

SNITCH OR SAVIOR? HOW THE MODERN CULTURAL ACCEPTANCE OF PHARMACEUTICAL COMPANY EMPLOYEE EXTERNAL WHISTLEBLOWING IS REFLECTED IN DODD- FRANK AND THE AFFORDABLE CARE ACT

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INTRODUCTION

Literally, Dr. Joseph Gerstein wore a wire instead of a whistle. Figuratively, however, Gerstein blew his metaphorical whistle to sound the alarm on TAP Pharmaceutical Products, Inc. (TAP), the company that produces the prostate cancer drug Lupron. TAP's National Account Manager Janice Swirski and District Manager Kimberlee Chase entered into negotiations with Gerstein in an attempt to get Lupron added to Tufts University's insurance formulary. Since Gerstein was an urologist for Tufts Associated Health Maintenance Organization, Swirski and Chases offered him a \$65,000 unrestricted grant in exchange for the reversal of his previous decision to only offer a cheaper but equally effective drug to Tufts Associated's prostate cancer patients instead of Lupron.¹ Instead of sincerely negotiating with Swirski and Chase, Gerstein wore a wire, blew his whistle, and alerted government officials to TAP's bribery attempt. The Department of Justice (DOJ) prosecuted TAP for its attempted bribery as well as other fraudulent marketing and sales practices reported by another whistleblower, Douglas Durand, former Vice President of Sales for TAP. The DOJ secured a total recovery of \$900 million. Gerstein, Durand and Tufts Associated, whistleblowers whose tips led to the successful prosecution, shared a bounty award equal to seventeen percent of the total recovery, or \$95 million.²

Economically, Gerstein made the correct financial decision because the bounty he received from the DOJ was significantly larger than the grant Swirski and Chase offered him. Morally, however, the judgment of whether Gerstein made the right ethical decision to report TAP to the government depends on the American cultural attitude³ toward external whistleblowing and pharmaceutical companies at the time the ethics are being judged. A century ago, our culture would have perceived Gerstein as a "snitch,"⁴ an egotistical saboteur who attacked a company that provides

1. See Press Release, U.S. Dep't of Justice, TAP Pharmaceutical Products Inc. and Seven Others Charged with Health Care Crimes; Company Agrees to Pay \$875 Million to Settle Charges (Oct. 3, 2001), <http://www.justice.gov/opa/pr/2001/October/513civ.htm> [hereinafter TAP Press Release] (explaining the TAP incident).

2. *Id.*

3. Throughout this Comment, I will use the term "cultural attitude" to refer to "a systematized network of opinions held by a person or persons." BERNARD RUBIN ET AL., *BIG BUSINESS AND THE MASS MEDIA* 169 (1977).

4. "Snitch" is a colloquial word used to label a person who becomes an informer, particularly an informer who discloses negative information about someone they owed allegiance to. See Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 563 n.1 (1999) ("'Snitching,' 'substantial assistance,' and 'ratting' are all synonymous with

life-saving medicine for cancer patients and gives thousands of jobs to hardworking Americans.⁵ Conversely, in 2001, when the TAP case was settled, popular perception of Gerstein was that he was a “savior,” a hero who passed up an opportunity for self-gain to support the greater good.⁶

This Comment will focus on the evolution of cultural attitudes and modern laws regarding the external whistleblowing of pharmaceutical company employees. Part I of this Comment will trace cultural attitudes from the past to the present. I will demonstrate that the cultural shift from adoration to contempt for corporations has led to an opposite shift with regards to external whistleblowers. American society’s perception of external whistleblowing has gone from past contemptuous disdain of “snitches” to present positive adoring of “saviors.” The current cultural attitude is that these “saviors” support individuals, distrust corporations, and promote safe and legal corporate products and practices. Part II of this Comment will show that modern statutes—the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Patient Protection and Affordable Care Act (ACA)⁷ in particular—have evolved

cooperation, if not quite interchangeable. The Oxford English Dictionary notes that ‘snitch’ is slang and of obscure origin. Its first definition is ‘A fillip on the nose,’ the second is ‘The Nose’ and the third is ‘An informer; one who turns King’s or Queen’s evidence.’ The first citation for the use of ‘snitch’ as informer is to a 1785 dictionary entry, followed by an 1800 citation from Byron and many others.”)

5. See MARCIA MICELI & JANET NEAR: BLOWING THE WHISTLE, THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 1 (1992) (noting that whistleblowers have been seen as “company traitors who reveal secrets for their own personal glorification”).

6. See *id.* (noting that whistleblowers are often seen as heroes and corruption fighters “who represent society’s last line of defense against organizational misconduct.”).

7. This health care reform law has been known by three names. The legislation signed by President Barack Obama on March 23, 2010 was titled the Patient Protection and Affordable Care Act (PPACA). Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010). Seven days later, the President signed the Health Care Education and Reconciliation Act (HCERA). Health Care Education and Reconciliation Act of 2010, H.R. 4872, 111th Cong. (2010). HCERA made significant amendments to the original version of PPACA. The combined version of PPACA and HCERA health care reform laws, while officially still titled PPACA, is more often referred to as the Affordable Care Act (ACA) to distinguish between the original March 23rd version of PPACA and the March 30th combined version of PPACA. See, e.g., C. STEPHEN REDHEAD & ERIN D. WILLIAMS, CONG. RESEARCH SERV., RL41278, PUBLIC HEALTH, WORKFORCE, QUALITY, AND RELATED PROVISIONS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA): SUMMARY AND TIMELINE (2010), available at <https://www.aamc.org/download/130996/data/ph.pdf>. In popular culture, the law has been referred to as “Obamacare.” Gregory Wallace, ‘Obamacare’: The Word That Defined the Health Care Debate, CNN (June 25, 2012), http://articles.cnn.com/2012-06-25/politics/politics_obamacare-word-debate_1_health-reform-law-health-care-affordable-care-act?_s=PM:POLITICS. Initially, opponents of the President used “Obamacare” as a pejorative nickname, but more recently, supporters of the

much like attitudinal norms. Inherent in these modern statutes is society's aspiration to protect individuals, caution companies, and safeguard the integrity of products through the discouragement of corporate misconduct by way of external whistleblowing. Part III will show that Dodd-Frank and the ACA directly reflect the increased cultural attitudinal acceptance of external whistleblowing, and these Acts will have a tangible impact on pharmaceutical companies. I argue that due to our contemporary disdain for pharmaceutical companies, the early twentieth century disapproval of external whistleblowing in American culture and law has developed into the current prevailing cultural and legal promotion of external employee whistleblowing.

I. EVOLUTION OF CULTURAL ATTITUDES REGARDING EXTERNAL WHISTLEBLOWING

The term “whistleblowing” originated from police officers blowing whistles to alert bystanders of the occurrence of unlawful activity.⁸ The term has become a legal and cultural concept that impacts employee-employer relationships as well as the relationship corporations have with the general public. The first part of this Comment will outline how the conception, perception and reception of external whistleblowing have evolved over the past one hundred years.

A. *Background on External Whistleblowing*

Although cultural attitudes about whistleblowing have changed over time, its definition has remained relatively constant. Whistleblowing has been defined as “the disclosure by organizational members of illegal, immoral, or illegitimate organizational acts or omissions to parties who can

President reclaimed “Obamacare” to give the term a more favorable interpretation. *Id.*

8. See Matthias Kleinhempel, *Whistleblowing: Not An Easy Thing To Do*, EFFECTIVE EXECUTIVE, July 2011, at 44 (“The term ‘whistleblowing’ comes from England, where policemen, as in many other countries around the world, used to ‘blow the whistle’ when they spotted illegal activity, calling the attention of both other policemen and passers-by.”). *But see* ALAN F. WESTIN, WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 1-2 (1981) (pointing out the irony in the difference between police officer and corporate employees in blowing a whistle). Westin explains that in normal situations, the person with the whistle has more authority than the person who the whistle is blown on, as in the case of police officers. *Id.* He uses the example of a referee, police officer, and lifeguard, all positions where “the person who has the whistle is the legally invested authority on the spot.” *Id.* Contrarily, “[e]mployees who complain about organization wrongdoing lack such power. . . . Employees who protest corporate wrongdoing are therefore not invoking the whistle of authority but the whistle of desperation.” *Id.* at 2.

take action to correct the wrongdoing.”⁹ An alternative, more modern and less neutral definition of whistleblowing is “the act of a man or woman, who, believing that the public interest overrides the interest of the organization he serves, publicly ‘blows the whistle’ if the organization is involved in corrupt, illegal, fraudulent, or harmful activity”¹⁰

Beyond their similar positions as employees or affiliates of the corrupt company in question, whistleblowers may have little in common. Whistleblowers may be “Easterners, Southerners, Midwesterners, and Westerners. Some are Democrats, some Republicans, and some Independents; in political philosophy, some are conservatives, some liberals, and some wholly apolitical.”¹¹ In addition to being urologists like Gerstein, whistleblowers may come from “a wide range of occupations in the corporate work force—auditor, lawyer, nuclear engineer, salesperson, secretary, airline pilot, truck driver, construction worker, research director, and automotive design engineer.”¹²

The whistle has been blown on a broad range of activities, such as “illegal campaign payments to public officials, dangerous nuclear reactors, fraudulent reports to public utility omissions, sex discrimination, unsafe passenger aircraft, potentially harmful drugs, sexual harassment, dangerous construction sites, and unsafe trucks on the highways.”¹³ Marketing fraud and manufacturing adulteration of pharmaceuticals are within this range of activities reportable to the government.

