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A MEASURED ANALYSIS OF THE WHISTLEBLOWER PROVISIONS OF THE 2015
FAST ACT (FIXING AMERICA'S SURFACE TRANSPORTATION ACT)

ERIC D. LOVE
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Reviewed and approved* by the following:

Paul Whitehead
Professor of Practice, Labor and Employment Relations
Thesis Supervisor

Stan Gully
Professor, Human Resource Management
Honors Adviser

* Signatures are on file in the Schreyer Honors College.

ABSTRACT

In recent years, whistleblowers have become an important tool in the regulatory apparatus to combat fraud. Statutes designed to combat fraud that include whistleblower provisions are often reactionary, being enacted in response to major fraud scandals that gain public attention. Similarly, scholarship on whistleblower statutes has been reactionary, with much of the work being done in this field focused on critical reviews of singular whistleblower statutes. These analyses have provided insight into which of various mechanisms within a given whistleblower statute contribute to the failure or success of that statute. However, this singular approach has made it difficult to take the insights learned from any one law and apply them more generally to other whistleblower statutes. This paper seeks to synthesize the lessons gained from these works in order to develop a framework that encompasses the collective knowledge of the field on various mechanisms found in whistleblower statutes. The framework developed in this paper will focus on how regulators can employ the best mechanisms to encourage individuals to blow the whistle, and this paper will first create the framework based on lessons from the literature. The paper will then put that framework to the test by analyzing the whistleblower provisions in the newly enacted Fixing America's Surface Transportation Act (FAST). By comparing the best mechanisms of the framework against those included within the whistleblower provisions of The FAST Act, this paper will predict how each mechanism may contribute to the ability of the FAST Act to root out and remedy practices dangerous to the public.

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Chapter 1

Introduction

Recent years have witnessed a rapid evolution in how U.S. policymakers view the value of whistleblowing. This evolution is evidenced by how capriciously the government has handled some recent notable whistleblower cases. The case of CIA employee John Kiriakou is one example of how unpredictably the government responds to whistleblowers. In 2007, Kiriakou disclosed that the CIA had tortured detainees using waterboarding techniques. For his disclosures, Kiriakou was charged with violating the Intelligence Identities Protection Act and the Espionage Act. He was found guilty and sentenced to over two years in prison as a result of his speaking truth to power. Kiriakou was issued his sentence on January 25, 2013, and served his prison term until February 3, 2015. In September of 2016, less than two years after his release from prison, Kiriakou was awarded the Sam Adams Award for Integrity, an award given by retired CIA officers. Paradoxically, this move was backed by the Obama Administration.¹ This reversal of fortune is just one illustration of how uncertain our nation is about the proper response to whistleblowing. Scholarship on this topic is lacking, and that perhaps is due to the fact that whistleblowing pits our values of loyalty and righteousness against each other, leading many to feel conflicted on how whistleblowers should be received by society.

More closely studied are the whistleblowing cases that have recently rekindled the debate regarding the balance of our security and privacy. The most recent high-profile whistleblower

¹ According to a press release issued by the Sam Adam's Award Foundation. <<http://samadamsaward.ch/john-kiriakou/>>

case of this kind was that of Edward Snowden. In a series of disclosures from 2013 through 2014, Snowden, a CIA employee, released over 7,000 classified documents to trusted American journalists. These documents revealed that U.S. Intelligence agencies have the capability to remotely surveil individuals using their cellphones, computers and other personal electronic devices.² Further, these documents showed that government agents were able to access the text messages, call log and web history of individuals under U.S. surveillance.³ Certainly, the most controversial evidence in the Snowden releases was the revelation that U.S. Intelligence agencies had actually used these capabilities to surveil foreign leaders, the citizens of foreign nations and U.S. citizens.⁴ Fearing retaliation from the U.S. government, Snowden fled the country seeking asylum in Russia following his initial disclosures to the press. The case of Edward Snowden and other whistleblowing cases with national security implications have been the subject of some scholarly works.⁵ However, whistleblowing cases do not always involve federal employees who disclose government secrets. There are private sector whistleblowers who have reported corporate misconduct, such as Sherron Watkins and Cynthia Cooper who exposed the fraud of Enron.⁶

Interestingly, despite the intermittent opposition of the federal government to whistleblowing within their own ranks, the U.S. government has developed programs that

² Wu, Amy, Will WK Ma, and Wendy WL Chan. "“Whistleblower or Leaker?” Examining the Portrayal and Characterization of Edward Snowden in USA, UK, and HK Posts." *New media, knowledge practices and multiliteracies*. Springer Singapore, 2015. 53-66.

³ Di Salvo, Philip, and Gianluigi Negro. "Framing Edward Snowden: A comparative analysis of four newspapers in China, United Kingdom and United States." *Journalism* 17.7 (2016): 805-822.

⁴ Poitras, Laura, and Glenn Greenwald. "NSA whistleblower Edward Snowden: “I don’t want to live in a society that does these sort of things”—video." *The Guardian*, June 9 (2013).

⁵ Glenn Greenwald. (2014) *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State.*; Stephen Vladeck (2007). *The Espionage Act and National Security Whistleblowing after Gacetti Left out in the Cold – The Chilling of Speech, Association, and the Press in Post-9/11 America.*

⁶ TIME Magazine (2002). <http://content.time.com/time/magazine/article/0,9171,1003998,00.html>

employ whistleblowers to combat private sector fraud.⁷ These federal whistleblower programs encourage whistleblowing as a means of regulatory enforcement by using several mechanisms to incentivize employees to disclose the wrongdoing of their employer.

Private sector whistleblower laws tend to be reactionary in nature. The False Claims Act was amended in 1986 in response to reports of fraud among defense contractors. Sarbanes-Oxley was passed in 2002 in response to the Enron and WorldCom Scandal. Dodd-Frank was passed in response to the 2008 financial crisis caused by reckless conduct in the financial industry. Most recently, the whistleblower provisions in the Fixing America's Surface Transportation Act were largely in response to scandals in the automobile industry such as the Volkswagen emission scandal.

Since the turn of the century, the federal government has increasingly pursued these programs as a means of enhancing regulatory enforcement. However, these whistleblower schemes are not universally embraced by all government officials. Notably, Senate majority leader Harry Reid criticized the concept of offering financial incentives for whistleblowers as a policy of "rewards for rats."⁸ This paper will examine the literature that focuses on the effectiveness of regulations that use whistleblower programs as an enforcement mechanism; it will look especially at the writings which scrutinize the viability of using financial incentives as a means to encourage whistleblowing. Further, this paper will look to identify the mechanisms that have been the most successful at encouraging individuals to make a report. Based on the lessons gleaned from the analysis of work already done in this field, Chapter 3 of this paper will seek to create a framework using the mechanisms that are most effective at encouraging

⁷ Schultz and Harutunyan (2015). Whistleblowing to combat fraud.

⁸ 144 Congressional Record (1998). Statement of Senator Harry Reid.

whistleblowers to come forward and make disclosures to an agency. Chapter 4 of this paper will then apply that developed framework to a new whistleblower law which was passed as part of the Fixing America's Surface Transportation (FAST) Act. After analyzing the whistleblower provisions in The FAST Act through the lens of the newly created framework, this paper will make predictions on how effective we can expect this law to be at encouraging employees to blow the whistle.

Chapter 2

Literature Review

Whistleblowing has been defined by scholars in the academic community using varied language. Johnson describes whistleblowing as being comprised of four characteristics:⁹

- An individual acts to make information public.
- The information is disclosed to an outside organization and becomes a part of the public record.
- The information disclosed has to do with wrongdoing within the organization being reported.
- The individual doing the reporting is a member of the organization and not an outside member of the public.

Other scholars have defined whistleblowing as the disclosure by organization members, current or former, of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.¹⁰ Jubb, arguing that other definitions of whistleblowing are highly dependent on the purpose of the author employing the term, proposed defining whistleblowing as a disclosure on the public record by a person with privileged access to the organization's data or information about illegality or wrongdoing which implicated the organization to an external entity.¹¹

If we compare these definitions, there are disparities among them worth noting. It is in dispute whether internal reporting is a sufficient condition in order for reporting activity to be considered whistleblowing or if an external report is a necessary condition for a disclosure to be

⁹ Johnson, R. (2003). *Whistle-blowing: when it works – and why*. Boulder, CO: Lynne Rienner

¹⁰ Near and Miceli (1985). *Organizational dissidence: the case of whistleblowing*.

¹¹ Jubb, P. (1999) *Whistleblowing: A restrictive definition and interpretation*.

given this status. Additionally, there is some disagreement as to whether an individual doing the reporting must have been affiliated with the organization at some point or if the reporter of the wrongdoing can be apart from the organization entirely. Finally, it is unclear whether the reported information must be made public in order for a disclosure to qualify as whistleblowing activity.

While these definitions diverge at points, we see several commonalities across definitions. In all the definitions, there are three actors involved in the whistleblowing process: the reporter who blows the whistle, the organization that is being reported and the organization or entity to whom the report is being made. Another common element is the requirement that the behavior being reported must be considered wrong in order for that reporting activity to be considered whistleblowing.

Looking beyond the academic community, we see that individual statutes and federal regulations have their own unique definitions regarding what activity constitutes whistleblowing and who qualifies as a whistleblower.¹² Similarly, the Courts have weighed in on defining both the act of whistleblowing and the qualities of a whistleblower.¹³ The array of definitions, which seem to depend on the context in which these terms are being employed, supports the claim of Jubb that each definition says more about an author's purpose than it describes whistleblowing and whistleblowers in general terms.¹⁴

¹² Sarbanes-Oxley Act of 2002 Sec. 806.; Federal False Claims Act of 1986 Sec. 3730.; Fixing America's Surface Transportation Act of 2015 Sec. 24352(6).; Internal Revenue Code (IRC) 7623(b).; Dodd-Frank Wall Street Reform and Consumer Protection Act Sec. 23(7).

¹³ US. 5th Circuit. *Asadi v. Energy (USA), L.L.C* (2013). US. Supreme Court. *Garcetti v. Ceballos* (2006).

¹⁴ See note 11, Jubb.

What is clear is that much of the inquiry into the topic of whistleblowing has focused on the employee who blows the whistle.¹⁵ This is for good reason considering most of the relevant laws concerning whistleblowing activity are geared toward the role of the employee in the process.¹⁶ Although some academics have argued that whistleblowing activity is not something to be encouraged,¹⁷ most acknowledge that whistleblowers can play a fundamental¹⁸ or at least a supplemental¹⁹ role in regulations designed to combat fraud.

