizations"); *see also* DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 15 (2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf (indicating reform goals to "[s]trengthen [i]nvestor [p]rotection" by "expanding protections for whistleblowers [and] expanding sanctions available for enforcement").

[210] *See supra* Section III.B.

[211] *See supra* notes 124–127 and accompanying text.

[212] 138 S. Ct. 767 (2018).

[213] *See supra* notes 161–167 and accompanying text.

[214] Wadler v. Bio-Rad Laboratories, Inc., 916 F.3d 1176, 1182 (2019) (vacating the Dodd–Frank verdict connected to reporting an FCPA violation in light of *Digital Realty Trust*, "which held that Dodd-Frank does not apply to purely internal reports").

negative treatment from their employers without any legal recourse or remedy. If employees report internally, in accordance with company anti-corruption policies, but not to the SEC, they may not receive protection under Dodd–Frank, and SOX protection may separately remain unavailable.[215] Moreover, even if an employee reports the corrupt conduct directly to the SEC, she still may not receive legal protection from any ensuing retaliation, depending upon the nature of the corrupt conduct.[216] As corporate anti-corruption policies generally cover a wide scope of behavior that can be considered corrupt, the policies may prohibit certain conduct that could in fact be legally permissible in the United States, where no retaliation protection would apply.[217] To highlight this gap, the following sections demonstrate how the anti-corruption corporate compliance domain targets certain conduct pertaining to the FCPA and separately to domestic commercial bribery laws, encouraging reporting of such conduct that could nevertheless expose employees to workplace retaliation without legal recourse.

1. Facilitating Payments under the FCPA: Legally Permissible in the United States, Yet Widely Prohibited by Corporate Anti-Corruption Policies. The FCPA's anti-bribery provisions cast a wide net in prohibiting foreign bribes, but they contain a narrow exception for "facilitating or expediting payment[s],"[218] also known as "grease" payments,[219] made in furtherance of "routine governmental action."[220] Intending to provide a "very limited exception[] to the kinds of bribes to which the FCPA does not apply,"[221] Congress drafted this exception to capture "those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[222] The exception applies when payment is made to a "foreign official" in order to further "routine governmental action" that

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[215] *See supra* note 202 and accompanying text.

[216] *See supra* Section IV.A.

[217] *See supra* Section III.B.

[218] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2018).

[219] United States v. Kay, 359 F.3d 738, 745 (5th Cir. 2004).

[220] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b); *see also Kay*, 359 F.3d at 750–51 (providing examples of "[r]outine governmental action").

[221] *Kay*, 359 F.3d at 750.

[222] H.R. REP. No. 95-640, at 8 (1977).

involves non-discretionary acts.[223] Examples of routine governmental action include obtaining permits or licenses to qualify a person to conduct business in a foreign country, processing visas, providing mail service or police protection, or supplying utilities, such as power, water, and phone service.[224]

Facilitating payments that qualify within the exception would not constitute FCPA violations but nevertheless may violate laws in foreign countries where the company issuing the facilitating payments operates. For instance, facilitating payments are illegal in the United Kingdom under the U.K. Bribery Act 2010,[225] and the U.K. Ministry of Justice has condemned the payments for "creat[ing] artificial distinctions that are difficult to enforce, undermin[ing] corporate anti-bribery procedures, confus[ing] anti-bribery communication with employees and other associated persons, perpetuat[ing] an existing 'culture' of bribery and hav[ing] the potential to be abused."[226] Thus, companies making genuine facilitating payments may still be subjecting themselves to possible sanctions.[227] The OECD Working Group on Bribery recommends that all OECD signatory countries "encourage companies to prohibit or discourage the use of facilitation payments" through internal controls and anti-corruption ethics and compliance programs, signaling to companies the ethically objectionable nature of these payments.[228]

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[223] *See id.* (noting that the congressional committee intentionally "exclud[ed] from the definition of 'foreign official' government employees whose duties are essentially ministerial or clerical"); *see also Kay*, 359 F.3d at 751 ("[R]outine governmental action does not include the issuance of *every* official document or *every* inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.").

[224] 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A) (2018).

[225] Bribery Act 2010, c. 23, http://www.legislation.gov.uk/ukpga/2010/23/contents.

[226] MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE para. 45, at 18 (2011), http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[227] *See id.* (stating that "the Bribery Act does not . . . provide any exemption for [facilitating] payments," unlike U.S. law).

[228] OECD WORKING GRP. ON BRIBERY IN INT'L BUS. TRANSACTIONS, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS § VI, at 5 (2009), https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf (providing these recommendations

As companies often express a zero-tolerance approach in their anti-corruption policies and seek to prohibit any conduct that could be considered corrupt in any jurisdiction where they do business, facilitating payments fall within the scope of bribes as defined in many anti-corruption policies within company handbooks.[229] Indeed, roughly eighty percent of U.S. companies prohibit facilitating payments through their policies,[230] with many companies noting explicitly that facilitating payments fall within the scope of their bribery prohibition policies.[231] For example, the Anti-Bribery Policy of Coca-Cola states that "[t]he Company's prohibition on bribery applies to all improper payments regardless of size or purpose, including 'facilitating' (or expediting) payments."[232] These policies typically apply to all employees,

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"in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law").

[229] *See, e.g.*, *Anti-Corruption Policy*, FRANKLIN TEMPLETON, https://www.franklintempleton.com/financial-professionals/help/anti-corruption (last visited Nov. 14, 2020) ("This overview of Franklin Resources, Inc. Anti-Corruption Policy outlines the principles that FRI and its affiliates . . . follow to achieve zero-tolerance against bribery and corruption."); *Zero Tolerance Approach to Bribery and Corruption*, ING GROUP, https://www.ing.com/About-us/Compliance/Zero-Tolerance-Bribery-Statement.htm (last visited Nov. 14, 2020) (explaining ING's "zero tolerance approach" to bribery and corruption and that the approach applies to third parties with whom ING does business or who ING retains). *But see* Marc Le Menestrel, *Zero-Tolerance Policies are Dishonest and Damaging*, THE FCPA BLOG (Feb. 6, 2019, 1:08 PM), https://fcpablog.com/2019/2/6/zero-tolerance-policies-are-dishonest-and-damaging/ (arguing that moral and ethical decisionmaking is a grey area and that a "zero-tolerance stance towards corruption is neither necessarily honest nor desirable").

[230] R. Christopher Cook & Stephanie L. Connor, *OECD Calls for an End to Facilitating Payments Exception*, JONES DAY: INSIGHTS (Dec. 2009), https://www.jonesday.com/en/insights/2009/12/oecd-calls-for-an-end-to-facilitating-payments-exception (stating that "80 percent of U.S. companies prohibit facilitating payments altogether").

[231] *See, e.g.*, *Anti-Corruption Program and Policies*, LOCKHEED MARTIN, https://www.lockheedmartin.com/en-us/who-we-are/ethics/anti-corruption.html (last visited Nov. 14, 2020) ("The policy strictly prohibits facilitating payments.").