The decision to blow the whistle may depend on the employee’s motives, which can vary as much as their background. Jack Behrman, former Professor Emeritus at University of North Carolina Kenan-Flagler Business School, believes that employees frequently have mixed motives for reporting wrongdoing. Whistleblowers may be motivated by “a dedication to the organization’s stated goals, when the matter is perceived as being counter to those goals.”¹⁴ Whistleblowers may also be motivated by “the purposes society has for its business sector and an attempt to respond to those purposes by redirecting the organization’s

9. MICELI & NEAR, *supra* note 5, at xv.

10. WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY vii (Ralph Nader et al. eds., 1972). Note that the second definition is characterized as “modern” because it relies on an assumption that employees consider the public interest when deciding whether to blow the whistle on their employer. The first definition does not depend on any assumptions about the employee’s intent. The first definition is simply an explanation of the actual act of blowing the whistle. The second definition is an explanation of the employee’s motivations and actions.

11. WESTIN, *supra* note 8, at 131.

12. WESTIN, *supra* note 8, at 2.

13. WESTIN, *supra* note 8, at 2.

14. JACK BEHRMAN, *ESSAYS ON ETHICS IN BUSINESS AND THE PROFESSIONS* 140 (1988).

activities”¹⁵ Furthermore, whistleblowers may be motivated by the desire “to live with one’s own moral standards, which one perceives are violated by the particular situation”¹⁶

These motives may affect whether the whistleblower decides to blow the whistle internally or externally. If a worker is troubled by his or her colleagues’ noncompliant behavior, he or she may blow the whistle to internal management. If a worker seeks to redirect an entire company or defend the general public, the whistle may be blown externally, reporting violations of state or federal laws to the government. External whistleblowing “can hurt the collective interest of the organization by damaging its *image*, the public face on which an appropriation usually depends.”¹⁷ For this reason, consumer protection activist Ralph Nader believes that “[f]ormal channels for bringing a situation to the attention of top management should be pursued first,” to offer companies an opportunity to investigate illegalities and remedy situations before financial and reputational damage occurs from outside exposure.¹⁸ However, since “whistleblowers may well encounter difficulties when they appeal internally,” employees may resort to handing information over to federal or state governments.¹⁹

Cultural attitudes have always embraced internal whistleblowing for the most part.²⁰ However, cultural attitudes have not always embraced external whistleblowing. Americans’ reaction to external whistleblowers has transformed over time, particularly during the twentieth century when society’s opinion of large corporations began to change.

B. Early Twentieth Century Disdain for External Whistleblowing

Before civil rights became a prominent issue in the second half of last century, society was more concerned with the corporation’s right to contribute to the financial success of the United States; thus,

15. *Id.*

16. *Id.*

17. ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS—AND WHY 14 (2003) (quoting Taylor Branch, *Courage Without Esteem: Profiles in Whistle-Blowing*, in *CULTURE OF BUREAUCRACY* 232 (Holt, Rinehart, & Winston eds., 1979)).

18. WHISTLE BLOWING, *supra* note 10, at 230.

19. Lilanthi Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, MARKKULA CTR. FOR APPLIED ETHICS (2003), <http://www.scu.edu/ethics/publications/submitted/whistleblowing.html>.

20. Internal reporting has always been considered more effective than external whistleblowing in deterring misconduct. Westin wrote that in the past, “employees first tried to voice their concerns within the company’s own channel, in the tradition of the organizational loyalist.” WESTIN, *supra* note 8, at 2.

“whistleblowers . . . [who] threaten[ed] the organization’s authority structure, cohesiveness, and public image” were thought to threaten American prosperity.²¹ Alan F. Westin, professor and founder of the Center for Social and Legal Research,²² writes, “[f]rom the development of large corporate enterprise in the late 19th century until the middle 1960s, American law and public attitudes supported very broad powers of management in matters of both personnel administration and business policy.”²³ Pharmaceutical companies in particular were offered leeway in their business and operational practices because “health care is seen as a social need, rather than a demand.”²⁴ Therefore, society afforded pharmaceutical companies flexibility to function as providers of consumer health medications.²⁵ In the early twentieth century, an employee who divulged information about a pharmaceutical company’s alleged wrongdoing was perceived as a “snitch,” a selfish tattletale concerned with personal gain over national success.²⁶

There are three prominent ways that the historical propensity to equate a whistleblower with a “snitch” manifested in the attitudinal norms of the early twentieth century. First, at the time, loyalty to an employer was a shared value stemming from “the medieval concept that the ruling lords owed certain protection and support to their vassals in return for their loyalty and service in times of war.”²⁷ This concept of loyalty signified that

21. John P. Keenan, *Upper-Level Managers and Whistleblowing: Determinants of Perceptions of Company Encouragement and Information about Where to Blow the Whistle*, 5 J. BUS. PSYCHOL. 223, 223 (1990).

22. Sarah D. Scalet, *Privacy Q&A: Alan Westin On Protecting Corporate Data*, CIO (June 15, 2003), <http://www.cio.com/article/print/29756>.

23. WESTIN, *supra* note 8, at 4.

24. BEHRMAN, *supra* note 14, at 112.

25. BEHRMAN, *supra* note 14, at 112.

26. Whistleblowers have been perceived negatively in the past. See MICELI & NEAR, *supra* note 5, at 1 (noting that the term “whistle-blowing” often has a negative connotation based on society’s apprehension to approve of employees disclosing secrets and inner workings of the company’s they work for). Arthur S. Miller gave the example that a tax evasion informer can “snitch” on someone in order to receive a percentage of the money recovered. WHISTLE BLOWING, *supra* note 10, at 25.

27. RUBIN, *supra* note 3, at 103; see also WHISTLE BLOWING, *supra* note 10, at 3 (“The large organization is lord and manor, and most of its employees have been desensitized much as were medieval peasants who never knew they were serfs. It is true that often the immediate physical deprivations are far fewer, but the price of this fragile shield has been the dulling of the senses”); see e.g., JOHNSON, *supra* note 17, at 14 (“Loyalty to team and group has always been valued in the American culture”); WHISTLE BLOWING, *supra* note 10, at 26 (“The preeminent virtue is loyalty, and the principle is ‘your organization, love it or leave it.’”); BEHRMAN, *supra* note 14, at 148 (“Such loyalty cannot be bought; it has to be nurtured. . . . Economically, one is supposed to be loyal above all to one’s own career.”).

supporting the success of his or her company was a worker's contribution to the United States' status as a superpower.²⁸ Due to this strong cultural notion of employee loyalty, even Senator Charles Grassley, one of the biggest champions for whistleblowers, had to admit, "[u]nfortunately, whistleblowers are often as welcome in an agency as a skunk at a picnic."²⁹ An arbitrator in a 1972 case proved Grassley's point when he told an employee whistleblower, "you cannot 'bite the hand that feeds you and insist on staying on for the banquet.'"³⁰ Colleagues who felt indebted to the employer that offered their family sustenance and their country opulence often alienated a worker who blew the whistle.³¹ During the early twentieth century, society would have felt that Gerstein subverted national prosperity by impeding the ability of a pharmaceutical company that helps prolong the lives of cancer patients conduct its business.

Second, past disapproval stemmed from an assumption that whistleblowers had adverse motives. Condemnation resulted from a collective suspicion that whistleblowers might be committed to "goals other than those of the organization," which lead to the company's "suboptimum performance and, therefore, loss of productivity, efficiency, competitiveness, and ability to serve."³² For example, "General MacArthur was sacked by President Truman for publicly disagreeing with his Commander in Chief. Otto Otepka got the deep freeze for squealing to a congressional committee."³³ Because many Americans doubted the motives of whistleblowers, in addition to "snitch," there were other "invidious terms for [a whistleblower]: he is a 'fink' or a 'stool pigeon,' a

28. See WHISTLE BLOWING, *supra* note 10, at 21 ("America became great in engineering and production because of its entrepreneurs.").

29. 151 CONG. REC. S534 (daily ed. Jan. 26, 2005) (statement of Sen. Chuck Grassley).