For policy-makers who wish to employ the use of whistleblowers as part of a regulatory enforcement scheme, there are a variety of mechanisms at their disposal to encourage whistleblowers to come forth. The cost and benefits of each of these mechanisms has recently begun to be a substantial topic of study as academics have crowded to scrutinize new regulations developed by policy-makers. If we glean the literature on laws such as the FCA, Sarbanes-Oxley, Dodd-Frank and other regulations which include whistleblower provisions, there are several themes that have developed that policy-maker should be cognizant of when devising regulations of this nature.

In large part, it seems there is a consensus that anti-fraud regulatory schemes that seek to encourage employee whistleblowing activity must, at a minimum, offer a protection from retaliation –whether in the form of reinstatement²⁰ or the ability to recover damages.²¹ Scholars

¹⁵ Near and Miceli (1984). The relationship among belief, organizational position and whistleblowing status: A discriminant analysis; Johnson and Chape (2005). How Can a Career Counselor Work with a Whistleblower?; Feldman and Lobel (2010). Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality.

¹⁶ See note 12; several of these acts explicitly mention the application of these provisions to the employee of an organization that is reported for wrongdoing.

¹⁷ M. Malin (1983). Protecting Whistleblowers from Retaliatory discharge.

¹⁸ Callahan and Dworkin (2000). The State of State Whistleblowers.

¹⁹ Kovacic (1996). Whistleblower bounty lawsuits as monitoring devices in government contracting.

²⁰ Earle and Madek (2007). Mirage of Protection under Sarbanes-Oxley: A Proposal for Change.

²¹ Matt Vega (2009). Sarbanes-Oxley and Culture of Bribery: Expanding the scope of private Whistleblower suits overseas.

have examined the effectiveness of these protections. Several of them have concluded that these protections often fail to achieve their intended purpose of preventing an employee whistleblower from incurring a cost as a result of blowing the whistle.²² Damage to reputation and future employment prospects are examples of costs that regulators have seldom been able to address when developing protections for whistleblowers within their regulatory enforcement schemes.²³ Even among those who are skeptical of the value of encouraging future employees to become whistleblowers, there is recognition of the need to protect individuals who have already disclosed the wrongdoing of their employer from being retaliated against.²⁴

The latest in regulatory enforcement statutes reflects the views of the academic community on protections for employees. Sarbanes-Oxley, Dodd-Frank and other recently enacted regulations designed to utilize whistleblower employees as part of the enforcement apparatus provide remedial measures for employees who experience retaliation as a result of blowing the whistle, even if those protections are underwhelming in practice. Even further, some of these regulatory enforcement schemes offer additional mechanisms to compel whistleblowing—a financial incentive.²⁵

The modern US concept of offering financial motivation or bounties to private parties who assist in fraud recoveries can be traced back to the nineteenth century and the False Claims Act (FCA). Passed during the Civil War in 1863, the FCA was designed in response to reports of rampant fraud among defense contractors who provided ammunition and supplies to the

²² Devine and Aplin (1988). Whistleblower protection: Gap Between Law and Reality.; B. Martin (2003). Illusions of Whistleblower Protections.; Earle and Madek see note 20.

²³ Dozier and Miceli (1985). Potential Pedictors of Whistleblowing: A prosocial behavior perspective.

²⁴ Malin, see note 17.

²⁵ See note 12; several of these statutes make mention of offering financial awards to whistleblowers who make a qualifying disclosure

Union during the war.²⁶ At inception, the FCA was not designed with the intention of deputizing employees like its contemporary counterparts. As the chief architect of the law, Michigan Senator Jacob Howard stated, the federal statute was designed with the purpose of “setting a rogue to catch a rogue.”²⁷

The broad language of this law permitted an individual to bring a lawsuit on behalf of the United States government when there was evidence that a defense contractor was submitting false claims for the government to pay out. These types of suits, known as *qui tam* lawsuits, originated in England and can be traced back to as early as 1318.²⁸ The term *qui tam* comes from the Latin phrase *qui tam pro domino rege quam pro si ipso in hac parte sequitur* meaning “who sues on behalf of the king as well as for himself.” Where resources to enforce the will of the king were in short supply, *qui tam* laws incentivized private citizens to enforce the rule of law on his behalf.

Under the FCA, the individual bringing the *qui tam* suit (the “reporter”) would have to bear the cost of litigation, but if reporters were successful in proving fraud, the fraudster was required to pay double the damages caused to the United States in addition to a fine of \$2,000 per false claim. In order to incentivize this litigation, the provision stated that the “relator” or the person who brought the lawsuit would receive half of the amount of damages that they recovered on behalf of the United States.²⁹ There is an overwhelming conclusion among scholars who have

²⁶ *Rainwater v. United States* (1958).

²⁷ Congressional Globe, 37th Congress, 3rd Session, 955-56. Remarks of Senator Howard.

²⁸ The Statutes of the Realm, 12 Edward II, Ch. 6 (1318), pp 177-178. As quoted by Charles Doyle for the Congressional Research Service (2009).

²⁹ J. Helmer (2013). False Claims Act: Incentivizing Integrity for 150 years for Rogues, Privateers, Parasites and Patriots.

studied the history of the FCA that the FCA of 1863 was well intentioned but largely ineffective.³⁰

It was not until over 100 years later and the revisions to the FCA in 1986 that scholars would herald this regulatory enforcement scheme as the gold standard of whistleblower protection and bounty rewards.³¹ Scholars are justified in this claim considering that the FCA has been the most effective law at recovering federal dollars lost to fraud when compared to other regulatory enforcement statutes; most of these funds were recovered under the FCA in the last two decades alone.³² There are three key differences between the post-1986 FCA and its original design.³³ First, the award amount for relators under the 1986 version of the statute is limited to 15-30%. Second, the Department of Justice has the authority to control or terminate private actions brought by relators. Third, employees who act as relators are protected from retaliation; such a provision was not included in the original statute given it was intended as a vehicle for actions of fellow “rogues” rather than employees against their employers.

Scholarship on the topic of *qui tam* lawsuits under the FCA has pointed to several factors that have contributed to its success. Features of the FCA that have been praised are the control or voice it gives whistleblowers to pursue a claim despite the Department of Justice gatekeeping mechanism,³⁴ the use of private sector efficiencies,³⁵ as well as the fact that there is

³⁰ Ibid.; Haron, Dordeski, Labman (2009). *Bad Mules: A Primer on the Federal and Michigan False Claims Acts.*; E. Askanase (2003). *Qui Tam and The False Claims Act: Criminal Punishment in Civil Disguise.*; D. Hargrove (2004). *Soldiers of “Qui Tam” Fortune: Do Military Service Members have Standing to File “Qui Tam” Actions Under The False Claims Act?*

³¹ Elizabeth Winston (2009). *The Flawed Nature of the False Marking Statute.*; G.C. Rapp (2012). *Mutiny by the Bounties? The attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act.*

³² Pamela Bucy (2002). *Private Justice and The Constitution*; Pamela Bucy (2001). *Private Justice.*; see note 31. Rapp.

³³ See note 5. *False Claims Act of 1986. Sec 3730.*

³⁴ See note 32. Bucy. See note 31. Rapp.

³⁵ Stewart and Sustain (1992). *Public Programs and Private Rights.*

no required minimum recovery amount in order for a whistleblower to be eligible for an award.³⁶

Detractors of the FCA criticize the Original Source Rule in the law which has been interpreted to mean that relators must have “seen the fraud with their own eyes” in order to be eligible for an award.³⁷ Additionally, criticisms come from the defense contractors who are entities being regulated by this statute. They lament the fact that the law provides for no incentive to self-report or self-correct, but rather, that the FCA incentivizes organizations who discover fraud within their ranks to conceal it to avoid penalties.³⁸

Although the FCA has been replicated by state policy-makers who have implemented similar *qui tam* lawsuit protocols,³⁹ most other federal statutes designed to combat fraud using financial incentives for employee whistleblowers employ a different financial incentive scheme. This other model, described as cash-for-information,⁴⁰ is imbedded in both the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and Provision 7623 of the Internal Revenue Code (IRC). In these cash-tips-for-fraud-tips schemes, whistleblowers walk away with cash when able to satisfy the necessary conditions set forth by the respective statute. These conditions concern five discrete areas:

- The status of the whistleblower (i.e. level of culpability; status within the organization)
- The nature of the information being reported (i.e. inculpatory; original)
- The timing of the disclosure relative to the reported activity (i.e. statute of limitations)
- The resulting value of the disclosure (i.e. minimum value threshold)
- The means of the reporting (i.e. internal reporting requirement; compliant with agency).

³⁶ See note 31. Rapp.

³⁷ Beverly Cohen (2009). *Trouble at the Source: The Debates Over the Public Disclosure Provisions of the False Claims Act's Original Source Rule*.

³⁸ Subcommittee on the Constitution and Civil Justice. 113th Congress (2014). Testimony of David W. Ogden, Partner, Wilmerhale, U.S. Chamber Institute for Legal Reform.

³⁹ See Note 18. Callahan and Dworkin.

⁴⁰ David Freeman Engstrom (2014). *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*.

While the general design of these regulatory enforcement schemes is the same, the five conditions within them vary and have been analyzed by academics for their effectiveness in encouraging individuals to blow the whistle.

A discussion of the whistleblowing provisions in Dodd-Frank cannot begin without first discussing the inadequacies of its precursor, the Sarbanes-Oxley Act of 2002 (SOX). SOX was enacted in 2002 after a series of corporate fraud scandals including Enron and WorldCom. On the purpose of SOX, Senator Patrick Leahy stated, “[...] it is time for action – decisive and comprehensive action that will restore confidence and accountability in our public markets [...].”⁴¹ On the whistleblower provisions within SOX, the most relevant of them being Section 806, Leahy stated that it was designed specifically, “to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets.”⁴² It follows logically that the intention of the framers of this regulation was to encourage whistleblowers to report the wrongdoing of their organizations and/or employers as a means of keeping financiers accountable. On the matter of which government agency would be receiving these reports, Section 3(b) of SOX states, “a violation by any person of this Act ... shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934.” By creating this equivalency, policy-makers gave the authority to enforce Sarbanes-Oxley to the Securities Exchange Commission, including the provisions pertaining to whistleblowers.