[232] *Anti-Bribery Policy*, THE COCA-COLA COMPANY, https://www.coca-colacompany.com/policies-and-practices/anti-bribery-policy (last visited Nov. 14, 2020) ("Generally, facilitation payments are prohibited by this Policy, except for a very limited set of circumstances for which prior written approval must be obtained from both Company Legal Counsel and E&C.").

officers, directors, and third party agents worldwide working on behalf of the employer company.[233]

As companies encourage their employees and agents to promptly report internally any behavior that may represent a violation of the company's anti-corruption policy,[234] an employee who observes a colleague issue a facilitating payment to a foreign government official and subsequently reports such conduct, in line with the expectations created by the employer's anti-corruption policies, risks suffering from possible retaliation from the employer.[235] No federal law would apply to protect the employee in blowing the whistle.[236] Facilitating payments to foreign government officials are permissible under the FCPA yet condemned on ethical grounds and banned by law in other jurisdictions.[237] As a result, a whistleblower who reports such payments as directed by a company's anti-corruption policy may, by that very act, expose herself to retaliation without legal recourse.

2. Commercial Bribery Payments: Legally Permissible in Some U.S. Jurisdictions, Yet Widely Prohibited by Corporate Anti-Corruption Policies. Commercial bribery presents another area of exposure for whistleblowers in the anti-corruption domain. Also known as private bribery or business-to-business bribery,

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[233] *See*, *e.g.*, EXXONMOBIL, ANTI-CORRUPTION LEGAL COMPLIANCE GUIDE 4 (2014), https://corporate.exxonmobil.com/-/media/Global/Files/policy/Anti-Corruption-Legal-Compliance-Guide.pdf ("It is the policy of Exxon Mobil Corporation that directors, officers, employees, and third parties acting on its behalf are prohibited from offering or paying, directly or indirectly, any bribe to any employee, official, or agent of any government, commercial entity, or individual in connection with the business or activities of the Corporation."); *Ping Identity Corporation Anti-corruption Policy*, PING IDENTITY, https://www.pingidentity.com/en/legal/anticorruption.html (last revised Mar. 6, 2018) ("This policy applies to all world-wide directors, officers, employees, partners, agents, distributors, resellers, representatives and contractors . . . .").

[234] *See, e.g.*, COCA-COLA HELLENIC BOTTLING CO., ANTI-BRIBERY POLICY & COMPLIANCE HANDBOOK 8, https://ch.coca-colahellenic.com/en/policies (last visited Dec. 20, 2020) ("If you observe behaviour that concerns you, or that may represent a violation of our Policy, raise the issue promptly with your Relevant Legal Officer. . . . Suspected Policy violations of a serious nature, such as those involving high levels of management, significant amounts, or alleged criminal activities should be reported to the General Counsel immediately.").

[235] *See supra* Section IV.A.

[236] *See supra* Section IV.B.

[237] *See* Cook & Connor, *supra* note 230 (stating that many countries prohibit facilitating payments whereas the FCPA permits certain facilitating payments).

commercial bribery at common law is an "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors."[238] Transpiring entirely within the private sector and involving no public official, the offense involves the transfer of money or other form of kickback to employees or other agents in exchange for special treatment to the briber.[239]

To illustrate, imagine a private school tasks its purchasing agent to buy a set of printers for school use, and the agent contacts an office supply company. The agent discovers the printers' fair market value after selecting the specific printer model. Rather than negotiating with the office supply company to reach the lowest possible price, the agent agrees with the company's salesperson to purchase the printers on behalf of the school at a cost significantly higher than their fair market value. In exchange, the office supply company gives the purchasing agent a significant kickback for boosting the company's profits. This arrangement exemplifies commercial bribery, as the office supply company secretly pays the purchasing agent to influence the agent's official act, obtaining the printers for the school. The essence of this offense involves the corruption of the employee or other type of agent, where, for instance, the briber offers a bribe to an employee with the intent to induce the employee to act in the interest of the briber instead of the employer.[240] When an agent accepts a bribe, he violates a duty of loyalty to his principal and "abuses his [principal]'s trust and loyalty for his own economic benefit."[241]

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[238] 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 49 (3d ed. 1968).

[239] *See* Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT'L L. 673, 681 (2014) ("The offense involves the bribing of private sector employees or other types of private sector agents so that the agents show favor to the briber when carrying out their workplace duties.").

[240] Mantek Div. of NCH Corp. v. Share Corp., 780 F.2d 702, 705 n.3 (7th Cir. 1986) ("The essence of commercial bribery is that the [briber] is secretly giving a bribe to the . . . agent to induce the agent to betray his principal . . . .").

[241] Peter Burckhardt & Benjamin Borsodi, *Switzerland Tightens Anti-Corruption Laws, Focuses on Private Sector Bribery*, 23 INT'L ENFORCEMENT L. REP. 213, 214 (2007).

Commercial bribery has been condemned as deceptive commercial conduct that creates tangible economic harm.[242] A "regretfully common practice," it runs rampant across many industries.[243] It is a "marketplace mainstay[]" that is "tolerated everywhere," and demonstrated through payments to obtain business across industries.[244] In spite of its harmful nature and widespread prevalence, no comprehensive federal legislation criminalizes commercial bribery domestically or internationally.[245] It is inconsistently criminalized at the state level in the United States, with thirty-nine states having enacted general statutes that criminalize commercial bribery across industries.[246] More specifically, Georgia, Idaho, Indiana, Maryland, Montana, New Mexico, Ohio, Oregon, Tennessee, West Virginia, and Wyoming have not enacted a general prohibition on commercial bribery.[247] Internationally, however, there is a growing movement to combat commercial bribery through the enactment of domestic criminal laws, with the U.K. Bribery Act 2010[248] and Ireland's Criminal Justice (Corruption Offences) Act 2018[249] as examples of legislation that criminalize commercial bribery domestically and internationally.[250]

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[242] *See, e.g.*, *Proposed RICO Reform Legislation: Hearing on S. 1523 Before the S. Comm. on the Judiciary*, 100th Cong., 390–91 (1987) [hereinafter *Proposed RICO Reform Legislation*] (statement of John A. Kocur, President, Apache Corporation) (discussing the harm to an oil company defrauded by commercial bribery); Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 121 (2014) ("Companies disadvantaged and defrauded by the practice argue that the practice creates tangible economic harm.").

[243] United States v. Kristel, 762 F. Supp. 1100, 1101 (S.D.N.Y. 1991).

[244] Joel Cohen, *Commercial Kickbacks: A Crime for the Recession*, N.Y.L.J., Aug. 17, 1992, at 4 (describing types of kickback payments in different industries).

[245] *See* Ira Handa, *Fallacies in the Current Methods of Prosecuting International Commercial Bribery*, 38 CARDOZO L. REV. 725, 727 (2016) ("While the FCPA addresses bribery of public officials internationally, the United States does not have a comprehensive statute that specifically addresses commercial bribery internationally.").

[246] Boles, *supra* note 242, at 129–30.

[247] *Id.* at 130 n.64.

[248] Bribery Act 2010, c. 23, § 1, http://www.legislation.gov.uk/ukpga/2010/23/contents.

[249] Criminal Justice (Corruption Offences) Act 2018 (Act No. 9/2018), http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html.

[250] *See* Boles, *supra* note 239, at 688 (discussing growing international efforts to combat commercial bribery).