30. Ravishankar, *supra* note 19.

31. JOHNSON, *supra* note 17, at 14.

32. BEHRMAN, *supra* note 14, at 147.

33. WHISTLE BLOWING, *supra* note 10, at 26. Douglas MacArthur was removed from his command as general for criticizing President Truman's Korean War strategy in a letter to the House of Representatives. 3 D. CLAYTON JAMES, THE YEARS OF MACARTHUR: TRIUMPH AND DISASTER 1945-1964 (1985). Otto Otepka, the State Department security official responsible for issuing security clearances, was alienated when he decided not to give clearance to John F. Kennedy's appointees whom he deemed risks to national security. After testifying to the Senate Internal Security Subcommittee about the security risks of the appointees, a reporter wrote about Otepka, "No one speaks to the man and he speaks to no one.[.] . . . 'When he enters the elevator, the conversation fades to a painful silence. In the corridors, one or two people nod in polite recognition, but quickly lower their eyes.[.] . . . 'He sits behind his bare desk to face another morning in solitude.' . . . Otepka is a human island, ostracized by all other State Department workers." Wes Vernon, *Security Whistle-Blowers Pay a Heavy Price*, NEWSMAX.COM (June 1, 2002), <http://archive.newsmax.com/archives/articles/2002/5/31/181539.shtml>.

‘squealer’ or an ‘informer,’ or he ‘rats’ on his employer.”³⁴ Ultimately, Americans assumed that a whistleblower was “a lowlife who betrays a sacred trust largely for personal gain.”³⁵ A century ago, Gerstein would have been recognized as an opportunist who sought a large bounty as opposed to a modest grant. Also, Gerstein would be recognized as a liar. He could have simply turned down Swirski and Chase’s offer instead of pretending to negotiate with them while wearing a wire.

Third, the collective attitude before the 1970s was that external whistleblowing was not necessary to deter corporate misconduct. Even recently, the indispensability of external whistleblowing has been doubted by then-Representative Johnny Isakson when he stated, “I would submit to my colleague it would not have taken a whistle-blower at Enron to blow it sky high.”³⁶ Isakson’s statement is a reminder that there are other mechanisms to uncover wrongdoing and influence corporate governance, such as by “regulation, competition, [and] litigation”³⁷ In the early twentieth century, society would have preferred Gerstein to report Swirski and Chase’s attempted bribe to their superiors at TAP, allow competition from the lower-priced drug to force Lupron out of the market, or encourage Tufts Associated patients to advocate for themselves in court.

C. Contemporary Cultural Acceptance and Encouragement of External Whistleblowing

During the second half of the twentieth century and into the twenty-first century, “[l]arge American corporations . . . [began to] fac[e] new and at times unprecedented social and economic changes which make public accounting and accountability absolutely necessary.”³⁸ The social change

34. WHISTLE BLOWING, *supra* note 10, at 26.

35. Ravishankar, *supra* note 19.

36. 149 CONG. REC. H4067 (daily ed. May 14, 2003) (statement of Rep. John Isakson).

37. WHISTLE BLOWING, *supra* note 10, at 4.

38. RUBIN, *supra* note 3, at xiii. For a more developed overview of society’s changes in the 1960s and 1970s, see WESTIN, *supra* note 8, at 6 (“During the 1960s and ‘70s, a series of events and developments took place that shattered these traditional assumptions and drastically altered social attitudes toward the conduct of corporate affairs. The rise of the consumer movement of the ‘60s focused on dangerous and substandard products, challenging the adequacy of consumer protection under the existing regulatory agency system. The equality movements first attacked racial discrimination and then sex and age discrimination in corporate employment. New findings were made and widely publicized about perils to employee life and health from harmful substances used in the workplace, as well as growing threats of radiation and chemical damage to people living in communities near many types of industrial plants. . . . Throughout this period changes in social values about sex, life-styles, and political beliefs altered the public’s sense of the proper line to be drawn between private and public matters”).

that pharmaceutical companies faced was pressure from the media, social groups, and rights movements. These groups portray corporations as threats to civil liberties by promoting this belief:

[T]he leaders of large organizations are distracted and corrupted by luxuries and the trappings of corporate success, they have no time to consider fundamental values like honesty, truth, and justice. They have no time to listen to the voices of their own people who know what's right and what's wrong with their products and services.³⁹

The economic changes companies faced resulted from periodic recessions like the 1979 energy crisis, the 1990 oil price shock, the 2001 burst of the dot-com bubble, and the 2008 subprime mortgage crisis, the last of which was blamed on corporations' risky fiscal practices.⁴⁰ These social and economic changes led to a loss of public confidence in corporations.⁴¹ At the present time, "[e]mployees and consumers say they no longer trust corporations, and believe they have no moral operating standards."⁴²

The cultural shift from reverence to distrust of large companies led to an attitudinal change toward external whistleblowing. Companies are vilified before the public by the media, social movements, onset recessions, and evidence of business scandals.⁴³ Even though Aaron Chatterji,

39. WHISTLE BLOWING, *supra* note 10, at 24.

40. For an explanation of historical economic crises, see NAT'L BUREAU OF ECON. RESEARCH, U.S. BUSINESS CYCLE EXPANSIONS AND CONTRACTIONS (2010), available at http://www.nber.org/cycles/US_Business_Cycle_Expansions_and_Contractions_20100920.pdf. For information about the most recent recession's cause, see DAVID B. GRUSKY ET AL., THE GREAT RECESSION 21-22 (2011) ("The proximate cause of the 'Great Recession' was the unraveling of the mortgage securitization industry in 2007. . . . Our basic argument in this chapter is that the Great Recession happened because the growing American financial sector sought to base its business on selling risky mortgages to individuals.").

41. See RUBIN, *supra* note 3, at 76 ("A 1976 Conference Board study entitled *Managing Corporate External Relations* reported that the 'dearth of public confidence in business' was seen by 107 out of 185 chief executive officers as the paramount external problem facing corporate management.").

42. Mary Donohue, *Five Cultural Shifts That Are Changing the Workplace*, NAT'L POST, Jun. 13, 2011, <http://www.nationalpost.com/Five+cultural+shifts+that+changing+workplace/4938845/story.html>.

43. Valerie Hans writes that there has been a cultural shift "toward holding businesses and corporations responsible for harm." Valerie P. Hans, *Attitudes Toward Corporate Responsibility: A Psycholegal Perspective*, 69 NEB. L. REV. 158, 158-59 (1990). This cultural shift was due to the public receiving negative information about companies from the media that made people suspicious of large corporations. See RUBIN, *supra* note 3, at 69 (discussing "[b]usiness's sense of ill treatment by the media," as opposed to "social action groups" that "have been successful in commanding media attention. . . . These groups lean for their effectiveness 'on the creation of instant TV visibility' for themselves and at the

associate professor at Duke University, states, “Americans do not seem to be questioning that an innovative and entrepreneurial private sector is what makes this country great,” Americans do question corporations’ ethics in their pursuit of greatness.⁴⁴ A worker who reports lawless activities by vilified companies is deemed a trusted “savior[],” a superhero against a villain, a champion for ethics, a “guardian[] of public accountability.”⁴⁵

The new national distrust of corporations altered the three early twentieth century manifestations of the disdain for external whistleblowers. First, medieval loyalty to the employer morphed into paternalistic loyalty to the employee. The consumer advocacy movement has encouraged loyalty to individual persons who work for a company, as opposed to loyalty to the company itself. Consumer advocates defend people against powerful organizations and support consumer individualism—the ability to make decisions about one’s own health.⁴⁶ For example, “the TAP employees who knowingly participated in this broad conspiracy took advantage of older Americans suffering from prostate cancer. . . . [T]he elderly Americans suffering from prostate cancer paid more for their care than if the doctor had prescribed the competitor’s product.”⁴⁷ Consumer advocates also support free speech through informing internal authority or external government agencies about their colleagues’ illegal activity and would have upheld Gerstein’s service as an informant for the DOJ.⁴⁸ The current attitudinal norm is to guard consumers’ attempts to ensure that pharmaceutical companies are not taking advantage of individuals with less bargaining agency than large corporations.

Second, past suspicion of whistleblowers’ motives turned into present doubt about the truthfulness of large corporations, especially pharmaceutical companies that profit from Americans’ dependency on

expense of their adversaries”); *see also* MICELI & NEAR, *supra* note 5, at 2 (“Whistle-blowing incidents are frequently in the public eye.”).

44. Aaron Chatterji, *No Beef with Jobs’ Business*, NEWS & OBSERVER, Oct. 15, 2011, <http://www.newsobserver.com/2011/10/15/1566367/no-beef-with-jobs-business.html> (explaining that there has been a cultural shift to “diverge on the worth we ascribe to certain industries or products and wonder if cozy relationships among the rich and powerful thwart fair competition . . .”).

45. Ravishankar, *supra* note 19; MICELI & NEAR, *supra* note 5, at 3 (“There is evidence that whistle-blowing is on the increase [since 1983]. . . . Whistle-blowing may reflect a general trend toward greater recognition of employee rights and responsibilities in the workplace.”).

46. Individualism can be defined as the constitution of individuals based on the choices they make as consumers. MICHAEL PERELMAN, *MANUFACTURING DISCONTENT* xi (2005).