Although well intentioned, SOX has been largely ineffective at encouraging whistleblowing⁴³ and as such has been the subject of heavy criticism. One criticism concerning

⁴¹ Senate Judiciary Hearing (Jul 2010). Remarks of Senator Patrick Leahy.

⁴² 107th Congress, 2nd Sess. (Jul 2002). Cong. Rec. Remarks of Senator Patrick Leahy.

⁴³ Deborah Solomon (2004). For Financial Whistle-Blowers, New Shield is an Imperfect One.

the weak protections of SOX focuses on the barriers whistleblowers must overcome in order to receive recompense from a retaliatory action. An example of these barriers is the fact that the statute provides whistleblowers who face a retaliatory action a short window of ninety days to file a complaint.⁴⁴ Even further, those complainants who do file within the allotted timeframe are barred from seeking any damages beyond compensatory damages.⁴⁵ Criticisms of this restriction are justified in light of other works which show that statutes which fail to provide for the ability to recover additional damages did not make employees whole nor did they effectively encourage employees to blow the whistle.⁴⁶ Perhaps the most valid criticisms of SOX have focused on the fact that it does not offer a financial incentive to compel whistleblowers to come forward,⁴⁷ despite the fact that the SEC had offered bounties to whistleblowers under other laws such as the Insider Trading and Securities Fraud Enforcement Act.⁴⁸ Some scholars had suggested correcting the lack of incentive problem by infusing SOX with the *qui tam* bounty model seen under the FCA,⁴⁹ policy-makers decided to take a different route with the passage of Dodd-Frank in 2010.

Dodd-Frank, which was introduced as “A bill to improve financial stability [...],” set forth a regulatory scheme using financial incentives for whistleblowers under Title XI subtitle B.⁵⁰ Some scholars have claimed that the regulatory scheme in Dodd-Frank has been modeled after the FCA⁵¹ but it more closely resembles Provision 7623 of the IRC. As to whether this tip-for-tip

⁴⁴ Dworkin (2007). *Sox and Whistleblowing*. Pg 1763

⁴⁵ See Sarbanes Oxley 1514A.(c)2

⁴⁶ See note 20. Earle and Madek

⁴⁷ See note 44. Dworkin

⁴⁸ Callahan and Dworkin (1992). *Do Good and Get Rich: Financial Incentive for Blowing the Whistle and the False Claims Act*.

⁴⁹ Geoffrey Rapp (2007). *Beyond Protections: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*.

⁵⁰ H.R.4173. 111th Congress (2010). *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

⁵¹ Patrick Barthle (2012). *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bouny Program*.

model is an effective enforcement tool in Dodd-Frank, academics are conflicted. Some scholars claim that Dodd-Frank relies too heavily on financial incentives,⁵² while others argue that the tip-for-tip model doesn't go far enough and a *qui tam* lawsuit would be more effective.⁵³ A quantitative measure of the effectiveness of Dodd Frank shows that, to date, through the Investor Protection Fund established for the purpose of making awards to quality whistleblower disclosures, the SEC has awarded \$111 million dollars to thirty-four whistleblowers, with \$30 million going to one whistleblower alone.⁵⁴ Each year since the implementation of the program, the amount of funds awarded has increased, with \$57 million in 2016 being the highest amount paid from the fund in one fiscal year.

What is clear is that the tip-for-tip scheme has been an effective means for the IRS when the agency has sought to increase their revenue by encouraging whistleblowers. From 2007 to 2015, the IRS program has recovered \$3 billion in tax revenue and has awarded more than \$403 million dollars to whistleblowers.⁵⁵

While both *qui tam* lawsuits and tip-for-tip regulatory schemes have shown promise in encouraging whistleblowers to come forth, little scholarship exists on the question of which type of scheme is most appropriate in a given context. One exception to this silence is the work of Engstrom who proposes a loose framework based on two variables: harm and determinacy.⁵⁶

In his work, Engstrom compares the regulatory schemes of the FCA and Dodd Frank by categorizing the statutes into six components:

- Bounty Amount
- Regulator Discretion

⁵² Matt Vega (2012). Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting."

⁵³ See Rapp note 30.

⁵⁴ Dodd-Frank Whistleblower Program FY 2016 Report.

⁵⁵ IRS Whistleblower Office FY 2015 Report.

⁵⁶ See note 40. Engstrom.

- Independent Enforcement Authority
- Retaliation Protection
- Limits on Whistleblower Standing
- Filing Prerequisites

According to Engstrom, attempting to identify the optimal bounty model poses several challenges. The first challenge Engstrom cites is that over-incentivizing whistleblowers would overwhelm regulators by dramatically increasing tips. As a result, Engstrom argues, regulators would have to make difficult choices on how to sift through these tips. He further states that this higher volume would subsequently lead to inaccuracies if agencies did not devote additional resources to triage whistleblower claims. However, this challenge Engstrom theorizes is not borne out in empirical data. In fact, behavioral economic research on this topic shows that the real issue with current whistleblower statutes is not increased frivolous claims, but rather, that these statutes still are not effective at getting quality whistleblowers to come forward.⁵⁷

Engstrom cites other challenges that are not supported by the current work in the field. For example, he surmises that higher-ranking members of an organization are more responsive to retaliatory protection and less motivated by incentives. He bases this assumption on the work of Bucy⁵⁸, who found that higher ups face greater professional costs when blowing the whistle but often provide more valuable tips to regulators than lower ranking employees. While it is certainly reasonable that those higher in an organization would have more useful information and disclosing that information would pose a greater risk, this alone does not support the claim that higher ranking employees would find protections more enticing, or sufficient, in lieu of financial incentives.

⁵⁷ See note 15. Feldman & Lobel.

⁵⁸ See note 32. Bucy.

A third challenge Engstrom cites that would complicate the development of a more robust framework for the optimal bounty model is the crowding-out effect. The crowding-out effect refers to the way that a financial incentive might backfire, that is, discourage reporting of some types of wrongdoing. According to Feldman and Lobel who did the most comprehensive work on the crowding-out effect in a whistleblower context, the crowding-out effect can be observed when individuals with knowledge of wrongdoing have a strong intrinsic motivation to report the misconduct.⁵⁹ Their analysis shows that a scheme using bounties can have a negative effect on the rate of whistleblowing when those with information to report are intrinsically motivated to blow the whistle without an incentive. In these cases, intrinsic motivation manifests as moral outrage. In these situations, external incentives can undermine enforcement efforts by belittling the wrong or reducing it to a monetary value, theoretically disgusting a would-be reporter to the point where he or she chooses not to make a report. A scenario that fits this description would be a statute that seeks to prevent child abuse by offering individuals who report child abuse a monetary reward, thus undermining reporting efforts by monetizing the reward for making a report. These types of wrongdoing, while worthy of study, are only one type of wrong that regulators seek to address using financial incentives and thus cannot preclude the development of a framework for regulations addressing wrongdoing that is less conscience-evoking.

Perhaps in an effort to be cautious, Engstrom leaves a lot of lessons on the table that could inform a more robust framework for an optimal bounty scheme. This paper seeks to compile those lessons and develop that more complete framework.

⁵⁹ See note 15. Feldman & Lobel.

Chapter 3

Framework

Limitations

Before attempting the construction of a framework for the ideal whistleblower incentive scheme, it is prudent to recognize the limitations any potential framework would face. To date, the regulatory enforcement statutes that contain whistleblower provisions apply to fraud environments that differ greatly. Dodd-Frank and SOX were enacted to police the financial sector, the IRC seeks to address tax fraud, and the FCA covers government contractors ranging from the defense industry to the healthcare sector. Given the fact that the fraud occurring in these separate environments manifests in different ways, a successful framework should consider the nuances of these fraud environments. That said, the primary goal of the whistleblower provisions in each of these statutes is to incentivize employees and other actors to report fraud. Thus, the design of particular mechanisms should be most sensitive to the behavior of the reporter rather than to the activity of the fraudsters. In lieu of research that suggests otherwise, it is reasonable to proceed on the notion that incentives that would motivate employees to disclose the wrongdoing of a financial corporation would have the same effect if the wrongdoing were done by a manufacturer or a healthcare group. Thus, for the purpose of developing a framework in this paper, the variable that can be categorized as the fraud environment will be put aside, while recognizing that fraud environments should be considered by regulators to some degree when developing statutes utilizing whistleblower provisions.

Another limitation that should be acknowledged is the lack of certainty that exists when trying to predict the effectiveness of the whole a statute based on an analysis of its parts. When analyzing the data regarding the effectiveness of the FCA and SOX, it is clear based on outcomes that the FCA has been effective and SOX has not. Many scholars analyzing the mechanisms in these laws have tried to attribute the success and failures of whistleblower statutes to specific mechanisms that function within them. However, without an ability to isolate and test the effectiveness of these mechanisms in a vacuum, there is no real scientific way to pinpoint which mechanisms are contributing to better outcomes and which are acting as a hindrance. To address this issue, the framework developed in this paper will lean on behavioral research that can be and has been applied to whistleblower activity as support for claims made regarding the effectiveness of certain mechanisms. While this framework will not be able to provide definitive rules for which whistleblower mechanisms to use in all statutes, through reasonable inferences based on supporting evidence, it will develop measures that can inform regulators seeking to create whistleblower provisions that will effectively encourage individuals to make disclosures.

Scope of Reportable Offenses Definition

3.1 Scope of Reportable Offenses Definition – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Scope of reportable offenses definition	Any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government [...]to get a false claim paid by the government	Any provision of federal law relating to fraud against shareholders	Tax evasion and tax fraud; not necessarily intentional fraud.	Any disclosure leading to judicial or administrative action brought by the commission under this act.	Balanced definition that is neither overly broad nor overly strict.

Any statute which seeks to encourage individuals to report wrongdoing must define what wrongdoings, if reported, will qualify a whistleblower for protections and rewards. Framers of statutes with whistleblower provisions have taken different approaches when defining the scope of what reported wrongdoings will trigger whistleblower status and the benefits that go with that designation. Some statutes define the scope of the wrongdoing by the identity of the victim. The FCA uses this type of statutory definition. The statutory language of the FCA allows for a whistleblower to bring a *qui tam* lawsuit when they are bringing suit against “any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly creates a false record or statement to get a false claim paid by the government.”⁶⁰ Under this statute, the defining requirement in order to bring a claim, and thus qualify as a whistleblower, is that the victim of the reported offense must be the government. While this definition also limits the wrongdoing to willful financial fraud, it does not strictly limit the type of financial fraud that would qualify. Additionally, it places no requirements or limitation on the identity of the person committing the wrongdoing. The relatively broad language regarding the wrong behavior and the identity of the fraudsters is purposely open-ended

⁶⁰ 31 U.S. Code. Sec 3729 (a) 1.

to allow for this statute to have broad jurisdiction over actors and across industries. Thus, this approach creates far-reaching opportunities to protect and reward all whistleblowers who act in the interest of the victim of the fraud, in this case the government.