Given the potential risk for legal exposure and reputational harm, the legal industry is increasingly advising its corporate clients to review their anti-corruption policies, procedures, and training materials to ensure that they cover domestic and foreign commercial bribery, in addition to public-sector bribery.[251] Many companies include commercial bribery risk as a component of their compliance programs.[252] For instance, Moody's Anti-Bribery and Anti-Corruption Policy makes clear: "Commercial bribery (not involving public officials) is also illegal in many countries. This Policy prohibits all commercial or public sector bribery."[253]

With a growing number of companies prohibiting commercial bribery as part of their anti-corruption policies, their employees are encouraged to promptly report such conduct internally.[254] Employees who witness their colleagues engaging in commercial bribery and internally report it—in compliance with their employers' anti-corruption policies—expose themselves to possible retaliation from their employers.[255] Worse, no federal law would

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[251] *See, e.g.*, M. Scott Peeler, Glenn C. Colton, Kay C. Georgi, Terree A. Bowers & Peter V.B. Unger, *Don't Forget Commercial Bribery: New Laws and Convictions Highlight an Often Overlooked Risk*, ARENT FOX (June 18, 2018), https://www.arentfox.com/perspectives/alerts/dont-forget-commercial-bribery-new-laws-and-convictions-highlight-often (advising that companies adequately cover commercial bribery, in addition to other forms of corruption, in their policies and training materials); William M. Sullivan, Jr., G. Derek Andreson, Robert J. Nolan, Ryan R. Sparacino & Wesley M. Spowhn, *Commercial Bribery: What GCs Should Know About the Achilles Heel of Anti-Bribery Law*, PILLSBURY L. (Mar. 9, 2012), https://www.pillsburylaw.com/images/content/3/9/v2/3952/CorporateInvestigationsWhiteCollarDefenseAlertComplianceProgramO.pdf ("[I]n-house counsel should ensure that the company's anti-corruption program provides sufficient protection against commercial bribery risks.").

[252] *See* Stacey Sprenkel, Amanda Aikman & Sarak Thomas, *Recent Legal Developments May Encourage Companies to Commit More Fully to Ethical Business Conduct*, ETHISPHERE: MAGAZINE (Oct. 7, 2015), https://magazine.ethisphere.com/commercial-bribery/ ("[S]ending a clear message that *all* bribery is prohibited, regardless of the setting, will make for a more effective compliance program overall.").

[253] MOODY'S, ANTI-BRIBERY AND ANTI-CORRUPTION POLICY 1 (2016), https://www.moodys.com/uploadpage/Mco%20Documents/SP21200_AntiBribery_AntiCorruption.pdf.

[254] *See id.* at 6 (requiring employees to report facilitation payments to Moody's Legal Department immediately after such payments are made).

[255] *See* Nicole H. Sprinzen, Asadi v. G.E. Energy (USA) L.L.C.*: A Case Study of the Limits of Dodd–Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 191 (2014) (noting that whistleblowers who try to report violations internally often are "ignored, rebuffed, or retaliated against").

protect these whistleblowing employees.[256] Commercial bribery remains uncriminalized in several U.S. states, yet commercial bribes are condemned on economic and ethical grounds and banned in other jurisdictions.[257] Given that commercial bribery violations of a company's anti-corruption policies and procedures are generally not covered under federal law and may not be criminalized in certain states, reporting such commercial bribes under a company's anti-corruption policy may expose the whistleblower to retaliation without any legal protection.

In sum, the expansive development of compliance efforts in the commercial sector has generated organizational policies, codes of conduct, compliance programs, and other initiatives that exceed the applicable requirements under federal law. As reflected in the EEO, securities regulation, and anti-corruption domains, this gap in coverage exposes whistleblowers to retaliation without legal protection when they adhere to their employers' policies and report wrongdoing. The following Part proposes solutions to this problem.

V. PROPOSED SOLUTIONS

Due to the statutory limitations in EEO, anti-fraud, and anti-corruption law, numerous employees across various industries are excluded from the law's robust protections when they follow internal company policies and compliance programs. To protect such individuals and facilitate the continued use of such internal programs, we propose alternative theories of redress, housed in contract law and tort law, for such individuals. We also recommend that regulators consider specific amendments to the laws and guidelines that govern various compliance industries.

A. ALTERNATIVES TO CONTRACT APPROACHES

Internal company codes and compliance programs outlining norms of expected behavior are not typically viewed as contracts

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[256] *See* Handa, *supra* note 245, at 734 ("[N]o federal law explicitly prohibits international commercial bribery . . . .").

[257] *See* Boles, *supra* note 242, at 129–30, 143 (stating that, while eleven states currently do not criminalize commercial bribery, thirty-nine states have outlawed commercial bribery, and most courts "condemn the offense" for its many "corrosive effects").

given the infeasibility of arguing that every element of a binding contract has been established in such instances.[258] As a result, arguing that internal codes of conduct and compliance programs establish a binding promise as to the terms and conditions of employment is difficult, and establishing that any aspect of an internal code of conduct or compliance program would provide an exception to employment-at-will is nearly impossible.[259] However, the legal doctrine surrounding employee handbooks traditionally supported viewing such documents as binding contracts if certain conditions are met.[260] Under this traditional view, which originated in the 1980s, an "exception to the employment-at-will rule" establishes job security-related promises that would be viewed as contractually binding on the employer.[261] However, employers increasingly include disclaimers in employee handbooks explicitly stating that these are not contracts, and courts routinely uphold such disclaimers, rendering the alleged contract unenforceable.[262]

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[258] *See infra* notes 265–270.

[259] *See, e.g.*, Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 175 (2005) (noting reluctance in courts "to enforce corporate codes as enforceable promises").

[260] *See* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 337 (1991) (discussing the history of various courts holding that employee handbooks are binding contracts).

[261] Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 195 (2007) (discussing the exception to the employment-at-will rule as it pertains to employee handbooks); *see also* Robinson v. Ada S. McKinley Cmty. Servs., Inc., 19 F.3d 359, 363 (7th Cir. 1994) (holding that defendant-employer was contractually bound to follow the termination provisions of the employee handbook under which the plaintiff was hired); Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 881 (2016) ("In most jurisdictions, for an employee handbook to constitute a binding contract, the employer must demonstrate that: '(1) the language of the policy statement contains a promise clear enough that an employee would reasonably believe that an offer has been made, (2) the statement was disseminated to the employee in such a manner that the employee was aware of its content and reasonably believed it to be an offer, and (3) the employee accepted the offer by commencing or continuing work after learning of the policy statement.'" (quoting Ricco v. Sw. Surgery Ctr., LLC, 73 F. Supp. 3d 961, 972 (N.D. Ill. 2014))).

[262] *See, e.g.*, Workman v. United Parcel Serv., Inc., 234 F.3d 998, 1000 (7th Cir. 2000) (holding that such disclaimers are "a complete defense to a suit for breach of contract based on an employee handbook"); Fischl, *supra* note 261, at 195 ("When the so-called 'employee handbook' exception to employment at will took hold in the 1980s, many employers reacted by attempting to rewrite their materials to opt back into the employment-at-will rule via disclaimers of job security."); Elinor P. Schroeder, *Handbooks, Disclaimers, and Harassment*

With both of these contract-based avenues of protection unavailable to vulnerable whistleblowers, one possible solution is to turn to alternatives to contract theories that support the public policy of protecting individuals who follow company compliance codes and experience retaliation as a result.

The basic elements of a binding contract include offer, acceptance, consideration, and mutual assent to the essential terms of the agreement, all of which are established through a meeting of the minds to enter into the agreed upon terms and conditions of the contract.[263] Internal codes of conduct and compliance programs are broadly applicable documents—they are not exclusive to any individual in the sense that no single offeree would possess the power of acceptance to the employer-offeror's offer in a way that establishes mutual agreement to the specified conditions that govern that individual's employment.[264] Not only is this the case because an internal company code or compliance program is not directed or communicated to one offeree, but also because the subject matter of such a program is simply not relevant to one's own unique employment situation and instead relates to broader themes of organizational governance, internal systems and channels, and the overall ethical functioning of an enterprise.[265] Although employees are often asked to sign a statement that they have received their organization's code of ethics or compliance program, there is no certainty that they have actually read or fully understood the document or are aware of ongoing efforts to adopt the code as part of a daily work dialogue.[266] In light of the fact that employees

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Policies: Another Look at Clark County School District v. Breeden, 42 BRANDEIS L.J. 581, 581–82 (2004) (discussing the decrease of the employee handbook exception by states).