47. TAP Press Release, *supra* note 1.

48. *See* JOHNSON, *supra* note 17, at 20 (noting that since September 11, 2001, the number of whistleblowers has increased due to a profound sense of patriotic duty).

medication.⁴⁹ Public suspicion of corporations stems from the opinion that “the prime objective of business is profits”⁵⁰ Consequently, this “all-powerful profit motive, which guides business behavior, gives corporations no reason . . . to ensure that human creativity be nurtured, except when it serves their narrow purposes.”⁵¹ This suspicion is amplified when companies like TAP are publically exposed for fraud, bribery, or other unlawful behavior. Many Americans will assume that because one pharmaceutical company compromises values and legality to make a profit, other companies will engage in similar compromising activities.

Third, the doubt as to whether external whistleblowing was necessary to deter misconduct turned into certainty that external whistleblowing is essential in compelling lawful manufacturing and trading.⁵² In a survey of corporate management officers, “[Chief Executive Officers] conceded that the loss of credibility on the part of business is caused by mistakes made by business. These include faulty products, some cases of overpricing, insider stock trading, political slush funds, and the bribes of government officials in the United States and abroad.”⁵³ Scandals involving large companies’ products like TAP’s Lupron have damaged the credibility of the entire pharmaceutical industry.⁵⁴ The contemporary cultural attitude is that whistleblowers like Gerstein “have the ability to help organizations correct unsafe products or working conditions or to curb fraudulent practices”⁵⁵

49. See BEHRMAN, *supra* note 14, at 113-14 (“The major problem is that demand is outstripping any reasonable supply. . . . The present approach to health care implies that illness care and life prolongation are a top priority in the use of society’s or an individual’s resources; consequently, consumer preferences are reordered by fiat”).

50. RUBIN, *supra* note 3, at 1.

51. PERELMAN, *supra* note 46, at 181.

52. See 151 CONG. REC. S533 (daily ed. Jan. 26, 2005) (statement from Sen. Grassley) (“Historically, whistleblowers have been key to uncovering waste, fraud, and abuse.”).

53. RUBIN, *supra* note 3, at 76.

54. For example, the recent discovery of mercury in Merck manufactured vaccines has contributed to public distrust of pharmaceutical companies. Representative Dan Burton, chairman of the Committee on Government Reform and chairman of the Subcommittee on Health and Human Rights, discussed during a meeting of the House of Representatives that because a whistleblower who worked for Merck turned over an internal memo to the government, it was disclosed that Merck did not remove Mercury from its vaccines for years after the company had been aware of the harmfulness of the element. “In fact, the [Merck] memo clearly states, ‘If eight doses of Thimerosal-containing vaccine were given in the first 6 months of life, the mercury given, say to an average-size infant of 12 pounds, would be 87 times the daily allowance of mercury for a baby of that size.’ Eighty-seven times. . . . What did the pharmaceutical company do after learning this? They did nothing. Absolutely nothing. It took 8 years before they started removing Thimerosal from any of the children’s vaccines.” 151 CONG. REC. H481 (daily ed. Feb. 9, 2005) (statement of Rep. Dan Burton).

55. Keenan, *supra* note 21, at 223.

*D. Cultural Attitude Toward Whistleblowing in the
Pharmaceutical Industry*

In the past several decades, society has progressed from viewing employee whistleblowers with negative disapproval to accepting external whistleblowers as altruistic heroes. This shift in cultural attitude is due to a broader cultural shift in how American society perceives large companies. In the past few decades, as society began to trust corporations less, it became concerned with deterring corporate misconduct more. A 2007 survey revealed, “neither employees nor consumers believe corporations are providing value to the community.”⁵⁶ Scandals about unsafe products and dishonest commercial practices have caused Americans to doubt business ethics.⁵⁷

The change in our attitudes about whistleblowing has been considerably impactful in the pharmaceutical industry. Pharmaceutical companies are often large employers with scores of workers and products to manage. The integrity of companies’ practices is dependent on the reliability of numerous employees. Employees who do not uphold ethical standards may expose the entire company to liability for faulty manufactured goods or fraudulent operational systems.⁵⁸ Pharmaceutical companies are constantly scrutinized because their merchandise is ingested, meaning that misconduct in manufacturing is potentially dangerous for the health of consumers.⁵⁹ In addition, pharmaceutical companies receive a higher level of scrutiny since pharmaceutical companies like TAP have been publicly exposed for fraudulent and illegal practices in the past few decades, causing society to distrust the entire industry.⁶⁰

56. Donohue, *supra* note 42.

57. See Chatterji, *supra* note 44 (explaining that there has been a cultural shift to “diverge on the worth we ascribe to certain industries or products and wonder if cozy relationships among the rich and powerful thwart fair competition . . .”).

58. See Allen Roberts & George Breen, *Burgeoning Whistleblower Considerations for Health Care Employers*, CCH HEALTH CARE COMPLIANCE LETTER (CCH), Sept. 20, 2011, at 1 (remarking that the health care and pharmaceutical industry has become more prominent because of its size—it is a substantial portion of the United States gross domestic product).

59. While health care products and services are some of the most important objects to Americans, that industry is one of the most criticized. See Christopher D. Zalesky, *Pharmaceutical Marketing Practices: Balancing Public Health and Law Enforcement Interests; Moving Beyond Regulation-Through-Litigation*, 39 J. HEALTH L. 235, 242 (2006) (explaining that pharmaceutical products and health services have been beneficial to Americans, but “[f]raudulent or abusive marketing practices can cause patients to be exposed to the risks associated with unnecessary treatments or to be denied access to appropriate care”).

60. In terms of health care, “a belief developed in the 1960s that resource commitments should be constrained in meeting the demands of individuals or the medical profession.”

Due to the aforementioned unique aspects of the pharmaceutical industry as opposed to other business industries, “in the health care field, where the government oversees a trillion dollar industry, fraud and abuse are significant concerns; so too are the sorts of illegal promotion of pharmaceuticals that may endanger health.”⁶¹ Therefore, society has adopted the attitude that external whistleblowers are needed to restrain pharmaceutical companies from engaging in product contamination, payment fraud and resource waste.⁶² The role of whistleblowing within the pharmaceutical industry, as perceived by the general population, is that reporting misconduct to external overseers will expose and prevent fraud.⁶³ Since “[f]raud and wasteful spending of public monies have plagued governments for hundreds of years,”⁶⁴ the media has ensured that the public is aware that inefficient spending in pharmaceutical companies has a negative impact on our society’s economy. Americans have responded to the cultural encouragement of whistleblowing by stepping into the role to become whistleblowers:

Whistleblowers in the United States continue to expose fraudulent marketing practices at a pace never anticipated by the pharmaceutical industry or the US DOJ. *Qui tam* case settlements, just in the United States, and just since the turn of the twenty-first century, exceed \$5 billion. These settlements and jury verdicts are grabbing headlines and garnering the attention of the US [sic] Congress and federal regulators, as well as the global pharmaceutical industry.⁶⁵

BEHRMAN, *supra* note 14, at 128. Instead, many believe that pharmaceutical companies went beyond ethical constraints and engaged in immoral and unnecessary practices to turn larger profits. TAP is an example of a company who has been exposed for sacrificing legality for profits. Ortho Pharmaceuticals has also been exposed for considering testing harmful products on humans. *See infra* note 127.

61. Sylvester James Boumil, III et al., *Whistleblowing in the Pharmaceutical Industry in the United States, England, Canada, and Australia*, 31 J. PUB. HEALTH POL’Y 17, 18 (2010).

62. *Id.* at 20 (“In the past 10 years the United States government has greatly escalated its regulatory efforts with respect to the pharmaceutical industry as the interest over industry relationships with physicians has become more visible. Kickbacks, misleading advertisements, and impermissible off-label promotion of prescription drugs are frequent sources of fraudulent activity.”).

63. *See generally id.* (noting that *qui tam* laws would be helpful in any health-care system where public health policy necessitates conserving resources).

64. *Id.*

65. *Id.* at 27; *see also id.* at 18 (providing a definition of *qui tam* action; “It was the 1986 amendments that invigorated the so-called *qui tam* (whistleblower) actions. *Qui tam* comes from the Latin phrase *qui tam pro domino rege quam prosi ipso in hac parte sequitur* or ‘one who sues on behalf of the king as well as for himself.’ *Qui tam* laws encourage private citizens who have knowledge of fraud upon the government to get involved by

Because the public uses the method of external whistleblowing to expose and consequently deter fraud in the form of “overcharging for items purchased, billing for services never provided, and conspiracy to engage in such activities,”⁶⁶ the legislature has passed laws to encourage pharmaceutical company employees to offer the government information about the alleged illegal activity of their employer.⁶⁷ These laws “have been remarkably successful in ferreting out abuse and curtailing further illegal activity.”⁶⁸ Due to the shift in the societal perception of corporations, society has modified its reception of external whistleblowers. In the next part of this Comment, I will explore how modern law has conformed to current attitudinal norms.