Likewise, the framers of Sarbanes-Oxley defined the scope of what would be considered a reportable offense in terms of the victim. This statute states that protections for whistleblowers are triggered when a disclosure addresses, “[...] Any provision of federal law relating to fraud against shareholders.”⁶¹ Here again, we see that the scope of reportable offenses is strictly defined by the victim and not by some subset of fraudulent activity or by the identity of the fraudsters. While Sarbanes-Oxley does not offer rewards, this language still allows the protections afforded by the statute to apply to all whistleblowers acting in the interest of the victim, in this case, the shareholders.

Basing the scope of the fraud definition on the identity of the victim is an effective way to provide clear and inclusive guidelines to would-be whistleblowers. Research has suggested that a lack of clarity in a whistleblower provision can hinder the effectiveness of the statute at encouraging whistleblowers to come forward.⁶²

Other statutes set the boundaries of reportable offenses in different terms. The Dodd-Frank Act states that a report will be considered whistleblowing when the disclosure leads to “any judicial or administrative action brought by the commission under this act.”⁶³ Unlike the FCA and SOX, this statute shows little interest in who the victim of the wrongdoing may be. Rather, it anchors the scope of reportable offenses on the prohibitions which are incorporated within the statute itself. This approach to defining what would qualify as a reportable offense can

⁶¹ 116 STAT. 746 1514A.

⁶² See note 15. Feldman & Lobel

⁶³ H.R. 4173. Sec. 748 – 924.

be problematic in terms of its effect on would-be whistleblowers. In order for an individual to know whether or not their report will entitle them to whistleblower benefits, they would have to be able to understand and interpret the statute or hire legal counsel to do it for them.

Different still, the scope of reportable offenses found in the Internal Revenue Code limits whistleblowers not based on the victim or the statute itself but rather according to the type of fraud being committed. The regulation specifically seeks to encourage whistleblowing on tax fraud and tax evasion, whether intentional or not.⁶⁴ Of the three ways to define the scope of a reportable offense, this is seemingly the most straight-forward.

Whether a statute sets the scope of reportable offenses in terms of the victim, the prohibitions of the statute, or the type of activity, does not alone determine its effectiveness at encouraging whistleblowing. For regulators deciding on how to set the scope of reportable offenses definitions, it is paramount that regulators strike a balance between broad applicability and clarity. Overly narrow definitions may cause hesitation among would-be whistleblowers when determining whether or not their disclosure would qualify them for whistleblower benefits. On the other hand, definitions that are too broad may leave whistleblowers confused and lacking clear guidelines.

Further, regulators must be cognizant of the fact that statutory language will be shaped by the agencies and courts directed to administer and adjudicate whistleblower claims.⁶⁵ While legislators can expect that courts will interpret the statutory language in a way that may not

⁶⁴ 26 U.S. Code. Chapter 78. Sec. 7623.

⁶⁵ In *Allison Engine Co., Inc. v. United States ex rel. Sanders* (2008), the Supreme Court allowed for a plaintiff to bring a claim under the FCA even if there was never a loss of government funds to fraud. In this case, the fraudster intended to defraud the government but the payments made were from a private organization.

completely align with the intent of the legislature, steps should be taken to limit the opportunities for the level of judicial drift.

Whistleblower Status

3.2 Whistleblower Status – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Whistleblower Status	Relator must be an original source of information which leads to recovery on losses due to fraud	Organizational member	An individual who provides information that causes the IRS to initiate an administrative or judicial action against a taxpayer	Excludes government agents who obtained information during the course of an audit or compliance process; information must be “original.”	Definition that allows all recipients of information regarding organizational wrongdoing the opportunity to qualify for whistleblower status.

Regulations that seek to encourage whistleblowing have traditionally placed requirements on who is able to qualify for whistleblower entitlements. Across statutes, two main requirements have developed regarding the identity of a qualified whistleblower: the original source requirement and the organizational membership requirement. The FCA and Dodd-Frank state that an individual is entitled to whistleblower designation only when that individual is the original source of information that leads to an action by the agency.⁶⁶ Even further, an action need not be taken by the agency for a whistleblower to qualify for whistleblower designation, so long as the whistleblower acted under a good faith belief that wrongdoing had occurred within the reported organization.⁶⁷

⁶⁶ It is worth noting that an action need not be successful in order for a whistleblower to qualify for protections.

⁶⁷ See Note 60. False Claims Act.

In the case of the FCA, this requirement did not always exist but was added as part of amendments that were made to the statute in 1943. At that point in the life of the statute, the federal government had become well-developed in comparison to its size during the first enactment of the FCA during the Civil War. Additionally, the Justice Department had established enough infrastructure, resources and manpower to pursue claims against fraudsters without relying on private citizens filing *qui tam* actions. However, the fact that the executive branch was prosecuting these cases of fraud did not bar relators from filing their own civil lawsuits against defense contractors who were committing fraud. As a result, a few well-informed private citizens took advantage of the opportunity to bring *qui tam* lawsuits after the government had initiated its own process in the criminal courts, even though those private parties rarely had any new or relevant information to offer the courts regarding these claims.⁶⁸ Legislators during this time period saw this as “parasitic” and thus, amended the statute to include the original source requirement while further restricting the relators’ incentive to bring claims by lowering the ceiling on award amounts.⁶⁹ This first appearance of the original source requirement eventually led regulators to include this requirement in several other whistleblower statutes that would come later.

Notably, the objectively unsuccessful whistleblower regulation, SOX, contains no explicit requirement that whistleblowers provide original information. However, SOX does limit whistleblower eligibility to those who are organizational members. On the face, it appears logical that an organizational membership requirement would exist in SOX given that it only offers protection from retaliatory actions by employers and it does not offer any financial incentive to

⁶⁸ Charles Doyle for the Congressional Research Service (2009).

⁶⁹ See note 30. Hargrove.

whistleblowers. It seems unlikely that non-organization members who make disclosures would feel a need to qualify for whistleblower entitlements if those entitlements are limited to protection against adverse employment actions.

Despite the fact that the whistleblower provisions of the FCA, the IRC and Dodd-Frank were designed primarily with employee reporters in mind, these statutes do not require reporters to be members of the reported organization to qualify for whistleblower entitlements. In the case of the FCA and the IRC, an organizational membership requirement would be illogical. If included in these regulations, an organizational membership requirement would have prevented the substantial number of actions that have been brought based on reports from individuals who were not members of the organization committing the reported fraud. Further, many of the whistleblower reports under the IRC were made against individuals who had defrauded the IRS as opposed to an organization that had committed such fraud.

In the case of Dodd-Frank, in lieu of an organizational membership requirement, the statute bars government agents from qualifying as a whistleblower if those agents receive the information while performing their governmental duties. However, this limitation still allows employees of the non-governmental organizations and other individuals who become aware of wrongdoing to make a report.

For regulators seeking to encourage individuals to make disclosure, it is difficult to imagine any benefit an organizational membership requirement would have. The requirement excludes various actors who may become privy to information that fraud is being committed by an organization. Examples of such actors include clients who receive services from organizations and vendors who contract with the organization committing the fraud. Both groups have the potential to intercept information regarding the fraudulent behavior of the organization in

question. The research shows that, without allowing these individuals to qualify for whistleblower incentives and protections, it is unlikely they will come forward to report wrongdoing.⁷⁰

Statute of Limitations for Disclosure

3.3 Statute of Limitations for Disclosure – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Statute of Limitations for Disclosure	Action can be brought no more than 6 years after the date of violation, or more than 3 years after the date when facts are known or should have been known by US officials; In no event, more than 10 years after the date of violation	No express statute of limitations	In cases of reporting fraud no explicit statute of limitations; without evidence of willful or fraudulent intent, statute of limitations is 3 years.	No express statute of limitations; <u>Johnson v. SEC</u> may indicate that 5 year statute of limitation in SEC enforcement actions that seek civil penalties	Action can be brought no more than 6 years after the date of violation, or more than 3 years after the date when facts are known or should have been known by US officials; In no event, more than 10 years after the date of violation

Statutes of limitations are a fundamental part of any common law system which allows for one party to bring claims against another in a court of law. These laws exist primarily to protect defendants and ensure that anyone accused of a wrong is provided a fair opportunity to respond to those claims. These laws are based on three principles:⁷¹

- A plaintiff with a valid claim should pursue that claim with reasonable diligence.
- A defendant may lose evidence that would be necessary for their defense if a stale claim is pursued.
- A long-dormant claim is more cruel than it is just.

⁷⁰ See note 15. Feldman & Lobel.

⁷¹ Halsbury's Laws of England, 4th Edition. p. 439

In practice, these laws have the effect of establishing a timeframe within which a claim must be initiated. Once a statute of limitation has expired, even the most meritorious claims will be barred from proceeding.

For whistleblower statutes, the statute of limitations can have a profound impact on a whistleblower's ability to make a disclosure. If operating with the goal of encouraging the most whistleblowers to come forward, framers of these statutes should seek to set the statute of limitations with a large timeframe for disclosures. Certainly, having no statute of limitation on whistleblower disclosure would raise major criticisms from the organizations being regulated by these statutes and rightfully so. The principles that form the basis for statutes of limitation are ever present in a proceeding involving a whistleblower. However, given the fact that whistleblowers risk incurring great costs as a result of making a disclosure, there is a strong argument to be made for a lenient statute of limitations in this area of the law.

The statute of limitations in the FCA provides a good model for any statute which seeks to encourage whistleblowing. The statute of limitation under the FCA is as follows: "An action can be brought no more than 6 years after the date of violation, or more than 3 years after the date when facts are known or should have been known by US officials; In no event, [may an action be brought] more than 10 years after the date of violation." With a maximum of ten years for a whistleblower to make a disclosure this is adequate for a whistleblower to make a report but limited enough to ensure that defendant organizations have an opportunity to create a fair defense.

Prerequisite Reporting Requirements

3.4 Prerequisite Reporting Requirements – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Prerequisite Reporting Requirements	None	Must make an internal report.	None	Must make an internal report.	No requirement for internal reporting.