[263] *See* 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 4:3 (4th ed. 2007) (detailing the necessary elements to form a contract).

[264] *See* Lierz v. Coca Cola Enter., Inc., 36 F. Supp. 2d 1295, 1302 (D. Kan. 1999) (rejecting an employee's claims that the company code of conduct constituted "an express contract of employment").

[265] *See* Timothy L. Fort, *Steps for Building Ethics Programs*, 1 HASTINGS BUS. L.J. 194, 197–98 (2005) (noting the need for employee "buy-in" for ethical codes due to the general and pedantic nature of many codes).

[266] *See id.* at 196 (discussing conclusions drawn from informal surveys of executive education business students as to whether "codes of conduct permeate the lives of employees"); *see also* Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211,

are not specifically agreeing to take action in exchange for something else, the argument that there is bargained-for exchange or consideration in such scenarios is infeasible.[267] As a result, a breach of contract claim on the part of an employee who is retaliated against for adhering to company policy is not viable.[268]

As an alternative, courts should apply legal claims of promissory estoppel to any employee that relies on an internal policy, faces retaliation, and then has no outlet for redress because the company policy or program has extended beyond the confines of identifiable legal protections available by statute. While a promise under contract law is not enforceable unless supported by consideration, a promissory estoppel claim renders binding a promise when doing so would avoid injustice.[269] Injustice would be avoided in cases in which the promisor should reasonably expect to induce an action or forbearance by the promisee and that does induce the promisee's action or forbearance.[270] In each of the examples discussed above,

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260 n.320 (2006) ("All Enron employees were required to sign a certificate of compliance confirming that they had read the corporate ethics code and agreed to comply with it.").

[267] *See*, *e.g.*, Hinchey v. NYNEX Corp., 144 F.3d 134, 142 (1st Cir. 1998) ("[I]n order for a contract to have valid consideration, the contract must be a bargained for exchange in which there is a legal detriment of the promisee or a corresponding benefit to the promisor." (alteration in original) (quoting Frankina v. First Nat'l Bank of Bos., 801 F. Supp. 875, 886 (D. Mass. 1992))); Haselrig v. Liberty Mut. Ins., 19 F. Supp. 2d 392, 394 (E.D. Pa. 1998) (defining bargained-for exchange of consideration as "a specific, definite promise by each party to perform some act" (quoting Tuman v. Genesis Assoc., 935 F. Supp. 1375, 1389 (E.D. Pa. 1996))); P.R. Elec. Power Auth. v. Action Refund, 472 F. Supp. 2d 133, 138 (D.P.R. 2006) ("In order for a contract to have valid consideration, the contract must be a bargained-for exchange in which there is a legal detriment of the promise[e] or a corresponding benefit to the promisor." (citing Neuhoff v. Marvin Lumber & Cedar Co., 370 F.3d 197, 201 (1st Cir. 2004))).

[268] *See Hinchey*, 144 F.3d at 142 (noting that no contract can exist if there was a failure of consideration).

[269] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981) (defining promissory estoppel as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

[270] While the precise elements of a promissory estoppel claim vary by state, the definition included here is representative of the common elements contained among the states. *See id.*; *see also* Davis v. Siemens Med. Sols. USA, Inc., 399 F. Supp. 2d 785, 795 (W.D. Ky. 2005), *aff'd*, 279 F. App'x 378 (6th Cir. 2008) (per curiam) (discussing the requirements of a promissory estoppel claim); Skallerup v. City of Hot Springs, 309 S.W.3d 196, 201 (Ark. 2009) ("Promissory estoppel applies when the elements of a contract cannot be shown." (citing

the employer promises non-retaliation for adherence to provisions in the company policy that require internal reporting of either company or legal and regulatory violations.[271] From the standpoint of any employee, the employer's promise of non-retaliation should result in the employer reasonably expecting that employees will rely on this statement and take action based on that specific promise without fear of reprisal.[272] Even if a company policy or compliance program were to not explicitly make the promise of non-retaliation on the face of the document, if such a program requires or mandates any kind of reporting, this mandate should suffice as an implicit promise that the employer will not retaliate against any employee who simply adheres to that policy. Any other interpretation would be injurious to basic notions of fairness and equity, a cornerstone upon which promissory estoppel claims are based.[273]

Numerous public policy reasons justify protecting employees and whistleblowers who report internally, particularly in situations where an employer has essentially required internal reporting and then retaliates against those who follow the policy.[274] In addition to

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Reynolds v. Texarkana Constr. Co., 374 S.W.2d 818, 819–20 (Ark. 1964))); Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 287 (1996) ("The circumstances which may trigger the application of promissory estoppel in this case cannot be tortured into the requisite elements of a traditional contract. A contract and promissory estoppel are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other." (quoting Duke Power Co. v. S.C. Pub. Serv. Comm'n, 326 S.E.2d 395, 406 (S.C. 1985))).

[271] *See supra* Parts II–IV.

[272] *See* Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 993 (2008) (noting that "best practices" for corporate compliance encourage employees to report misconduct); *see also* Kylie M. Huff, Note, *The Case for an FCPA Exception to Dodd–Frank's Anti-Retaliation Provision*, 68 RUTGERS U. L. REV. 867, 879 (2016) (noting that promises of anti-retaliation "assure[] whistleblowers that they will not be retaliated against by their employers for coming forward").

[273] *See*, *e.g.*, Johnson v. Univ. Health Servs., Inc., 161 F.3d 1334, 1340 (11th Cir. 1998) ("[P]romissory estoppel is an equitable doctrine, and as such is intended to counteract the occasional harshness of common law rules . . . ." (citing Simpson Consulting, Inc. v. Barclays Bank PLC, 490 S.E.2d 184, 193 (Ga. Ct. App. 1997))); Smith v. Hi-Speed, Inc., 536 S.W.3d 458, 483 (Tenn. Ct. App. 2016) ("[P]romissory estoppel 'is an equitable doctrine, and its limits are defined by equity and reason.'" (quoting Chavez v. Broadway Elec. Serv., 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007))).

[274] *See, e.g.*, Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 319 (1992) (discussing the benefits to society of whistleblowing); Martin H. Malin, *Protecting the*

the societal benefits that employees and whistleblowers provide in bringing information about fraud and other wrongdoing to light, a strong public policy interest supports the existence of employer protections for whistleblowers, as credible promises of non-retaliation result in better organizational and corporate governance, proper self-regulation, the facilitation of effective internal compliance programs, and more efficient government oversight.[275] Employer anti-retaliation policies also encourage prompt reporting of organizational concerns that result in early and relatively amicable resolutions of potentially unethical, illegal, or dangerous workplace situations.[276] In a practical sense, an employer's interest in "self preservation" also supports enforceable employer-provided protections from retaliation, as opposed to protections from retaliation that are only available when employees report externally to a government agency.[277] If an employee circumvents internal reporting and reports externally because doing so is the only mechanism for ensuring protection from retaliation, the employer is forced to manage the situation by responding to the government agency without first being able to address the problem internally.[278] As one court explained:

> The situation is no better for the responsible employer, who would be deprived of information which may be vital to the lawful operation of the workplace unless and until the employee deems the problem serious enough to warrant a report directly to a law enforcement agency. Clearly, the fundamental public interest in a

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Whistleblower from Retaliatory Discharge, 16 U. MICH. J.L. REFORM 277, 277–78 (1983) (discussing the public policy arguments in support of whistleblowing).