II. STATUTES REFLECT CULTURAL ATTITUDES ABOUT EXTERNAL WHISTLEBLOWING

Attitudes toward whistleblowing have evolved considerably during the past 50 years in corporate America, from the early days of the ‘organization man’ ethos where loyalty to the company was the ruling norm, to the present time when public outrage about corporate misconduct has created a more auspicious climate for whistleblowing.⁶⁹

The law has developed similarly. Just as the cultural attitude toward whistleblowing evolved from disdain to approval during the twentieth century, statutes that relate to whistleblowing have undergone a parallel evolution. Past statutes did not promote external whistleblowing. In fact, before 1960, there were not many statutes that even referred to external whistleblowing.⁷⁰ Current statutes address whistleblowing directly, and some specifically focus on the pharmaceutical industry.⁷¹ There are several

becoming whistleblowers. The whistleblower (who pursues allegations of fraud) is rewarded with a portion of the monies recovered and protected from retaliation.” (citation omitted).

66. *Id.* at 19.

67. *See id.* at 17 (“In the United States the False Claims Act encourages whistleblowing by private individuals to expose evidence of fraud. They are rewarded for their efforts with monetary compensation and protection from retaliation.”).

68. *Id.* at 19.

69. Ravishankar, *supra* note 19.

70. *See id.* (“Prior to the 1960s, corporations had broad autonomy in employee policies . . . because of this lack of protection for whistleblowers . . . [i]n the late 1970s in the wake of the civil rights movement, federal and state laws were enacted to protect employees in private industry, including anti-discrimination legislation to regulate hiring and firing policies.”).

71. *See Boumil et al., supra* note 61, at 20 (“The pharmaceutical industry is regulated, in part, by a number of federal statutes that permit *qui tam* actions if they are violated: the

laws at the state and federal level solely focused on whistleblowing. There are even more state and federal laws that focus on other topics but include whistleblowing-related provisions.⁷² These laws delineate what the external whistleblowing process is, what proper employer reactions are, and what employee whistleblower incentives can be. In the second part of this Comment, I will show that modern statutes correspond to cultural acceptance of external reporting of employer misconduct.

The False Claims Act (FCA) is an important example of the manner in which statutory provisions track cultural attitudes in regards to whistleblowing. The FCA was enacted in 1863 to reduce rampant wartime fraud against the government and control private law suits during the Civil War.⁷³ In 1943, in *Marcus v. Hess*, the Supreme Court held that an individual could bring suit against a company for defrauding the government based on information he acquired from a federal criminal indictment.⁷⁴ Congress, displeased with the *Marcus* decision, amended the FCA to disallow suits based on information gained through public mediums. These World War II lawmakers, in an effort to safeguard companies from a profusion of lawsuits and prevent “parasitic” or “snitch”

Anti-Kickback Statute pursuant to Medicare and Medicaid laws (about public health insurance), the False Claims Act, and the Prescription Drug Marketing Act.”).

72. See, e.g., Safe Drinking Water Act § 1450(i)(1), 42 U.S.C. § 300j-9(i)(1) (2006) (“No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, (B) testified or is about to testify in any such proceeding, [or] (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.”); N.Y. CIV. SERV. LAW § 75-b(2)(a) (Consol. 2012) (prohibiting public employers from engaging in conduct similar to that proscribed for private employers); N.Y. LAB. LAW § 740(2), (5) (Consol. 2012) (prohibiting private employers from retaliating against employees who disclose unlawful activities, and allowing employees who have been disciplined in retaliation to sue for benefits, back pay, reinstatement, court costs, and attorney’s fees).

73. See Brooks E. Kostakis, Note, *Crafting a Hybrid Weapon Against Healthcare Fraud: Reflecting upon the Government’s Use of the Civil False Claims Act as an Incentive for Whistleblowers and Advocating a More Aggressive Utilization of Permissive Exclusion as a Deterrent Measure*, 37 U. MEM. L. REV. 395, 399 (2007) (describing the FCA’s enactment “to cope with the growing problem of contractor fraud against the government during the Civil War”). Congress enacted the FCA in 1863 to give the government power of public prosecution of fraud. The importance of the FCA is that it gave the government authority to prosecute, as well as private citizens. In *Francis v. United States*, the Supreme Court held that an individual could not be a party to the suit just because he or she had information about fraud. 72 U.S. 338, 340–41 (1866).

74. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

whistleblower suits based on “evidence or information in the possession of the United States . . . at the time such suit was brought,” severely limited the type of information from public media that could be used by whistleblowers in response to the societal dependence on large companies.⁷⁵

In 1986, however, the 1943 FCA amendments were undermined—a direct consequence of the cultural approval of external whistleblowing of the day.⁷⁶ The 1986 amendments to the FCA expanded the register of fraudulent activities that could be reported and prosecuted. Since 1986, the FCA has been amended by subsequent legislation to enlarge the number of prohibited activities and increase the protection afforded to workers who alert the government to illegal activities.⁷⁷

Like the two separate Congresses who amended the FCA in different eras to reflect the pervasive opinions of their time, lawmakers have continued to consider public opinion when crafting new legislation to guarantee that laws mirror the attitudes of their constituents.⁷⁸ Consequently, recent legislation tracks the modern cultural approval of whistleblowing.⁷⁹ Currently, thirty-five states have whistleblowing laws,

75. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1894 (2011).

76. Kostakis, *supra* note 73, at 399.

77. Jeremy E. Gersh, Comment, *Saying What They Mean: The False Claims Act Amendments in the Wake of Allison Engine*, 5 J. BUS. & TECH. L. 125, 125 (2010) (“Concerned with the loss of this anti-fraud tool, Congress amended the Act in 1986 with much success. However, the courts began to chip away at the Act’s foundation as they interpreted the Act’s language, culminating with the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*. In response to the Court’s attacks on the FCA, Congress again amended the Act in the Fraud Enforcement and Recovery Act of 2009 (‘FERA’). Through FERA, the tide has again turned the FCA into a powerful weapon against those who wish to defraud the federal government”) (citations omitted).

78. Whistleblowing laws are primarily statutory as opposed to judge-made because people are apprehensive about litigating without statutes protecting them. ROBERTS & BREEN, *supra* note 58, at 1. Courts have recognized that the proper body to construct whistleblowing laws is the legislature’s elected officials. In *Pavolini v. Bard-Air Corp.*, the Second Circuit recognized in its holding: “We certainly have no desire to encourage retaliation by employers against their employees who, having failed to obtain voluntary compliance, turn to the appropriate federal agency charged with insuring safety in an effort to prevent injury or death. But we are mindful that we do not sit as a legislature. Congress has in the past acted to protect against retaliation federal employees who “‘blow the whistle’ on violators of the law . . . Congress may well wish to consider protecting in an appropriate way those who help prevent the loss of life from improper operation or maintenance of aircraft.” 645 F.2d 144, 148 (2d. Cir. 1981) (citation omitted).

79. See Ravishankar, *supra* note 19 (“In the late 1970s in the wake of the civil rights movement, federal and state laws were enacted to protect employees in private industry, including anti-discrimination legislation to regulate hiring and firing policies. . . . With the enactment of the Sarbanes-Oxley Corporate Reform Act of 2002, internal and external

which vary in coverage and effectiveness.⁸⁰ State laws, however, are ultimately not as efficient as federal statutes since they are limited in scope and often only cover specific employees or industries.⁸¹ There are many examples of federal whistleblowing provisions created or amended in the past thirty years that have been effective in protecting whistleblowers and promoting whistleblowing, such as: the Truth in Lending Act, Fair Credit Reporting Act, Energy Policy Act, Civil Service Reform Act, Whistleblower Protection Act, and Sarbanes-Oxley Corporate Reform Act.⁸² Provisions in two recent pieces of legislation dealing with whistleblowing, Dodd-Frank and the ACA, are the culmination of the escalating cultural acceptance of external whistleblowing over the past several decades. Dodd-Frank and the ACA's whistleblowing provisions were enacted because, as Representative Edolphus Towns explained, "[p]rotecting whistleblowers is not a Democratic or Republican issue. It is an issue of importance to all Americans, because they are one of our most potent weapons against waste, fraud, and abuse. Ensuring that those who blow the whistle are protected from retaliation benefits all Americans."⁸³ While "one should be very careful about extending the principle of whistleblowing unduly," Dodd-Frank and the ACA nonetheless significantly expand the protection and incentives offered to external whistleblowers.⁸⁴

whistleblower protection has been extended to all employees in publicly traded companies for the first time. . . . The passage of this act has created an environment in which many organizations have realized the importance of instituting ethics policies and codes of conduct to address issues related to unethical or illegal conduct. The business climate in the wake of Enron and WorldCom, coupled with Sarbanes-Oxley, is one in which employees can feel more empowered to report ethical or legal violations."