Prerequisite reporting requirements refer to any steps a whistleblower must take before being able to qualify for the benefits afforded by the statute. Under some statutes, failure to comply with the prerequisite requirements could bar a reporter from any protections and awards offered by the statute. SOX and Dodd-Frank, require that would-be whistleblowers must use internal reporting channels before filing a report with the agency. Provisions in SOX mandate that organizations regulated by the SEC must establish internal channels for employees to report any violations of SEC rules. The internal reporting mechanism and the requirement for whistleblowers to utilize it became part of the statute as a compromise between lawmakers and the financial corporations regulated by SOX.⁷² The organizations regulated by SOX wanted the opportunity to self-correct.

From a regulator standpoint, internal reporting may be an effective way to correct violations; however, this would depend on an organization's response to internal whistleblower reports. Organizations could become responsive to these complaints and self-correct, or internal reporting could lead to organizations retaliating against reporters and covering up, rather than correcting, reported violations. Recognizing the risk of increased retaliation, SOX and Dodd-Frank require that internal reporting channels allow for anonymous reporting. If a goal of an

⁷² See note 20. Earle and Madek.

agency is to encourage whistleblowers to report to an agency, however, internal reporting requirements would be counterproductive to achieving that end.

Anonymity

3.5 Anonymity – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Anonymity	Not guaranteed	Not guaranteed	On case by case basis.	Anonymity guaranteed when represented by counsel	Guaranteed anonymity

The decision to report an employer for fraudulent activity comes at a cost to the individual who makes the report. Not all of these costs can be mitigated by a protection from adverse employment actions. Costs that fall into this category would include damage to the reputation of a whistleblower and an inability to gain future employment. When awarding compensatory damages to a whistleblower who pursues a retaliation claim, courts have been willing to consider these costs.⁷³ However, these awards often do not equate to the full damages incurred by the whistleblower.⁷⁴ Because of this, regulators have recognized the importance of offering anonymity as a mechanism to encourage whistleblowers to come forward. Anonymity as part of the incentive matrix functions similarly to protections from retaliation. The idea is that, if individuals with information to disclose know they will be anonymous and therefore can avoid the costs associated with blowing the whistle then, these individuals will be less deterred from coming forward.

⁷³ Mahoney v. Keyspan Corp., 2007; Becker v. Community Health Systems, INC. and et al. Nov 2016.

⁷⁴ See note 18. Callahan & Dworkin.

If we are to accept the logic that anonymity lowers any disincentive to blow the whistle, this might only be the case when there is a guarantee in place that the identity of a whistleblower will not be revealed to the public. But, this is not what we see in practice. The FCA does not guarantee anonymity, largely because the whistleblower under this statute would normally be a named plaintiff in a *qui tam* lawsuit. SOX and the IRC also do not guarantee anonymity, although the IRS does provide anonymity on a case by case basis. Dodd-Frank does guarantee anonymity but only to whistleblowers who have incurred the cost to retain counsel to represent them before the SEC and in judicial proceedings.

Offering anonymity without guaranteeing it is no different than offering a protection from retaliation without guaranteeing a right to a retaliation claim. While researchers acknowledge there are costs that can only be mitigated by concealing a whistleblower's identity, regulators have not translated that knowledge into firm assurances. This lack of action on the part of legislatures could be hindering their efforts to encourage whistleblowers to come forward.

Reporter Protections

3.6 Reporter Protections – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Reporter Protections	Yes, enforced through right of private action.	Yes, enforced through right of private action.	None	Yes, enforced through right of private action.	Yes, enforced through right of private action.

Protection against retaliation is a fundamental component of any whistleblower law that seeks to encourage employees to report the fraudulent activity of an employer. Both successful and unsuccessful whistleblower statutes use this protection, recognizing that blowing the whistle

on an employer places the whistleblower in jeopardy of retaliation.⁷⁵ These statutes allow whistleblowers legal remedies to seek recompense for any retaliatory actions taken against them as a result of their disclosure. In employment law, the most common forms of protection against retaliation are the right to seek financial damages and reinstatement. This section will address the appropriateness of these two remedies in the context of whistleblower statutes.

The benchmark for whistleblower anti-retaliation protections is the FCA. This statute allows whistleblowers to seek “all relief necessary” to make them “whole.”⁷⁶ The relief available under this statute includes reinstatement with the same seniority that the individual would have had in absence of the retaliatory action, double the amount of back pay, interest on the back pay and compensation for any special damages that were sustained as a result of the action taken by the employer, including the cost of litigation.⁷⁷ Even further, one court has allowed a whistleblower under the FCA to collect damages for emotional injury when a whistleblower was threatened with physical injury.⁷⁸ The damage a whistleblower may not seek during a retaliation lawsuit under the FCA is punitive damages, which courts have expressly prohibited.⁷⁹

Like the FCA, SOX and Dodd-Frank also grant a protection from retaliation to whistleblowers in the form of a right to private action, however these statutes are in some respects more generous to whistleblowers pursuing a retaliation claim. Both allow for back pay and reinstatement, and when reinstatement is not feasible, they permit an award of front pay.⁸⁰

⁷⁵ It is important to note that a protection from retaliation is somewhat of a misnomer as no statute can preemptively act to prevent an employer from taking an adverse employment action against a whistleblower. A statute can, however, provide an avenue for seeking remedies for the retaliation.

⁷⁶ 31 U.S.C. Sec. 3730 (h) 1.

⁷⁷ 31 U.S.C. Sec. 3730 (h) 2.

⁷⁸ Neal v. Honeywell (U.S. ex rel. Wilson vs. Graham County Soil & Water Conservation District.), 7th circuit. 1999.

⁷⁹ U.S. ex rel. Saralich v. City of Los Angeles (C.D. Cal 2001).

⁸⁰ Perez v. Progenics Pharmaceuticals (U.S. District Court NY, 2016). Where there was open hostility toward whistleblower damages of back pay and front pay awarded.

Dodd-Frank goes further than SOX as it calls for double back pay like the FCA, where SOX allows only for the straight amount. Additionally, both allow whistleblowers to collect punitive damages, where the FCA does not.

In contrast, the IRC offers no protection from retaliation. This is despite recommendations that were made to Congress to include anti-retaliation provisions.⁸¹ In some cases, due to overlap, whistleblowers under the IRC may qualify for protection under SOX or Dodd-Frank. It is not surprising there is no protection from retaliation included in the IRC considering it is the one whistleblower statute we are examining that has not been designed with employees as the main sources of disclosure.

Some researchers have suggested that utilizing reinstatement as opposed to awarding financial damages may be more appropriate in the context of whistleblower statutes.⁸² However, in light of research that shows whistleblowers faces social consequences in workplaces as a result of their disclosure⁸³, further evidenced by court rulings,⁸⁴ it is hard to imagine this option being superior. While it is true whistleblowers can have difficulty finding employment at different organizations as a result of making a disclosure, that does not necessarily mean that the individual would prefer to be able to return to work at organization that is hostile to them.

⁸¹ President Obama's 2014 proposed that Anti-retaliation provisions be added to the IRS whistleblower program, however these recommendations were not acted on by Congress.

⁸² See note 20. Earle and Madek.

⁸³ See note 45. Dworkin, SOX.

⁸⁴ See note 80. *Perez v. Progenics*.

Statute of Limitations for Retaliation Claims

3.7 Statute of Limitations for Retaliation Claims – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Statute of Limitations for retaliation claim	Must be filed under the statute of limitation applicable to the most closely analogous state statute.	180 days	n/a	An action must be filed either within 6 years after the date when the retaliations occurs or within 3 years after the date “facts material to the right of action are known or reasonably should have been known by the employee,” but no more than 10 years after the violation.	An action must be filed either within 6 years after the date when the retaliations occurs or within 3 years after the date “facts material to the right of action are known or reasonably should have been known by the employee,” but no more than 10 years after the violation.

A protection against retaliation can only be an effective incentive if whistleblowers are given a reasonable opportunity to seek recompense for any adverse employment action taken against them as a result of their disclosure. Although the statute of limitations on the retaliation claim of a whistleblower may not be as critical as the statute of limitations for a disclosure in so far as its effect on encouraging whistleblowers is concerned, that does not mean it should be dismissed. Scholars have pointed to the strict statute of limitations on retaliation claims under SOX as one of the causes of the statute’s failure. Under SOX, whistleblowers must file a retaliation claim within a 180-day window. This overly short statute of limitations can hardly be justified under the principles on which these limitations are based.⁸⁵ While SOX is a case-study

⁸⁵ See note 71. Halsbury’s Laws of England.

for what not to do with a statute of limitation, other whistleblower statutes take a more reasonable approach to setting the statute of limitations for retaliation claims.

The framers of the modern FCA chose not to be consistent when deciding how they would set the statute of limitations for retaliation claims. Rather than electing to use the same reasonable statute of limitations that it used for disclosures,⁸⁶ instead, the FCA leaves the statute of limitations for retaliation claims up to the states. As a result, the statute of limitations for a whistleblower under the FCA varies greatly. This lack of uniformity could cost a whistleblower the opportunity to pursue a rightful retaliation claim if they allow the statute of limitations to lapse before filing a claim.

While the FCA reserves its reasonable statute of limitations for initial disclosure, Dodd-Frank employs that same reasonable FCA standard for its retaliation claims. Under Dodd-Frank, a retaliation claim action can be brought no more than 6 years after the date of violation, or more than 3 years after the date when facts are known or should have been known by US officials; in no event, may an action be brought more than 10 years after the date of violation. This statute of limitation is equally reasonable for retaliation claims under Dodd-Frank as it is for a disclosure under the FCA and thus, serves as a good model for other whistleblower statutes to follow.

⁸⁶ See *Supra*, at p. 25

Reporter Control

3.8 Reporter Control – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Reporter Control	High degree of control; however, DoJ has ability to control or terminate relator actions	None. OSHA has complete discretion on whether to pursue action	None. IRS has complete discretion to pursue actions.	None. SEC has complete discretion on whether to pursue an action.	Uncertain. Qui tam model in cases where ability to control narrative is important to whistleblower.

Reporter control refers to a whistleblower’s ability to influence how a claim against an organization is pursued. A whistleblower’s level of involvement and decision-making ability are factors that would contribute to how much control a whistleblower has over a claim against an organization. In practice, control over an action rests primarily with the agency or the whistleblower. There are two models that exist for control over a claim: *qui tam* lawsuits, which places control over a claim primarily with a whistleblower; and the tip-for-tip model, which places control over a claim with the agency. The FCA is the only federal statute that uses the *qui tam* lawsuit model. The IRC, and Dodd-Frank utilize the tip-for-tip model.