[275] *See* Moberly, *supra* note 272, at 1006–07 (discussing the benefits of anti-retaliation promises as a form of self-regulation within a company).

[276] *See* Verduzco v. Gen. Dynamics, Convair Div., 742 F. Supp. 559, 561–62 (S.D. Cal. 1990) (discussing the public policy benefits of encouraging whistleblowing in the workplace).

[277] Collier v. Superior Court, 279 Cal. Rptr. 453, 456 (Cal. Ct. App. 1991) (discussing the employer's and employee's interest in retaliation protections).

[278] *Id.* (noting that if the employee must report externally, the employer "would be in the unfortunate position of responding to a public agency without first having had an opportunity to deal internally with the suspected problem").

> workplace free from illegal practices would not be served by this result.[279]

Given the important public policy interests at stake in such circumstances, injustice would be avoided if courts upheld employer promises of non-retaliation for adhering to internal policies.

Alternatively, employees should be able to rely on quasi-contract claims when seeking redress for retaliation in the circumstances discussed in this Article, which largely center around instances in which employees have relied on an employer's directive or request in working toward a collective organizational goal. Although the precise elements of a quasi-contract claim differ among jurisdictions, they generally include "elements of reliance (the plaintiff's loss) and . . . unjust enrichment (the defendant's gain)."[280] This gives courts "broad discretion" to provide remedies for aggrieved parties that promote general principles of fairness and justice.[281] Unlike contract law, in which liability is imposed on defendants due to their breach of an agreed-upon obligation, defendants are held liable in quasi-contract cases because "it serves justice to do so," thereby largely rendering the parties' intentions less relevant, except as may be important to determine whether the defendant was unjustly enriched.[282]

Reasonable arguments exist for why the concept of unjust enrichment is applicable to the situations discussed in this Article. To prove unjust enrichment, the following elements typically must be established: "(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of a justification for the enrichment and impoverishment; and (5) the absence of a remedy provided by law."[283] When an

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[279] *Id.*

[280] HOWARD HUNTER, MODERN LAW OF CONTRACTS § 16:9 (2020), Westlaw.

[281] *Id.*

[282] *Id.* § 16:5.

[283] 66 AM. JUR. 2D *Restitution and Implied Contracts* § 11 (2020), Westlaw. Just as promissory estoppel claims vary by state as to their precise elements, so do claims for unjust enrichment. The elements listed here reflect the common elements of unjust enrichment claims among the various states. Some jurisdictions have adopted the elements of quasi contract for unjust enrichment claims, the elements of which would include "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the

employee blows the whistle or adheres to an internal reporting policy by providing the employer with information about suspected or known violations of internal company policy or violations of the law, the "enrichment" obtained by the employer would be that the employer now has the benefit of information that it did not previously possess, information that is valuable to the employer.[284] The employer is able to benefit on several organizational levels by acting upon the information—actions may include: remedying an emerging problem; investigating the issue; obtaining legal counsel or consultants to manage the issue; and opting to self-report to a government agency to obtain leniency, cooperation credit, or other cooperation-based measures that will ultimately mitigate the damage of a potential problem.[285]

While the value of information provided in this way is obviously more challenging to calculate, one can feasibly draw parallels to existing case law analyzing unjust enrichment claims in which plaintiffs recovered when they shared confidential or novel information with others who then adopted and used the information for their own benefit.[286] These cases have largely fallen within the realm of intellectual property.[287] Despite the difference in subject matter from that discussed in this Article, the underlying premise is the same—valuable information that employers would not have known but for the whistleblowing of their employees results in the employer's ability to capitalize on that information in various ways. Such benefits to the employer include the enrichment resulting from

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defendant of the benefit; and (3) the acceptance and retention by the defendant of the benefit under such circumstances as to make it inequitable . . . without the payment of its value." *Id.*

[284] *See* Jennifer M. Pacella, *The Cybersecurity Threat: Compliance and the Role of Whistleblowers*, 11 BROOK. J. CORP. FIN. & COM. L. 39, 45–46 (2016) (discussing whistleblowing's numerous "organizational benefits" to the employer).

[285] *Id.*

[286] *See* Mitchell Novelty Co. v. United Mfg. Co., 199 F.2d 462, 464–65 (7th Cir. 1952) (recounting how a developer of gaming devices recovered following the defendant's use of his ideas in its products); De Filippis v. Chrysler Corp., 53 F. Supp. 977, 980–81 (S.D.N.Y. 1944), *aff'd*, 159 F.2d 478 (2d Cir. 1947) (noting that it is "well settled" that inventors can recover after disclosing their "novel" ideas to someone who subsequently betrays their confidence); Thermo Trim, Inc. v. Mobil Oil Corp., No. 1973-367, 1977 WL 22873, at *4 (W.D.N.Y. Mar. 4, 1977) (holding that a plaintiff can recover if novel information was disclosed in confidence to the defendant and that defendant made use of the information).

[287] *See e.g.*, *Mitchell Novelty Co.*, 199 F.2d at 464–65; *De Filippis*, 53 F. Supp at 980–81; *Thermo Trim, Inc.*, 1977 WL 22783, at *4.

the avoidance of thousands or even millions of dollars in potential compliance infractions, litigation, or other related problems.[288] If an employer that benefits from the employee's information in this way ultimately retaliates against that employee, it can then be said that the employee is "impoverished," as retaliation results in a clear loss whether in the form of termination, harassment, loss of promotion, or another identifiable retaliatory act—especially given the expectation that the employee would be protected from retaliation.[289]

The "connection" element of unjust enrichment would be satisfied if the employee can establish that the employer inflicted retaliation as a result of the employee's transmission of information.[290] It would then be incumbent upon the employer to justify in some way the retaliatory action that resulted therefrom.[291] Finally, no legal remedy exists for whistleblowers, as the types of situations discussed in this Article would emerge in instances in which there are no identifiable legal protections because the parameters of the internal compliance program, policy, or code do not fit squarely within the requirements of the applicable laws. Given the feasibility of arguing that an unjust enrichment exists in such situations, a quasi-contract claim is also a viable alternative for employees to seek redress in this context.[292] These alternatives to contract theories would ensure that notions of fairness and justice are served because employees would then be assured of legal protection in instances in which they have complied with an employer's policy only to suffer retaliation as a result.

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[288] *Cf. supra* notes 274 and 284.

[289] *See, e.g.*, Eisenstadt & Pacella, *supra* note 33, at 671–73 (discussing the common types of retaliation that whistleblowers experience); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1762 (2007) (discussing various forms of retaliation as defined by SOX); *see also* Weichert Co. Realtors v. Ryan, 608 A.2d 280, 285 (N.J. 1992) (noting the requirement for an unjust enrichment claim that a plaintiff provide information with the expectation of receiving something in return).

[290] *See supra* note 283 and accompanying text.