80. See, e.g., Carolyn Dellatore, *Blowing the Whistle on CEPA*, 32 SETON HALL LEGIS. J. 375 (2008) (discussing New Jersey Conscientious Employee Protection Act, a statute that gives employees the right to sue if an employer takes retaliatory employment action against them for reporting their dissatisfaction with company policies or goal); Thomas Grande, *The Hawaii False Claims Act: A Private Tool to Combat Public Fraud and Improve the Quality of Health Care*, HAW. B. J., Apr. 2001, at 6 (discussing the Hawaiian False Claims Act, which offers whistleblower protection like the federal FCA, but also imposes liability on whistleblowers who inadvertently submit a false claim if they learn that the claim was false and fail to report it to the Hawaiian government); Patricia Meador, *Health Care Fraud and Abuse*, PRACTISING LAW INST. Order No. B0-00IU 21, 75-76 (2000) (describing state law analogues to the federal Anti-Kickback Statute).

81. See Zalesky, *supra* note 59, at 242-43 ("The profusion of state-by-state efforts overlooks the importance of a uniform federal approach—in a field already occupied by federal law—to minimizing pharmaceutical healthcare fraud and abuse.").

82. Ravishankar, *supra* note 19.

83. 155 CONG. REC. H730 (daily ed. Jan. 28, 2009) (statement of Rep. Edolphus Towns).

84. WHISTLE BLOWING, *supra* note 10, at 30.

A. Dodd-Frank Whistleblowing Provisions

Dodd-Frank,⁸⁵ signed into law on July 21, 2010, implemented regulatory reform for the U.S. financial services industry during an economic recession blamed, in part, on the corrupt subprime mortgage lending of large corporate financial institutions.⁸⁶ Financial institutions are financial services organizations that offer real estate services, credit or loans, financial advisory services, or analyze and provide consumer financial information. Dodd-Frank protects consumers and the economy from unproductive business practices of banks and insurance companies.⁸⁷

There are multiple provisions in Dodd-Frank that address employee reports of misconduct to government agencies. However, many of these provisions do not apply to pharmaceutical companies. Section 1057 is important but does not apply to pharmaceutical companies. Section 1057 offers whistleblowers within financial services companies a private right of action if retaliated against by their employer for reporting misconduct.⁸⁸ Another important Dodd-Frank whistleblower provision that does not apply to pharmaceutical companies is Section 748. Section 748 permits bounty awards for employees who report or assist in the investigation of violations of the Commodity Exchange Act by companies under the Commodity Futures Trading Commission's (CFTC's) jurisdiction due to their trading in agricultural, energy and metals.⁸⁹ The bounty award is usually between ten

85. The Act is named Dodd-Frank because Representative Barney Frank and Senator Chris Dodd proposed the bill in two separate Congressional meetings. Damian Paletta, *It Has a Name: The Dodd/Frank Act*, WASHINGTON WIRE (June 25, 2010, 6:06 AM), <http://blogs.wsj.com/washwire/2010/06/25/it-has-a-name-the-doddfrank-act/>.

86. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 103 Stat. 440 (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 16, 18, 19, 20, 22, 25, 26, 28, 29, 30, 31, 41, 42, 44, 49, and 112 U.S.C.). Democratic congressmen "contend [that Dodd-Frank] will restore confidence in U.S. financial markets, protect consumers and spur growth." Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL. ST. J., July 19, 2010, <http://online.wsj.com/article/SB10001424052748704682604575369030061839958.html>.

87. Kathleen L. Casey, Commissioner, SEC, Speech at the Directors' Forum at the University of San Diego (Jan. 23, 2011) (transcript available at <http://www.sec.gov/news/speech/2011/spch012311klc.htm>) ("In terms of its breadth and scope, Dodd-Frank is arguably the most significant financial legislation in modern history. The legislation ushers in a breathtaking amount of changes that will result in a tectonic shift in the legal, regulatory and policy landscape affecting our markets and our economy in a relatively short period of time. These changes touch every aspect of our financial markets, from consumer credit to proprietary trading at financial firms, from OTC derivatives markets to securitization, and from private fund registration and regulation to corporate governance at public companies.").

88. Roberts & Breen, *supra* note 58, at 6.

89. Dodd-Frank Wall Street Reform and Consumer Protection Act § 748.

to thirty percent of the amount the CTFC received from the prosecution, but the whistleblower may appeal the award amount within thirty days if the bounty he or she is offered is less than ten percent of the total recovery from the company by the CFTC.⁹⁰ In addition, a portion of section 922 of Dodd-Frank amends section 806 of the Sarbanes-Oxley Act (SOX) to exempt whistleblower claims from mandatory arbitration.⁹¹ While section 929 of Dodd-Frank extends SOX whistleblower protection to employees of publicly traded company subsidiaries and section 922 expands SOX to cover employees of nationally recognized statistical ratings organizations, neither section broadens SOX to pharmaceutical companies.⁹²

Since much of Dodd-Frank applies only to financial institutions, pharmaceutical companies are not covered under the aforementioned provisions. However, due to their involvement in insider trading, market manipulation, inaccurate auditing, and bribery, pharmaceutical companies are subject to the Security and Exchange Commission's (SEC's) jurisdiction, and are covered under two key sections of Dodd-Frank.⁹³ Section 1079 of Dodd-Frank expands the definition of protected conduct under the Securities Exchange Act of 1934 to cover a broader range of whistleblowing related activities.⁹⁴ More types of protectable conduct offer employees more leeway to take action to help the government investigate and uncover qui tam actionable fraud. Section 922 gives pharmaceutical company employees protection for lawfully reporting at least one violation of the FCA, and offers a generous statute of limitations length of three years to bring a claim against their employer for retaliation if their employer harms them after making a government report.⁹⁵

Section 922 of Dodd-Frank applies to external whistleblowing in pharmaceutical companies.⁹⁶ The SEC has been particularly forceful in prosecuting pharmaceutical companies for bribery and accounting mistakes under the Foreign Corrupt Practices Act (FCPA). Whistleblowers can report wrongdoing directly to the SEC, even without pursuing internal reporting channels within their company first.⁹⁷ Whistleblowers may also report illegal activity that has already happened, or illegal acts that are

90. *Id.* § 748(b), (f).

91. *Id.* § 922(c)(2)(e)(2).

92. *Id.* §§ 922, 929A.

93. *Id.* § 922.

94. *Id.*

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

96. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300 (June 13, 2011), available at www.sec.gov/rules/final/2011/34-64545.pdf [hereinafter SEC Release].

97. 17 C.F.R. §§ 240.21F-9, 21F-10 (2012).

reasonably expected to occur.⁹⁸ Section 922 amends the Securities Exchange Act of 1934 (SEA) by adding new sections 21F-1 through 21F-17, the “Securities Whistleblower Incentives and Protections” provisions.⁹⁹ The SEC is now required to award whistleblowers¹⁰⁰ who voluntarily provide the SEC original information¹⁰¹ that leads to actions of \$1 million or more a bounty award of ten to thirty percent of the monetary aggregate recovery.¹⁰² These whistleblowers must submit information about securities law violations according to the SEC’s rule.

The amount of the bounty award is determined by weighing several factors, including the significance of the information provided, the whistleblower’s overall level of assistance, and the SEC’s interest in

98. 17 C.F.R. §§ 240.21F-2(b)(1)(i), (ii) (2012).

99. Dodd-Frank Wall Street Reform and Consumer Protection Act § 922(a).

100. The SEC published rules on May 25, 2011 to explain section 922.

Except for legal entities and the other exclusions discussed below, almost any individual may be eligible to receive a whistleblower bounty. Employees, former employees, vendors, agents, contractors, clients, customers, and competitors are all potential sources of tips and complaints that could justify a whistleblower award. Perhaps somewhat remarkably, even individuals involved in securities violations may be eligible whistleblowers under Dodd-Frank. . . . With some significant exceptions, the following categories of individuals are generally excluded from obtaining a whistleblower award under Dodd-Frank[.]

- Officers, directors, trustees, or partners of an entity, who are informed of allegations of misconduct.
- Individuals with compliance or audit responsibilities at an entity, who receive information about potential violations.
- Attorneys cannot be whistleblowers on their own behalf in connection with information they obtained in the course of their representation of a client. This prohibition applies both to inhouse lawyers and outside counsel representing a company.
- Accountants are ineligible for awards when providing information about a client or its directors or officers if obtained in the context of providing outside auditing services to that company.
- Foreign government officials.
- Individuals with a pre-existing legal obligation to report information about potential violations to the SEC or to other authorities (e.g., government contracting officers).

BRADLEY J. BONDI ET AL., CADWALADER, WICKERSHAM & TAFT, LLP, THE DODD-FRANK WHISTLEBLOWER PROVISIONS: CONSIDERATIONS FOR EFFECTIVELY PREPARING FOR AND RESPONDING TO WHISTLEBLOWERS 1, 4 (2011), http://www.cadwalader.com/assets/client_friend/052611DoddFrankWhistleblowerProvisions.pdf

101. “Under the SEC rules, ‘original information’ is information that is (1) not already known to the SEC, (2) derived from an individual’s independent knowledge or analysis, and (3) not exclusively derived from an allegation in a judicial or administrative hearing, or similar action.” *Id.* at 5.