The *qui tam* lawsuit offers whistleblowers a high degree of control over their claims against organizations. Under this model, whistleblowers can act as plaintiffs in courts on behalf of the government. Theoretically, the whistleblower has the ability to control the narrative in court by presenting the witnesses and evidence of their choosing. However, in the case of the FCA, the Department of Justice does have the ability to terminate any action a whistleblower pursues on behalf of the government. Additionally, when the Department of Justice joins a whistleblower in the lawsuit, the department tends to take at least some of the decision-making away from the whistleblower.

On the other side of the spectrum lies the tip-for-tip model. Under this model, the agency responsible for enforcing the statute directs the claim against the organization that was reported by the whistleblower. After a whistleblower makes the report, there are few opportunities if any for them to directly affect how the claim will be pursued. While the whistleblower might need to participate in the case as a witness, in that capacity alone the whistleblower would have little opportunity to make decisions regarding how the claim is pursued.

In terms of their effect on encouraging whistleblowers to make reports, it is unclear whether one of these models is superior to the other. There is research that suggests that the *qui tam* lawsuit model may be more effective because it allows the whistleblower to have more voice.⁸⁷ The fact that whistleblowers will be able to tell their story, or in other words “have their day in court,” may be a factor that makes them more likely to make a report. However, while this research makes a case that *qui tam* models are enhanced by this factor, the absence of this factor in tip-for-tip models does not necessarily mean that model is ineffective.

Award Restrictions

Current whistleblower regulations offer a protection from retaliation only, like SOX or, they offer financial incentive in addition a protection from retaliation, like Dodd-Frank, the IRC, and the FCA. For those whistleblower regulations that offer financial incentives in order to encourage individuals to make a disclosure, there are restrictions that dictate when an award will be issued and, where that is the case, the amount of that award. The restrictions placed on an

⁸⁷ See note 19. Kovacic.

award can affect whether a whistleblower comes forward in the first place. Although there are a multitude of ways regulators could restrict awards, in practice award restrictions can be categorized along three dimensions: agency discretion, minimum claim thresholds, and award value ranges. This section will address each of these dimensions in turn.

Agency Discretion

3.9 Agency Discretion – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Agency Discretion	15% guaranteed	n/a	10% guaranteed	10% guaranteed	Some guarantee

Whistleblower laws can give agencies discretion over awards at several stages of a whistleblower claim and in various ways. The first such point is in determining whether or not a whistleblower is entitled to an award. Even if it is assumed that a statute has prescribed requirements for award consideration and a whistleblower has complied with all of these requirements, it is still possible for a statute to be designed in such a way as to allow for an agency to deny a whistleblower an award. Under these circumstances, a qualified whistleblower would merely be eligible for an award but not guaranteed one. The research on whistleblower incentives makes clear that a statute designed in this fashion would not be the most effective way at encouraging whistleblowing.⁸⁸ While it is possible some whistleblowers would still be incentivized by the fact that they could receive an award, a guaranteed award will be more effective at incentivizing whistleblowing. It appears regulators understand this truth considering

⁸⁸ See note 15. Feldman & Lobel.

that the FCA, the IRC, and Dodd-Frank all guarantee that a whistleblower would be entitled to some award if all of the necessary conditions listed in the statute regarding the disclosure and the whistleblowers identity are satisfied.

Framers of whistleblower statutes must also make a choice about whether to give discretion to agencies to determine the amount of any award issued to a whistleblower. A statute that uses awards as a means to encourage whistleblowing can either exhaustively state the rules determining whether a qualified whistleblower is entitled to specified dollar amounts, or it can grant a controlling governmental agency discretion in making these determinations. In practice, it would be difficult for a statute to take the former approach considering that actions taken by an agency result in different amounts of recovery or sanctions and the contribution of a whistleblower in each case is not the same nor susceptible to a formula. A statute could offer a fixed-amount award to all whistleblowers, regardless of their involvement or the value of their claim, however research suggests that such an approach may not encourage whistleblowers with the most valuable information to come forward.⁸⁹ Further, none of the current statutes that provide whistleblower awards offer a fixed-amount award to those who qualify. The IRC and Dodd-Frank grant a varying degree of discretion to the respective agencies charged with enforcing these statutes. Additionally, the FCA gives discretion in determining award amounts to the courts who adjudicate *qui tam* lawsuits. Issuing awards that are proportional to the amount recovered by an agency due to the disclosure of a whistleblower appears to be the standard and most effective way to allocate funds to qualifying whistleblowers. However, even when awards are issued based on a percentage of the recovered amount, the question of which percentage is most appropriate remains.

⁸⁹ See note 15. Feldman & Lobel.

Minimum Recovery Thresholds for Award Eligibility

3.10 Minimum Recovery Thresholds for Award Eligibility – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Minimum Recovery Thresholds for Award Eligibility	None	n/a	\$2 million	\$1 million	None

Some statutes that give financial incentives to whistleblowers establish a minimum claims recovery threshold that must be met before a whistleblower would be entitled to an award. This means that in order for a whistleblower to receive an award, the disclosure made must result in a minimum dollar amount in recovery or sanctions. The IRC sets the minimum claim threshold for an award at two million dollars, while the Dodd-Frank regulation sets the threshold for an award at one million dollars. No clearly applicable research has been done on how these thresholds may influence a whistleblower's decision to make a disclosure. In the absence of this research, it is reasonable to assume that these minimum thresholds would have an effect similar to that of a lack of a guaranteed award, and as noted above research shows that lack of guarantee discourages at least some whistleblowers from making a disclosure. This can be accepted, if it is assumed that it would be a difficult for a whistleblower to predict the value of their disclosure prior to making it. This assumption seems most reasonable in cases where the amount recovered by an agency is based on sanctions assessed by the agency rather than amounts recovered due to fraud. In any event, it can be expected that the uncertainty caused by these minimum thresholds would deter at least some would-be whistleblowers from making a disclosure.

Award Value Ranges

3.11 Award Value Ranges – Current Statutes

	False Claims Act	Sarbanes-Oxley	IRC	Dodd-Frank	Best Mechanism
Award Value Ranges	15-25% with DoJ 25-30% w/o DoJ	n/a	15-30%	10-30%	Reasonable lower-end value; higher-end less significant.

Whistleblower statutes that offer proportional awards to qualifying whistleblowers rarely have a flat percentage. Rather, these statutes tend to favor percentage ranges that allow agencies to evaluate a whistleblowers contribution and culpability and issue an award accordingly. Award amounts, under the IRC and Dodd-Frank, range from 15-30% and 10-30% respectively. The FCA contains these award value ranges, although the exact values depend on whether or not the Department of Justice joins a relator's *qui tam* claim. When a relator is joined by the Department of Justice, their chances of success increase⁹⁰, however the relator is only entitled to 15-25% of the recovered funds. When the DoJ does not join the lawsuit, a successful relator is recognized for a greater contribution and entitled to 25-30%.

To date, no research has examined how these value ranges affect the overall incentivization of whistleblowers. The research that has been done on whistleblower incentives would seem to suggest that, as would-be whistleblowers consider whether or not to make a disclosure, the minimum value is more important than the maximum value.⁹¹ Given the fact that there is a slight tendency for whistleblowers to be more motivated by large awards,⁹² framers of these statutes should use caution when deciding how low to set the minimum value of the available range.

⁹⁰ Department of Justice. Significant False Claims Act Settlements & Judgements. Report FY 2009-2016.

⁹¹ See note 15. Feldman & Lobel.

⁹² Ibid.

Having identified the best components of an effective whistleblower statute, this paper now examines the recently enacted federal law, the Fixing America's Surface Transportation Act (FAST), to assess the likely success of its whistleblower mechanism.

Chapter 4

Fixing America's Surface Transportation Act

The Motor Vehicle Safety Whistleblower Safety Act

On December 4, 2015, President Barack Obama signed the Fixing America's Surface Transportation (FAST) Act into law. The FAST Act provided \$305 billion in funding for the purpose of repairing surface transportation and improving public transportation in the United States and its Territories.⁹³ In addition, the law allotted funds for conducting research to modernize the nation's various transportation systems. While on the floor of the Senate chambers, Senator Gary Peters (MI) praised the FAST Act for, "[...] making key investments [in] the future of mobility in the United States."⁹⁴ Funding from this bill was also intended to go to research for improved safety standards in America's transportation sector, most extensively in the automobile industry.⁹⁵

Along with funding for this research, this 1317-page bill sets new safety standards for motor vehicles. It went on to include new environmental regulations in an effort to pursue more environmentally sustainable automotive policies. Buried in the middle of this big-dollar package with progressive safety standards and new environmental regulations, lies The Motor Vehicle Safety Whistleblower Act (the MSA) (Title XXIV, Part V). All of the whistleblower provisions of the FAST Act are found in Part V of the bill.⁹⁶ The Motor Vehicle Safety Whistleblower Act at its core addresses safety violations as opposed to frauds more directly resulting in financial

⁹³ According to the summary of the FAST Act website.

⁹⁴ Dec .7 2015. 114th Congress, 1st Session Issue: Vol. 161, No. 176 — Daily Edition pages S8428-s8429.

⁹⁵ See note 93. FAST Act summary.

⁹⁶ FAST Act, Pg 1078.

gain for fraudsters. More precisely, this statute seeks to address fraudsters in the automobile industry who cut corners in order to reduce cost. Like Dodd-Frank, it imposes monetary sanctions, rather than sharing the bounties of recovery like the FCA and the IRC. The Motor Vehicle Whistleblower Act is an ideal candidate to apply the framework of best mechanisms developed in Chapter 3, as the statute itself details its whistleblower mechanisms. Thus, it permits scholars and observers to evaluate its features without having to await lengthy agency rule-making on the topic (as has been the case with other laws). In addition, the freshness of this statute provides for a unique opportunity to apply the framework before seeing the effectiveness of the law in action. For that reason, the application of the framework developed in Chapter 3 will focus on this part of the legislation, measuring each best mechanism against the provision found in the Motor Vehicle Safety Act. This Chapter turns to that analysis now.