[291] *Id.*

[292] *Id.*

B. TORT-BASED APPROACH: WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Finding that traditional contract law offers few solutions to combat the vulnerable whistleblower problem, we also propose turning to tort law as a potential remedy, at least in a subset of cases. Specifically, the tort claim of wrongful discharge in violation of public policy may offer protection to those whistleblowers who experience the most extreme form of retaliation—termination. This tort claim has been used only sporadically in whistleblower cases for a variety of reasons, but with some new interpretation and stretching of existing doctrine, it may prove beneficial.[293]

1. The Public-Policy Exception's General Application. The wrongful discharge tort is "currently recognized by all but a few states."[294] It is essentially an exception to the at-will employment doctrine that otherwise permits employers to terminate employees for any reason so long as it is not unlawful.[295] As one court stated, "[f]iring for bad cause—one against public policy articulated by constitutional, statutory or decisional law—is not a right inherent in the at-will contract."[296] The tort's purpose is clear—it "protects employees against employer discrimination based on their actions in support of public policy."[297] As Matt Bodie explains, the goal is to encourage employee actions that benefit society at large: "[I]t reminds us that employees are not only participants within their firm, but also citizens within a larger community. Courts have thus focused on adverse employer actions that 'strike at the heart of a

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[293] *See infra* notes 303–306 and accompanying text.

[294] William R. Corbett, *Finding a Better Way Around Employment at Will: Protecting Employees' Autonomy Interests Through Tort Law*, 66 BUFF. L. REV. 1071, 1084 (2018) (citing RESTATEMENT (THIRD) OF EMP'T LAW § 5.01 cmt. a (AM. LAW INST. 2015)).

[295] *Id.* at 1074 ("[F]orty-nine states in the nation adhere to the 'doctrine' of employment at will, pursuant to which employers, in the absence of a contractual or statutory restriction, may fire employees 'for a good reason, a bad reason, or no reason at all.'") (footnote omitted).

[296] Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 589 (2004) (quoting Murcott v. Best W. Int'l, Inc., 9 P.3d 1088, 1095–96 (Ariz. Ct. App. 2000)).

[297] Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment at-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 249–50.

citizen's social rights, duties, and responsibilities.'"[298] While courts are somewhat reticent to interfere in an employer's business decisions, this tort is most effectively used when the employee's actions were clearly "socially advantageous" and are typically relied upon for activities such as serving jury duty, participating in the criminal justice process, abiding by professional ethics codes, and the like.[299] The Arkansas Supreme Court explained the circumstances that would give rise to this tort as follows: "[P]ublic policy is violated when the reason for the discharge is 'so repugnant to the general good as to deserve the label "against public policy."'"[300]

When enforcing a claim for wrongful discharge in violation of public policy, courts typically look for a "clearly articulated, well established or mandated" policy on which to rely.[301] Courts resist invitations to invent public policy or determine its existence based on common sense.[302] Instead, "[t]he sources of public policy typically encompass constitutions, statutes, judicial decisions, and administrative rules, regulations, and decisions" and "in certain situations, the code of ethics of a profession."[303]

Unsurprisingly, there is no shortage of cases examining whether whistleblowing constitutes a protected activity under the public policy exception to at-will employment. Whistleblowing typically involves bringing to light unlawful activity, an action that itself benefits the public interest: "As recognized by courts considering

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[298] *Id.* at 250 (footnote omitted) (quoting Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878–79 (Ill. 1981)).

[299] *Id.* ("As described by one court, 'public policy must concern behavior that truly impacts the public in order to justify interference into an employer's business decisions.'" (quoting Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996))).

[300] Michael D. Moberly, *Cranking the Wrongful Discharge Ratchet: Judicial Abrogation of Legislative Limitations on the Public Policy Exception*, 24 SETON HALL LEGIS. J. 43, 66 (1999) (quoting Smith v. Am. Greetings Corp., 804 S.W.2d 683, 684 (Ark. 1991)).

[301] Cavico, *supra* note 296, at 590.

[302] *See id.* at 591 ("One court underscored that 'only in the most extraordinary circumstances should the courts of this State impose their judgment in an area which, in the first instance, is clearly a legislative function.'" (quoting Guy v. Mut. of Omaha Ins., No. W1999-00942-COA-R9-CV, 2001 WL 204485, at *7 (Tenn. Ct. App. Mar. 1, 2001), *aff'd*, 79 S.W.3d 528 (Tenn. 2002))).

[303] *Id.* at 590 (citing Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980) ("Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.").

this issue, '[p]ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.'"[304] Courts tend to protect employees who report violations of law that involve the "health and welfare of the public."[305] The majority of cases in which whistleblowers successfully rely on this tort involve workplace safety, public health, and illegal or criminal activity by the employer or government officials.[306]

There is some disagreement in the courts as to whether the whistleblower must expose an actual legal violation or if a good faith belief in such a violation is sufficient. As Frank Cavico explains, the unearthing of unlawful activity is generally essential to these claims, but "the conception of the common law doctrine is potentially much more expansive so as to encompass moral and ethical wrongdoing, presuming, of course, such misconduct, even though not technically illegal, is serious enough to contravene the public policy of the state."[307] Nonetheless, in many jurisdictions a

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[304] *Id.* at 592 (alteration in original) (quoting Dahl v. Combined Ins. Co., 621 N.W.2d 163, 167 (S.D. 2001)).

[305] *Id.* at 593. Cavico notes that not all states have adopted a public policy exception for whistleblowers, and some have adopted only narrow approaches. *Id.* at 593 n.257 (citing several cases to demonstrate this); *see, e.g.*, Szaller v. Am. Nat'l Red Cross, 293 F.3d 148, 153 (4th Cir. 2002) ("Maryland does not provide 'a general "whistle blower" cause of action' for an at-will employee who reports a violation of federal or state law. And Congress has not created one either. Therefore, it would be inappropriate for a federal court to create such a protection by expanding the wrongful discharge cause of action to all employees who are terminated for reporting potential illegalities." (citation omitted)); Terry v. Legato Sys., Inc., 241 F. Supp. 2d 566, 570 (D. Md. 2003) ("Maryland does not provide a general 'whistle-blower' cause of action for an at-will employee who reports a violation of federal or state law."); Storey v. Patient First Corp., 207 F. Supp. 2d 431, 454–55 (E.D. Va. 2002) (finding that no Virginia statute established a public policy with which the plaintiff's termination interfered); King v. Donnkenny, Inc., 84 F. Supp. 2d 736, 740 (W.D. Va. 2000) ("[T]here is no exception for employees who are terminated for merely 'blowing the whistle' on an employer for violating generalized regulatory mechanisms for business and industry."); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (establishing a "narrow exception" to the employment-at-will doctrine only for "the discharge of an employee for the sole reason that the employee refused to perform an illegal act").

[306] Cavico, *supra* note 296, at 592–93 (describing instances of whistleblowers successfully using this cause of action).

[307] *Id.* at 594. Cavico points to one jurisdiction whose "public policy whistleblowing cause of action . . . include[s] 'the reporting of illegal *or improper* conduct.'" *Id.* (quoting Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491, 493 (Ill. 1998)).

whistleblower must point to an actual violation of the law (as opposed to the "employee's reasonable or good faith belief") in order to rely on the public policy exception under tort law.[308] However, as Cavico points out, in at least one jurisdiction the court held that the existence of a claim "did not turn on whether a law or regulation had been violated but rather on whether an important public policy interest embodied in the law benefited from the whistle-blowing."[309] The court was essentially focused on "whether [the employee's] complaints addressed an important public policy interest."[310] This approach would be most useful in cases involving a whistleblower report of a violation of the compliance code where the violation is not itself criminal or unlawful and, as a result, typical legal protections for whistleblowers do not apply.