102. 17 C.F.R. §§ 240.21F-15, 240.21F-4(c) (2012).

detering the type of misconduct alleged. To qualify for a bounty award, a whistleblower cannot be an employee of a government regulatory agency, law enforcement agency, or the Public Company Accounting Oversight Board. The whistleblower must have provided the SEC with “original information” that:

(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.¹⁰³

Section 922 prohibits the SEC from providing a bounty award to an external whistleblower who is convicted of a crime that is related to the alleged misconduct. Whistleblowers also may not receive a bounty for reporting information found in securities laws mandated audits.

Section 922 of Dodd-Frank creates a private right of action for employees who were retaliated against for:

(i) . . . providing information to the Commission in accordance with [the whistleblower reward subsection]; (ii) . . . initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) . . . making disclosures that are required or protected under the Sarbanes-Oxley Act¹⁰⁴

An employee who believes he or she was retaliated against for blowing the whistle on illegal activities under the SEC’s jurisdiction may bring an action against his or her employer in federal district court up to six years after the violation or three years from the date facts about the violation are known or reasonably should have been known to the employee.¹⁰⁵ A whistleblower may receive damages in the form of double back pay, reinstatement, litigation costs, expert witness fees, and reasonable attorney’s fees.¹⁰⁶

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

104. *Id.* § 922(h)(1)(A).

105. *Id.* § 922(h)(1)(A), (B). Note that previous laws required employers who felt retaliated against to go through the Occupational Safety and Health Administration (OSHA) to seek relief.

106. *Id.* § 922(h)(1)(C).

B. ACA Whistleblowing Provisions

The ACA reforms aspects of private and public health insurance programs. The ACA increases and expands health care coverage and quality for ten percent of Americans by regulating the insurance industry and medical spending. Like section 1057 of Dodd-Frank, section 1558 of the ACA, which provides whistleblowers a private right of action, does not apply to pharmaceutical companies because it only applies to health plan and health insurance companies.¹⁰⁷ Section 1558 is still an important provision, however, since it incorporates the broad whistleblower protections contained in the Consumer Product Safety Improvement Act of 2008.¹⁰⁸ Section 1558, which covers both internal and external whistleblowing under the Fair Labor Standards Act, creates a private right of action for employees who suffer retaliation for intending to blow the whistle, disclosing information regarding fraudulent or unlawful delivery of health-care or coverage, or assisting the government in investigating such unlawful activities.¹⁰⁹ The whistleblower must file a complaint with the Occupational Safety and Health Administration (OSHA) within 180 days of the date on which the retaliation occurred.¹¹⁰ OSHA will investigate and may order or deny preliminary relief, a decision that can be appealed before an administrative law judge of the U.S. Department of Labor.¹¹¹ If the parties do not receive a decision on appeal within 90 days of receiving a written determination from OSHA or within 210 days of filing the complaint, the whistleblower may pursue action in federal court and request a trial by jury.¹¹² To recover under section 1558, an employee must only prove by a preponderance of the evidence that his or her reporting of illegalities or refusal to comply with misconduct was a contributing factor

107. Patient Protection and Affordable Care Act § 1558 (amending the Fair Labor Standards Act of 1938 to extend whistleblower protection to employees who report a violation by their employer of Title I of the ACA); Fair Labor Standards Act of 1938 § 18C(a), 29 U.S.C. § 218c(a) (Supp. IV 2010) (prohibiting employers from discharging or discriminating against employees in retaliation for reporting a violation of Title I of the ACA); Stephen J. Mogila & Daniel L. Saperstein, *Whistleblower Protections*, 203 N.J. L.J. 13, 951 (2011).

108. Consumer Product Safety Improvement Act of 2008 § 219(a), 15 U.S.C.A. § 2087(b) (2011).

109. Patient Protection and Affordable Care Act § 1558. Note that section 1558 also protects employees who refuse to participate in their employer's violations of ACA Title I. However, pharmaceutical companies are not subject to Title I of the ACA. *Id.*

110. *Id.* (incorporating 15 U.S.C. § 2087(b)'s procedural regime for filing an administrative complaint with the Department of Labor, along with burdens of proof, remedies and statutes of limitation).

111. 15 U.S.C.A. § 2087(b)(2)(A) (Supp. IV 2010).

112. *Id.* § 2087(b)(4).

to the employer's retaliation.¹¹³ The employer, however, has to meet a higher standard to avoid liability. The employer must show by clear and convincing evidence that it would have taken the alleged retaliatory action even if the employee did not either report, or refuse to engage in, violations of Title I of the ACA.¹¹⁴ If a whistleblower successfully proves that he or she was retaliated against, he or she may recover by receiving back pay, damages, reinstatement, and attorneys' fees.¹¹⁵

The ACA does have provisions that affect pharmaceutical companies, however. The ACA extends two categories of prosecutable misconduct that pharmaceutical companies can be held liable for.¹¹⁶ First, the ACA amended the Social Security Act. Kickbacks, illicit payments made to hospitals or physicians, are now punishable under the FCA regardless of whether the pharmaceutical company made fraudulent statements to get the kickbacks.¹¹⁷ Although knowingly presenting the government with false or fraudulent invoices for health care products and services has always been illegal, that action is now subject to harsher punishment.¹¹⁸ Section 6402(d) of the ACA demands that overpayments be reported and returned by the pharmaceutical company within sixty days to avoid prosecution.¹¹⁹ The civil monetary penalties for knowingly presenting fraudulent overcharging bills include a penalty of three to six times the amount of the overcharge.¹²⁰

The ACA also offers workers more latitude in what they can report. The ACA's amendments to the FCA relaxed the constraints of the "original source" definition and lowered the public disclosure bar set by Congress after *Marcus*. Before the ACA, "original source" in the FCA meant someone with "direct and independent knowledge of the information on

113. *Id.* § 2087(b)(2)(B)(iii).

114. *Id.* § 2087(b)(2)(B)(ii), (iv).

115. *Id.* § 2087(b)(3)(B).

116. Roberts & Breen, *supra* note 58, at 5–6.

117. Social Security Act § 1128B(b), 42 U.S.C. § 1320a-7b(b) (2006 & Supp. IV 2011).

118. The Fraud Enforcement Recovery Act of 2009, which was incorporated into the ACA, expanded the reverse false claims provision of the FCA. It lowered the liability standard so that a false record or statement is no longer needed to impose liability on a person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government . . ." Fraud Enforcement Recovery Act of 2009 § 4(a)(1), 31 U.S.C. § 3729(a)(1)(G) (2006 & Supp. IV 2011).

119. Patient Protection and Affordable Care Act § 6402(d)(2), 42 U.S.C. 1320a-7k(d)(2) (2006 & Supp. IV 2011).

120. See Patient Protection and Affordable Care Act § 1313(a)(6)(B), 42 U.S.C.A. § 18033(a)(6)(B) (West Supp. 2011) ("[T]he civil penalty assessed under the False Claims Act on any person found liable under such Act as described in subparagraph (A) shall be increased by not less than 3 times and not more than 6 times the amount of damages which the Government sustains because of the act of that person.").

which the allegations are based.”¹²¹ After the ACA’s enactment, “original source” now means someone who has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions”¹²² Under the ACA, an “original source” means an:

[I]ndividual who either (i) prior to a public disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) [*sic*] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.¹²³

Reverting back to the Supreme Court’s holding in *Marcus*, the ACA now allows federal courts to hear cases based on reports from non-original sources as long as the worker can materially add to that information.

III. DODD-FRANK AND THE ACA’S ADHERENCE TO THE CURRENT CULTURAL EMBRACE OF EXTERNAL WHISTLEBLOWING

Dodd-Frank and the ACA present an unprecedented measure of protection and incentives for external whistleblowers. In the third part of this Comment, I will demonstrate that Dodd-Frank and the ACA exhibit the three manifestations of the contemporary cultural embrace of whistleblowers as “saviors” by codifying the defense of individuals, suspicion of corporations, and collective concern about the integrity of products. I will then explain the specific impact Dodd-Frank and the ACA’s encouragement of external whistleblowing will have on the pharmaceutical industry.