Scope of Reportable Offenses

4.1 Scope of Reportable Offenses – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Scope of Reportable offenses	Balanced definition that is neither overly broad or overly strict.	Any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter, which is likely to cause unreasonable risk of death or serious physical injury. ⁹⁷

The FAST Act limits the scope of the reportable offenses to reporting motor vehicle defects or violations of the statute.⁹⁸ In addition, there is qualifying language stating that the offense must be one that is likely to cause unreasonable risk of death or serious injury. Each of these limitations could have potential effects on whistleblowers with information to disclose. The

⁹⁷ Sec. 30172. (6), Fast Act.

first limitation is reasonably inclusive. Like the IRC it provides clear guidelines on the type of fraud that can be reported. More problematic is the language referring to violations of noncompliance and the safety regulations listed in the statute. The language used is similar to that found in Dodd-Frank and thus we can expect similar problems. In order to determine whether or not to make a disclosure, whistleblowers would have to be able to interpret the statute or hire legal counsel to do it on their behalf.

The most unique limitation is the one addressing the severity of the offense. The requirement that a reportable offense is only one that is likely to cause unreasonable death or serious injury if interpreted strictly can be highly limiting. Under this language, a whistleblower who has knowledge of car defects, which manufacturers knowingly disregarded, may be discouraged from blowing the whistle out of concerns that their disclosure may not afford them protections and awards. While it is difficult to predict the extent to which this limitation will affect whistleblower claims without any current interpretations by courts or guidelines from the Department of Transportation, it does raise cause for concern.

Whistleblower Status

4.2 Whistleblower Status – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Whistleblower Status	Definition that allows all recipients of information regarding organizational wrongdoing the opportunity to qualify for whistleblower status.	Any employee or contractor of a motor vehicle manufacturer, part supplier or dealership who provides original information.

On the issue of the identity of a whistleblower, the FAST Act states that any employee, contractor, part supplier or dealership who provides original information is able to qualify for whistleblower entitlements. This language allows for a broad range of those individuals who would reasonably become privy to information regarding organizational misconduct the opportunity to qualify for whistleblower status. It includes vendors who work with the fraudulent organizations as well as clients who receive equipment from the organization. While it does exclude consumers who ultimately purchase equipment for use, it seems unlikely that this group would intercept information regarding wrongdoing considering the indirect supply chain which is characteristic of the automobile industry. Like Dodd-Frank but less explicitly, the FAST Act excludes government employees as well by limiting the whistleblower eligibility to the groups involved in the supply chain.

Like some of the previous laws analyzed in Chapter 3, the FAST Act whistleblower provisions contain an explicit original source requirement. Under this statute, original source is defined as “information derived from independent knowledge from the individual [that] is not already known to the Secretary of Transportation [and that is] not exclusively derived from a federal hearing, report, action, or session of congress.”⁹⁹ The mention of knowledge derived

⁹⁹ FAST Act pg 1080. Sec. 30172. A(3)

from federal actions in the original source requirement of this statute seems to suggest that it draws from lessons learned during the exploitation of the FCA by some knowledgeable private citizens during the World War II era.¹⁰⁰

Overall, the FAST Act whistleblower provisions provide an inclusive list of individuals who would reasonably intercept knowledge of wrongdoing. The original source requirement in this statute is appropriate. Further, it indicates that framers of the statute have considered the history of individuals exploiting loopholes in statutes to prevent that from happening with this regulation.

Statute of Limitation on Disclosure

4.3 Statute of Limitation Disclosure – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Statute of Limitation on Disclosure	Action can be brought no more than 6 years after the date of violation, or more than 3 years after the date when facts are known or should have been known by US officials; In no event, more than 10 years after the date of violation	Not explicit

The lack of an explicit statute of limitations for disclosure, coupled with the relative newness of this statute, makes it unclear how the FAST Act will compare with the best mechanism for the statute of limitations for whistleblower disclosures that was gleaned from the analysis in Chapter 3. It is possible that rules developed by the Department of Transportation will clarify the statute of limitation that applies for disclosures under the FAST Act. However, SOX does not have an explicit statute of limitation on disclosures so this is not necessarily the case. Significantly, it is clear that this statute allows whistleblowers to make disclosures on

¹⁰⁰ See supra, p 23.

wrongdoing that occurred before the statute was enacted. Given the fact that this law applies retroactively, it can be expected that the FAST Act will not have an overly strict limit on when disclosures can be made to the necessary agency. However, without more information it is difficult to determine how any limitation on when disclosures can be brought will affect the ability of this statute to encourage whistleblowers to come forward.

Prerequisite Reporting Requirements

4.4 Prerequisite Reporting Requirements – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Prerequisite Reporting Requirements	No requirement for internal reporting.	If internal reporting mechanism exists, whistleblower may be denied an award for not reporting internally.

As discussed in Chapter 3, internal reporting requirements are counterproductive to encouraging whistleblowers to make a disclosure to a governmental agency. While, internal reporting may allow organizations the opportunity to self-correct any wrongdoings, these opportunities make it less likely that a whistleblower will be able to report to a government agency. It is important to note that this statute does not mandate the establishment of internal reporting. It will be recalled that SOX does so. Instead, the FAST Act gives automobile companies (and all others covered by the whistleblower rule, including those in the supply chain) the discretion to decide whether to implement these internal reporting channels. If they do so, then employees of organizations with internal reporting mechanisms must use these mechanisms before reporting to the Department of Transportation or forfeit the consideration for an award.

While it may be early in the lifespan of this statute to make predictions about how this language will affect internal operations of the organizations it regulates, this language seems to incentive the regulated organizations to implement internal reporting mechanisms. From the standpoint of the organization, it would be in their interest to establish these internal reporting channels because of the higher cost associated with external reporting. These costs include not only potential sanctions levied against the organization but also the costs associated with the negative publicity that can accompany external whistleblowing reports that becomes public.¹⁰¹

If organizations do respond to the implementation of this statute by implementing internal reporting requirements, it should be expected that disclosures to government agencies will be discouraged as has been seen with SOX. However, as is the case with SOX, internal reporting requirements do not prevent employees from reporting to government agencies when organizations fail to take action after an internal report is made by an employee. For cases where an internal report is followed by a failure of the organization to take action, the specific procedures that whistleblowers would have to follow have not yet been developed by the Department of Transportation. However, these rules will have a substantial impact on how this internal reporting language will affect employee's decision to blow the whistle.

¹⁰¹ Dworkin, Terry Morehead, and Melissa S. Baucus. "Internal vs. external whistleblowers: A comparison of whistleblowing processes." *Journal of Business Ethics* 17.12 (1998): 1281-1298.

Anonymity

4.5 Anonymity – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Anonymity	Guaranteed	Anonymity but with exceptions

As discussed in the Chapter 3 analysis, a guarantee of anonymity can be reassuring to would-be whistleblowers who fear the costs and potential stigma associated with making a disclosure. Seemingly recognizing this fact, the FAST Act whistleblower provisions requires that the Secretary of Transportation takes great care to ensure that the identity of a whistleblower who makes a disclosure is not revealed.¹⁰² Additionally, the section addressing anonymity instructs the Secretary of Transportation to redact documents in proceedings involving a whistleblower to ensure that a whistleblower's identity is concealed.

While the allowances for anonymity in the FAST Act are explicit and protective, the statute does state exceptions to the anonymity guarantee. These exceptions are for the most part limited to cases where the Department of Transportation is required to release a whistleblower's identity when ordered to do so during a public proceeding. While an ironclad guarantee for anonymity would be most effective at encouraging whistleblower disclosures, these exceptions are limited to extreme cases that apply to a small minority of whistleblowers. Therefore, it is reasonable to conclude that these exceptions would have little impact on the anonymity guarantee this statute outlines.

¹⁰² 30172(f)1. FAST ACT

Reporter Protections

4.6 Reporter Protections – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Reporter Protections	Yes, enforced through right of private action.	Not explicit avenue for private action; 49 U.S. Code 30171 – may offer protection

A protection from retaliation is a fundamental component necessary in any statute that seeks to encourage whistleblowing. Despite this, the FAST whistleblower provisions make no mention of a protection for individuals who report the wrongdoing of an organization. However, in lieu of explicit language in this statute, a protection from retaliation for employees who provide information regarding motor vehicle safety exists in another section of the U.S. Code.¹⁰³ This section of the U.S. Code affords employees a right to private action if they are retaliated against for reporting an automobile safety violation. Based on the scope of the reportable wrongdoing under the FAST Act, it is fair to assume that most, if not all, reports made under the FAST Act will also be covered by this law. Thus, while the statute lacks explicit language for protections, it is reasonable to predict those protections still exist for whistleblowers.

If U.S. Code Section 30171 does apply to whistleblowers who make disclosures under the FAST Act, then those whistleblowers will be entitled to back pay, reinstatement and other compensatory damages. Notably, these protections are not as robust as the protections in the FCA which offers double back pay among other things. However, the protection afforded to individuals who report automobile safety concerns under the U.S. Code are reasonably sufficient to make an employee whole, which is the goal of these protections.

¹⁰³ 49 U.S. Code 30171

Statute of Limitations on Retaliation Claims

4.7 Statute of Limitations on Retaliation Claims – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Statute of Limitations on Retaliation Claims	An action must be filed either within 6 years after the date when the retaliation occurs or within 3 years after the date “facts material to the right of action are known or reasonably should have been known by the employee,” but no more than 10 years after the violation.	Not explicit

Given the fact that the FAST Act does not contain language regarding retaliation protections for whistleblowers, it is not surprising that the regulation does not provide for a specific statute of limitations on retaliation claims either. As discussed in the previous section, whistleblowers who face retaliation for making disclosure under the FAST Act will most likely be afforded protections under U.S. Code 30171. If it is assumed that this section of the U.S. Code will cover retaliation claims brought by FAST Act whistleblowers, then one must examine its statute of limitations.

U.S. Code Section 30171 contains specific language regarding the timeframe during which employees must initiate their claim against an employer. The section states that an employee, “who believes that he or she has been discharged or otherwise discriminated against by any person [...] may file, not later than 180 days after the date on which such violations occur.”¹⁰⁴ This 180-day statute of limitation if applied to FAST Act whistleblowers would be the same statute of limitation contains in SOX. As discussed in Chapter 3, there is a body of scholarly work done in the field which demonstrates that this 180-day statute of limitation is too strict and has a discouraging effect on whistleblowing.¹⁰⁵ With no substantial difference between whistleblowers under the FAST Act and SOX, it can be expected that the discouraging effect this

¹⁰⁴ US Code 30171 (b) 1

¹⁰⁵ See Supra, p. 32.

narrow window created for SOX whistleblowers will also have the same effect on FAST Act whistleblowers.