2. Applying the Exception to Compliance Whistleblowers. Expanding application of the wrongful discharge tort could provide a useful form of protection for employees who report violations of company compliance codes, whether they are reporting violations of EEO codes, fraud and securities codes, or anti-bribery/corruption codes. First, the employee's behavior is socially advantageous when he or she reports discriminatory, corrupt, or fraudulent behaviors to the employer (and perhaps to government agencies or the general public). Even if such acts do not necessarily rise to the level of illegal activity, the unearthing of improper, immoral, or internally prohibited conduct serves the public good defined broadly, as society as a whole, and narrowly in terms of the particular workplace at issue. In contrast, a legal system that permits the termination, demotion, or some other form of punishment of those who report this conduct—in contravention of company promises to protect or not retaliate against the whistleblower—will likely detrimentally affect both the workplace and society-at-large. If whistleblowers are routinely disciplined or terminated for reporting prohibited conduct, they will simply stop coming forward, leading eventually to an increase in the bad behavior—meaning an increase in discrimination, fraud, or corruption.[311] Moreover, the suppression of

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[308] *Id.* at 597.

[309] *Id.* (quoting Murcott v. Best W. Int'l, Inc., 9 P.3d 1088, 1096 (Ariz. Ct. App. 2000)).

[310] *Id.* (alteration in original) (quoting *Murcott*, 9 P.3d at 1096).

[311] *See* Eisenstadt & Geddes, *supra* note 94, at 184–85 (describing how retaliation ensures potential whistleblowers remain silent).

good faith complaints through threat of retaliation does not eliminate the anger or other emotions that prompt whistleblowers to come forward.[312] Instead, those emotions fester in the employee herself, are often spread to co-workers who cannot do anything to improve the situation, and can create a toxic workplace environment overall.[313] This spread of negative emotions has long-term detrimental health and psychological impacts on both employees and their friends and family.[314] Allowing retaliation against whistleblowers clearly impacts the public's health and welfare.

Benefits exist to relying on the wrongful discharge tort to protect whistleblowers instead of a contract term—even of an implied contract. Unlike a contractual provision, the employee cannot bargain away or be coerced into relinquishing the wrongful discharge claim. Were whistleblowers to turn to contractual provisions in individual employment contracts or seek to rely on company policies promising to protect those who report violations of the company code, we suspect that it would not take long for companies to begin inserting language (assuming they do not already) that makes clear that such promises are not legally enforceable.[315] In contrast, the tort is focused on protecting the public good and is not solely about the individual rights of a particular employee. As a result, the tort of wrongful discharge can withstand efforts by employers to insulate themselves from liability. As William Corbett has explained in the context of protecting employees' autonomy interests against employer incursions: "the tort, unlike the proposed default rule based on an implied

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[312] *Id.* at 185 ("It is uncontroversial to imagine that anger (and humiliation, fear, frustration and a host of other negative emotions) is a likely result when one feels himself to be a victim of harassment or some other form of discriminatory conduct. . . . [T]he anger continues to negatively affect the employee's mental and physical state regardless of the fact that it has been suppressed.").

[313] *Id.* at 186 (describing how suppressed anger due to fears of retaliation can spread to affect the workplace overall).

[314] *Id.* at 188 ("Those harms are real, having been studied and documented, and they take both psychological and physical forms and impact both the victims themselves as well as the workplace overall.").

[315] *See* Fischl, *supra* note 261, at 195 (noting that employers responded to "the so-called 'employee handbook' exception to employment at will . . . by attempting . . . to opt back into the employment-at-will rule via disclaimers of job security").

understanding, cannot be divested by an employer's supposed bargaining—and more likely coercion. This is the paramount advantage because a protection that can be taken away by one party is not much protection at all."[316]

Importantly, for the wrongful discharge argument to be useful to compliance whistleblowers, courts must extend the doctrine somewhat.[317] In general, courts look to constitutional provisions, statutes, judicial precedent, and regulations as "sources of public policy" on which to base the wrongful discharge tort.[318] In limited circumstances, courts have looked to "the code of ethics of a profession" as an additional source of public policy.[319] In the case of whistleblowers adhering to internal policies, courts would be asked to consider a company's EEO, fraud, or anti-corruption code of conduct as a source of public policy, too. A profession's ethics code creates clear expectations about industry standards and ethical behavior; the same is true for a company's compliance code. As described above, these codes explicitly prohibit conduct, typically encourage or require the reporting of violations of the code, and routinely promise protection for those who report such conduct.[320] While this constitutes a small expansion of existing doctrine, it tracks existing approaches to establishing public policy and would allow for a tort-based approach to hold companies accountable for their policies. If companies reap the benefits of an internal whistleblower alerting management to EEO violations, potential fraud, and possible corruption, those whistleblowers should, in turn, be protected from retaliation. Whistleblowers are explicitly playing by company rules and providing important benefits to the company and society at large.[321] The wrongful discharge tort can and should

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[316] Corbett, *supra* note 294, at 1084 (footnote omitted).

[317] *See id.* at 1076 (arguing that the wrongful discharge tort "although inadequate for the task [of protecting employee autonomy interests] in its current form, can be modified and fortified to fulfill this role"). We similarly argue that the tort can be modified slightly to protect whistleblowers in our compliance-focused society.

[318] Cavico, *supra* note 296, at 590.

[319] *Id.* (citing Pierce v. Ortho Pharm. Corp., 417 A.2d 512, 512 (N.J. 1980) ("Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.")).

[320] *See supra* Sections II.B, III.B, & IV.B.

[321] *See supra* notes 274 and 284.

be expanded slightly to offer protection to these vulnerable whistleblowers.

C. REGULATORY CHANGES CAN PROTECT WHISTLEBLOWERS FOLLOWING INTERNAL POLICIES

In addition to individual solutions offered by alternatives to contract theories and tort law, we also propose regulatory change as a solution with broad, collective benefits. From a legislative and regulatory perspective, it ultimately falls to Congress to protect whistleblowers who report wrongdoing yet are not protected from retaliation for disclosing the violations under state or federal law.[322] In the absence of congressional action, other options exist to increase protection indirectly; such options include modifications to the U.S. Sentencing Guidelines for Organizations (the Sentencing Guidelines), the DOJ Evaluation of Corporate Compliance Programs, and the Principles of Federal Prosecution of Business Organizations within the Justice Manual. Given their power to shape the internal compliance function within companies, amending these sources could significantly benefit whistleblowers.

The Sentencing Guidelines, promulgated by the U.S. Sentencing Commission, apply specific sentencing ranges for corporations, partnerships, non-profit entities, and other organizational units that are convicted of criminal acts.[323] The Sentencing Guidelines delineate a number of considerations that can influence the severity of the sentence received by an organization found criminally liable due to criminal conduct committed by its employees.[324] In particular, if the organization has a compliance and ethics program[325] that meets effectiveness standards as defined in the Sentencing Guidelines, the organization may receive a reduced

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[322] *See, e.g.*, Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 998 (M.D. Tenn. 2012) ("[I]t falls to Congress to protect individual FCPA whistleblowers who are not otherwise protected from retaliation under state or federal law for disclosing FCPA violations.").

[323] *See* U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 (U.S. SENTENCING COMM'N 2018) (explaining specific sentencing instructions for different organizations).

[324] *See id.* § 8C2.5 (outlining the considerations that influence sentence severity).