Reporter Control

4.8 Reporter Control – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Reporter Control	Uncertain. Qui tam model in cases where ability to control narrative is important to whistleblower.	None. Department of Transportation has completed discretion to pursue actions.

As discussed in chapter 3, there are two models for reporter control in whistleblowing: *qui tam* law suits and the tip-for-tip model. These models sit on opposite sides of the reporter control spectrum with *qui tam* lawsuits offering whistleblowers a high degree of control over their claims and the tip-for-tip model offering a low degree of control. The FAST Act whistleblower provisions are designed as a tip-for-tip model. Under the FAST Act, once a whistleblower makes a disclosure to the Department of Transportation, all actions regarding the claim are carried out by the government agents.

Due to a lack of scholarship, it is unclear how these two models may affect a would-be decision-making process of an individual with knowledge of organizational wrongdoing. It is possible certain whistleblowers would prefer the tip-for-tip model. Pursuing an action against an organization through a *qui tam* lawsuit could cause a significant burden on the reporter. The tip-for-tip model would spare whistleblowers from the burden of pursuing a claim; however, it would cost the whistleblower the ability to decide how to present the narrative.

As discussed in Chapter 3, the little research that has been done on the effects of the two different reporter control models suggests that the *qui tam* lawsuit model is more effective when

the ability to control the narrative is valued highly by a whistleblower. Compared to other whistleblower laws examined in Chapter 3, there is nothing unique to the FAST Act that would make whistleblowers under this law more eager to have control over a claim. In lieu of more definitive research, there is no way to make solid predictions regarding how this mechanism will affect the ability of the law to encourage whistleblowing.

Award Restrictions

Agency Discretion

4.9 Agency Discretion – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Agency Discretion	Some guarantee	Award not guaranteed. Issuance of awards is at the discretion of the Secretary of Transportation.

The FAST Act states that the Secretary of Transportation will have discretion to determine whether or not an award will be issued to a whistleblower.¹⁰⁶ In chapter 3, all the statutes offering awards to whistleblowers guaranteed that whistleblowers who made qualifying disclosures would be entitled to at least some award. This guaranteed does not exist under the FAST Act. Instead, the Secretary of Transportation will have the ability to deny individuals awards, even if, those individuals make a qualifying disclosure.

The language regarding the discretion given to the Secretary is a significant divergence from the language found in the other statutes offering awards that were discussed in Chapter 3.

¹⁰⁶FAST Act 30172 c(1)A.

While allowing the Secretary ultimate discretion on award decisions may provide some benefits to the agency, based on the research, this language will have an adverse effect on encouraging individuals to make disclosures.¹⁰⁷ According to this language, would-be whistleblowers with qualifying information face uncertainty as to whether or not the Secretary will issue an award, even if they meet all of the requirements laid out in the statute. Without a guarantee, regulators should not expect the possibility of an award to be a strong incentive for whistleblowers.

Minimum Recovery Thresholds for Award Eligibility

4.10 Minimum Recovery Thresholds for Award Eligibility – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Minimum Recovery Thresholds for Award Eligibility	None	\$1 million

The FAST Act sets the minimum claim threshold at one million dollars.¹⁰⁸ This means that the disclosure of whistleblower must result in a minimum of one million dollars in sanctions against the reported organization in order for the whistleblower to be eligible to receive an award. This is the same minimum threshold amount that is found in the Dodd-Frank statute. While this minimum recovery threshold probably will not render this statute ineffective, it may have the effect of discouraging some whistleblowers to make a disclosure. This mechanism may cause uncertainty among would-be whistleblowers who are unsure as to whether their disclosure will result in sanctions that meet this minimum threshold but, the uncertainty caused by this

¹⁰⁷ See note 15. Feldman & Lobel.

¹⁰⁸ FAST Act 30172(a)1

mechanism does not match the greater uncertainty caused by the agency discretion mechanism discussed in the previous section.

Award Value Ranges

4.11 Award Value Ranges – Best Mechanism Compared to FAST Act Mechanism

	Best Mechanism	FAST Act
Award Value Ranges	Reasonable lower-end value; higher-end less significant.	10-30%

According to this statute, whistleblower awards must be at least 10 percent of the sanctions issued against the reported organization but may not exceed 30 percent of those sanctions.¹⁰⁹ As discussed in Chapter 3, there is no definite rule on how these ranges should be set in order to encourage the most whistleblowers to make disclosure. In lieu of any certain ranges, it is important that regulators pay close attention to the lower range to ensure that it is enough to be worthwhile to whistleblowers.

In comparison to the statutes discussed in Chapter 3, the FAST Act has a reasonable value range for the issuance of awards. In fact, the value ranges established by the FAST Act are identical to the value ranges set by Dodd-Frank, which has been successful at encouraging whistleblowing. While the FAST Act has lower minimum range than the IRC or the FCA, it is important to note that both of these statutes deal with the recovery of federal funds lost to fraud, where the FAST Act and Dodd-Frank are offering awards in portion to sanctions levied against organizations as a punishment. Given the research that suggests higher awards lead to more reports, it is reasonable to assume that raising the minimum value would encourage more

¹⁰⁹ FAST Act 30172 (b) 1

whistleblowers to come forward. However, based on the success of Dodd-Frank, it is unlikely that setting the lower end of the value range at 10 percent will drastically impede the success of this statute at encouraging individuals to make a report.

Chapter 5

Discussion

The Department of Transportation has yet to develop rules that elaborate on the language of the whistleblower provisions within the FAST Act. With a new presidential administration and a new Secretary of Transportation, Elaine Chao, it is unclear how soon these rules will be made available to the public. Additionally, the relative newness of the statute means that there is no available data such as court rulings or agency reports to determine the effectiveness of this statute at encouraging whistleblowers to come forward. In the coming years, as this data becomes available, it is reasonable to expect that scholars in the field will move in to criticize the mechanisms within the statute, as has been done with previous whistleblower statutes discussed in this paper.

For now, the framework developed in Chapter 3 and applied in Chapter 4 provides some insight into the relative effectiveness of this law. When examined mechanism by mechanism, it is clear that the FAST Act contains some mechanisms which have been identified as problematic when incorporated in previous whistleblower laws.

The most concerning of these problematic mechanisms are the internal reporting requirement and the statute of limitations on retaliation claims. Although this statute only requires a whistleblower to use internal reporting channels when their organization has them in place, this provision offers a strong incentive to organizations to implement these internal reporting channels. If organizations do adopt this practice, then it can be expected that the FAST Act will result in less whistleblowing to the agency.

When it comes to the statute of limitations on retaliation claims, the statute itself does not address retaliation claims but rather seems to defer to the section of the U.S. Code that deals with retaliation claims made by employees in the automobile industry. If this section of the U.S. code ultimately governs retaliation claims for whistleblowers under the FAST Act, that means these FAST Act whistleblowers will have 180 days to file after being retaliated against to file their claim. This strict statute of limitation can be expected to have a discouraging effect on whistleblowers.

Interestingly, the two most concerning mechanisms in the FAST Act have been previously identified in SOX. The internal reporting requirement and 180-day statute of limitations are two mechanisms that scholars have been critical of in the SOX whistleblower provisions. Further, the failure of SOX to encourage whistleblowers has been attributed to these two mechanisms by various scholars in the community. The presence of these two mechanisms in the FAST Act provides a unique opportunity to researchers in this field. As data regarding the effectiveness of the FAST Act becomes available, scholars can examine this data to determine if this statute is as ineffective as SOX. Researchers will be able to either verify the conclusions that these two mechanisms led to the failure of SOX, or if the FAST Act is successful, look to other reasons why SOX may have been so ineffective. However, until this data becomes available, scholars in the community can only make predictions on how this law will measure up to its predecessors.

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ACADEMIC VITA

Eric D. Love
(814) 321-1279
Ericlove1017@gmail.com

Education

Schreyer Honors College at The Pennsylvania State University

B.A. Hons., Labor and Employment Relations, College of Liberal Arts (June 2013 – Present)
B.A., Political Science, College of Liberal Arts University Park, PA

Work Experience

Penn State Undergraduate Speaking Center (September 2014 – Present)

Public Speaking Tutor

- Conduct individual tutoring sessions to assist students with the content and delivery of their speeches
- Present to classes and organizations on the topic of effective public speaking

Day & Zimmermann Group (May 2016 – August 2016)

Human Resources Intern

- Prepared a report detailing industry standards as part of an enterprise-wide initiative to overhaul the onboarding process
- Created a manager's resource guide to assist new managers with employee relations issues
- Designed a development tool called "Betterment Builders" in order to assist employees with their development plans
- Earned a Betterment Bucks award, a bonus for employees who make a significant contribution to the company

Envision Career & Leadership Programs (May 2015 – August 2015)

Faculty Advisor

- Designed and implemented a law based curriculum for students in groups of 16
- Trained students on the fundamentals of trial advocacy in preparation for a mock trial

The Mayor of Philadelphia's Office of Communications (May 2014 – August 2014)

Press Office Intern

- Prepared talking points and press advisories
- Attended press conferences and availabilities for the Mayor and other local government officials

Kent & McBride P.C. (October 2009 – June 2013)

File Clerk

- Maintained case files for mid-size legal defense firm
- Researched and analyzed legal precedent using LexisNexis software

Leadership Experience

Penn State Mock Trial Association

(September 2013 – Present)

- Captain of the #1 ranked collegiate mock trial team in the state of Pennsylvania for two years
- As Tournament Director, organized mock trial competitions involving over 300 legal professionals and students
- Educated new members on the AMTA rules of evidence and the fundamentals of trial advocacy

University Park Undergraduate Association Judicial Board

(October 2015 – Present)

Chief Justice

- Responsible for hearing University Park parking and traffic citation appeals
- Authored bylaws and other governing documents for the undergraduate student government and affiliate organizations
- Arbitrated disputes between individuals involved in the undergraduate student government
- Regulated student government elections by ensuring compliance with candidacy and campaigning procedures

Student Organization Conduct Committee

(October 2015 – Present)

Chairperson

- Reorganized the committee creating officer positions to effectively execute the mission of the SOCC
- Held disciplinary conferences with the officers of student organizations accused of violating rules and policies
- Presided over disciplinary hearings involving student organizations accused of violating rules and policies
- Issued sanctions to student groups for policy violations and ensured compliance with issued sanctions

University Conduct Board

(April 2016 – Present)

Board member

- Adjudicated cases against university students accused of violating the student code of conduct