[325] The Sentencing Guidelines define a "[c]ompliance and ethics program" as "a program designed to prevent and detect criminal conduct." *Id.* § 8B2.1, cmt. 1.

sentence.[326] An "effective" program includes—among other factors—an organization establishing, monitoring, and enforcing compliance policies and procedures for its employees and agents, assigning program responsibility to high-level personnel, and taking appropriate steps to address offenses when detected.[327]

The Sentencing Guidelines ignited "a watershed moment for the field of compliance and ethics,"[328] as the Sentencing Guidelines offered legal incentives and financial benefits for companies to adopt and maintain effective compliance programs, and firms "quickly realized" these benefits.[329] Since the Sentencing Guidelines' release in 1991, the contemporary compliance function in organizations has massively expanded in scope, organization, budgets, and staffing.[330]

Given its ability to shape the internal compliance function, the Sentencing Guidelines could influence corporate behavior in connection with whistleblower activity.[331] Upon its next revision, the Sentencing Guidelines could be modified to specifically address whether a company adequately protects whistleblowers who report conduct that seemingly violates internal compliance policies and to determine the sufficiency of that company's compliance program. Such a modification may significantly affect willingness to engage

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[326] *Id.* § 8C2.5(f) (noting a reduced sentence for offering effective compliance and ethics programs); *see also* Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 655–56 (2007) ("As a result of these Guidelines, corporations quickly realized the benefits offered by corporate compliance programs. Such programs could not only deter criminal activity within the corporation, but also lessen the sentence imposed on the corporation if criminal activity occurred." (footnotes omitted)).

[327] *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)–(c) (U.S. SENTENCING COMM'N 2018); *see also* Joan H. Krause, *Regulating, Guiding, and Enforcing Health Care Fraud*, 60 N.Y.U. ANN. SURV. AM. L. 241, 255 (2004) (discussing features of "effective" compliance programs).

[328] Paul E. McGreal, *Caremark in the Arc of Compliance History*, 90 TEMP. L. REV. 647, 654 (2018).

[329] *See* Finegan, *supra* note 326, at 656.

[330] Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2084, 2100–03 (2016) (describing the expansion of the role of contemporary compliance programs since the Sentencing Guidelines' passage).

[331] CRIMINAL DIV., U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2020) [hereinafter DOJ EVALUATIONS], https://www.justice.gov/criminal-fraud/page/file/937501/download (discussing how the Sentencing Guidelines evaluate corporate behavior).

in retaliatory conduct as a response to whistleblowing within an organization.

The Department of Justice's Evaluation of Corporate Compliance Programs provides another influential federal source delineating relevant factors for evaluating corporate compliance programs.[332] The guidance document lists topics that the DOJ Criminal Division has found germane in its compliance program evaluations, and it is organized around three questions: "First, is the program well-designed? Second, is the program effectively implemented? And, third, does the compliance program actually work in practice?"[333] Section I.D of the guidance document notes, "Prosecutors should assess whether the company's complaint-handling process includes proactive measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers."[334] Given its existing emphases on "processes to protect whistleblowers" and related "fear of retaliation," this section could be expanded further to identify adequate protection for whistleblowers who report conduct that conflicts with internal corporate policies as a key characteristic of an effective compliance program.[335] Such a revision would further signal the importance of whistleblower protection to the private sector.

Finally, the Justice Manual's Principles of Federal Prosecution of Business Organizations provides guidance to U.S. Attorneys' Offices and reflects DOJ policy, mirroring the Evaluation of Corporate Compliance Programs approach.[336] Justice Manual section 9-

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[332] *See id.* at 2–4 (discussing the "fundamental questions" prosecutors must ask to determine the effectiveness of compliance programs).

[333] Press Release 19-452, U.S. Dep't of Justice, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019), https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs.

[334] DOJ EVALUATIONS, *supra* note 331, at 6.

[335] *Id.*

[336] *See, e.g.*, U.S. Dep't of Justice, U.S. Attorney's Manual § 9-28.000, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.200 (last revised July 2019); *see also* Wick Sollers, Dan Sale, Christina King & Kelli Gulite, *DOJ Issues Updated U.S. Attorneys' Manual*, ABA (Feb. 5, 2019), https://www.americanbar.org/groups/litigation/committees/criminal/practice/2019/doj-issues-updated-us-attorneys-manual/ (discussing updates to the Manual).

28.800.B provides, "Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it."[337] This language could be expanded to directly address the issue of whistleblower retaliation for reporting internal compliance policy violations as a relevant factor when evaluating an organization's corporate compliance program. Harmonizing with the revisions to the Sentencing Guidelines and the Evaluation of Corporate Compliance Programs, this modification of DOJ policy would be another soft law approach, in the absence of congressional action, to raise awareness and deter companies from retaliating against their employees and other agents for reporting compliance policy violations.[338]

VI. CONCLUSION

This Article has analyzed, across three separate contexts, instances where an employer's internal policies, codes of ethics, compliance programs, or other organizational governing documents exceed the requirements of federal laws and regulations, leaving those who report wrongdoing vulnerable to retaliation without legal protection. In the EEO industry, compliance has boomed and paved the way for a plethora of policies that promote workplace diversity and prohibit instances of sexual harassment and discrimination, especially in light of the #MeToo and Black Lives Matter movements.[339] In the anti-fraud and securities regulation domain, the 1990s amendments to the Sentencing Guidelines and the passage of legislation like SOX and Dodd–Frank, as well as these laws' enhanced whistleblower protections, have each contributed to the steady growth of compliance initiatives in this sector.[340] Finally, the FCPA's enactment and a steady stream of anti-bribery initiatives have caused a notable uptick in the anti-corruption

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[337] U.S. Dep't of Justice, U.S. Attorney's Manual § 9-28.000, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.200 (last revised July 2019).

[338] DOJ EVALUATIONS, *supra* note 331, at 1.

[339] *See supra* Section II.A.

[340] *See supra* Section III.A.

compliance industry, resulting in expansive corporate anti-bribery and anti-corruption internal policies.[341]

The steady growth of compliance initiatives in these sectors has led to the vast expansion of organizational policies that unfortunately exclude from retaliation protections a universe of potential whistleblowers who adhere to their employers' policies only to be retaliated against by a rogue constituent.[342] Such situations exist because compliance, as defined by these internal policies, exceeds the letter of the law.[343] The most notable and on-point federal statutes that would protect these employees and whistleblowers have not caught up with the vast and widespread adoption of compliance policies and programs.[344] To remedy this problem, we propose three solutions.

The first is based on contract law, namely alternatives to contract theories. While it is difficult to successfully argue that a compliance program or internal policy is a binding contract, doctrines like promissory estoppel and quasi contract—which include elements of reliance and unjust enrichment—are viable options for vulnerable whistleblowers who are seeking legal redress.[345] Second, a tort-based approach using a claim of wrongful discharge in violation of public policy offers a potential remedy. Whistleblowing has long been established as a strong public policy consideration that would justify the application of this theory to the examples set forth herein.[346] Finally, regulatory changes would offer widespread, collective protection. In addition to congressional action, modifications to the Sentencing Guidelines, the DOJ Evaluation of Corporate Compliance Programs, and the Principles of Federal Prosecution of Business Organizations would incentivize companies to protect vulnerable individuals when the requirements of their employers' compliance policies and programs exceed the boundaries of the law.[347] While the growth of compliance programs, codes, and departments is a positive step in many ways, this development

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[341] *See supra* Section IV.A.

[342] *See supra* Sections II.B, III.B, IV.B.

[343] *See supra* Parts II–IV.

[344] *Id.*

[345] *See supra* Section V.A.

[346] *See supra* Section V.B.

[347] *See supra* Section V.C.

makes those who report wrongdoing vulnerable to retaliation without legal protection. Through alternatives to contract theories, tort law, and soft law initiatives, we propose means of righting this wrong.