A. Dodd-Frank and the ACA Represent the Contemporary Cultural Acceptance and Encouragement of External Whistleblowing

First, Dodd-Frank and the ACA manifest loyalty to individuals by offering workers statutory protection against retaliation. Dodd-Frank and the ACA remove some of the personal risks that could have accompanied reporting misconduct to the government in the past. “Prior to the 1960s, corporations had broad autonomy in employee policies and could fire an

121. False Claims Act, § 31 U.S.C. § 3730(e)(4)(B) (1994) (current version at 31 U.S.C. § 3730(e)(4)(B)).

122. Patient Protection and Affordable Care Act § 10104(j)(2), 31 U.S.C.S. § 3730(e)(4)(B) (2012).

123. Patient Protection and Affordable Care Act § 10104(j)(2).

employee at will”¹²⁴ For this reason, workers were hesitant to report their employer’s illegalities for fear of being fired, discharged, harassed, demoted, unable to be promoted, having their salary reduced, forced to resign or retire, or deemed unhirable by other companies in the industry.¹²⁵

To remove their hesitation to inform the government of their employer’s wrongdoing, Senator Howard Metzenbaum believes that we need laws to “protect workers from reprisal when they blow the whistle on unlawful or dangerous activities that threaten the public health and safety” because “[t]he fear of reprisal has silenced many workers who otherwise could help Federal authorities enforce health and safety laws.”¹²⁶ Nader also believes that we need laws protecting workers’ right to report:

Corporate employees are among the first to know about industrial dumping of mercury or fluoride sludge into waterways, defectively designed automobiles, or undisclosed adverse effects of prescription drugs and pesticides. They are the first to grasp the technical capabilities to prevent existing product or pollution hazards. But they are very often the last to speak out, much less refuse to be recruited for acts of corporate or governmental negligence or predation. . . . Silence in the face of abuses may also be evaluated in terms of the toll it takes on individuals who in doing so subvert their own consciences.¹²⁷

Dodd-Frank and the ACA are examples of the laws that Metzenbaum and Nader beckon for.¹²⁸ Both Acts offer private rights of action if employees of financial institutions and health insurance corporations believe that they have been retaliated against for external whistleblowing. Dodd-Frank also allows employees of pharmaceutical companies limited

124. Ravishankar, *supra* note 19.

125. *See, e.g.*, WESTIN, *supra* note 8, at 1 (“Usually, whistle blowers get fired. Sometimes they get reinstated. Almost always, their experiences are traumatic, and their careers and lives are profoundly affected.”). Dr. A. Grace Pierce, who reported to her former managers that their employer, Ortho Pharmaceuticals Corporations, was planning to test a potentially unsafe drug on humans, faced “the loss of employment in the field of her choice, the financial hardship as her income slipped to half of what it had been, and the emotional strain of a prolonged court battle” WESTIN, *supra* note 8, at 117.

126. 135 CONG. REC. S2652-53 (daily ed. Feb. 23, 1989) (statement of Sen. Howard Metzenbaum); *see also* Scott Shane, *From Out of the Shadows, Whistle-Blowers Convene*, N.Y. TIMES (May 18, 2007), <http://www.nytimes.com/2007/05/18/washington/18whistleblower.html> (reporting that Senator Grassley believes these statutes are a reflection of our nation’s checks and balances commitment).

127. WHISTLE BLOWING, *supra* note 10, at 4.

128. *See, e.g.*, 131 CONG. REC. H4551 (daily ed. June 20, 1985) (statement of Rep. Patricia Schroeder) (exhorting Congress to press federal prosecutors to act on information provided by agency whistleblowers and to increase efforts to reduce government waste).

recovery of their jobs or back pay if they are retaliated against.¹²⁹ Knowing that there is less risk of retaliation will likely give workers who were once hesitant greater incentive to blow the whistle. By giving employees gracious protection and recompense, both Acts indirectly encourage each worker to take part in deterring corporate violations of regulations and rules.¹³⁰ If TAP were prosecuted post-Dodd-Frank and the ACA, additional employees beside Durand may have felt comfortable reporting TAP's fraud to government authorities. More tips from staff members could have led to an even broader uncovering of TAP's wrongdoing, and an even larger civil recovery for the DOJ.

Second, Dodd-Frank and the ACA echo public suspicion of corporations. Although neither statute is centered on employee-employer relationships, both include whistleblower provisions to offer the public assurance that their suspicions of corporations are important to lawmakers. Dodd-Frank and the ACA conform to the public's desire for potentially harmful business practices, like defrauding the government and offering kickbacks, to be condemned by federal law. The public would likely appreciate how TAP would be prosecuted under Dodd-Frank and the ACA. If TAP were prosecuted today instead of in 2001, the company would have been held liable for marketing manipulation and bribery under Dodd-Frank for inducing doctors to add Lupron to formularies. Under the ACA's amendments to the FCA, TAP could be liable for attempting to "influence the doctors' decisions about what drug to prescribe to patients by giving them kickbacks and bribes, from free samples to free consulting services to expensive trips to golf and ski resorts to so-called educational grants."¹³¹

Dodd-Frank and the ACA also assure the public that corporations may refrain from engaging in corporate misconduct. Corporations are now aware that more of their business practices can be penalized under Dodd-Frank and the ACA. This may very well lead pharmaceutical companies to prevent offenses from occurring in the first place to avoid giving their staff a reason to make an external report and expose them to substantial civil and criminal penalties.¹³² The DOJ claimed that:

129. 31 U.S.C. § 3729 (2006); *see also* ROBERTS & BREEN, *supra* note 58, at 1.

130. 157 CONG. REC. S1677, 1681 (daily ed. Mar. 15, 2011) (statement of Sen. Chuck Grassley).

131. TAP Press Release, *supra* note 1.

132. Roberts & Breen, *supra* note 58, at 4; *see also* WESTIN, *supra* note 8, at 111 (noting that in a pharmaceutical company like Ortho Pharmaceutical Corporation, which had a history of discouraging whistleblowing and retaliating against whistleblowers, internal bureaucracy may discourage employees who are considering blowing the whistle. When a group of researchers told Ortho's management that they disagreed with the company's slated human research study because the product being tested had an unsafe level of saccharin, Ortho made it clear that "it became politically inadvisable to go against the

The indictment of the six TAP employees sends a very strong signal to the pharmaceutical industry that it best police its employees' conduct and deal strongly with those who would gain sales at the expense of the health care programs for the poor and the elderly and the persons insured by those programs.¹³³

Dodd-Frank and the ACA send this signal even more strongly. These Acts codify what the DOJ tried to signify in the TAP settlement, a clear governmental disapproval of fraud, adulteration, and dishonesty, as well as a commitment to uncover and prosecute wrongdoing.

Third, Dodd-Frank and the ACA endorse the indispensability of external whistleblowing by emphasizing the opportunity for employees to assist the government in fulfilling its investigative and regulatory responsibilities. Workers within companies are in an ideal position to know if violations of federal and state laws are occurring.¹³⁴ Nader supposes that "the willingness and ability of insiders to blow the whistle is the last line of defense ordinary citizens have against the denial of their rights and the destruction of their interests by secretive and powerful institutions."¹³⁵ Therefore, "qui tam, or whistle-blower, suits have dramatically enhanced the government's ability to uncover health care fraud" since administrative agencies have been using optimally placed employees to investigate on their behalf.¹³⁶ Dodd-Frank and the ACA ensure that the government can continue to use private sector staff in this manner.

Even before Dodd-Frank and the ACA, forty-one percent of fraud at companies was detected from tips.¹³⁷ One of those tips led to "the highest criminal fine ever imposed on any health care company," the \$900 million TAP recovery.¹³⁸ After 2010's passage of the Acts in question, we can expect more large civil recoveries, since the ACA now allows the government to use information from unoriginal sources for its prosecutions, and Dodd-Frank allows the government to investigate securities law

order.' . . . [S]everal of the team members decided that it would be expedient to go along with the company's directives."). These statutes may give employees some assurance that reports will be taken seriously and handled properly.

133. TAP Press Release, *supra* note 1.

134. Kleinhempel, *supra* note 8, at 45; *see* WHISTLEBLOWING: IN DEFENSE OF PROPER ACTION 56 (Marek Arszulowicz & Wojciech W. Gasparski eds., 2011) (stating that "in the United States almost \$1 trillion is lost to corruption on an annual basis . . .").

135. WHISTLE BLOWING, *supra* note 10, at 7.

136. 149 CONG. REC. S8154 (daily ed. June 18, 2003) (statement of Sen. Patrick Leahy).

137. DELOITTE, CFO INSIGHTS: WHISTLEBLOWING AFTER DODD-FRANK: NEW RISKS, NEW RESPONSES 1-2 (2011), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/CFO_Center_FT/us_cfo_whistleblowers_022211.pdf.

138. TAP Press Release, *supra* note 1.

violations that happened in the past or have yet to happen but are expected to occur.¹³⁹ After the passage of Dodd-Frank, the SEC expects to receive thirty thousand more complaints and referrals regarding violations of the SEA and FCPA each year.¹⁴⁰ Government agencies can also expect an increase in reports post-ACA since, when the FCA was amended previously, the number of tips from whistleblowers swelled.¹⁴¹ The increase in the quantity of complaints and referrals to the government will likely lead to an increase in the amount of misconduct uncovered.

B. Impact of Dodd-Frank and the ACA on the Pharmaceutical Industry

Pharmaceutical companies will have to adapt to modern attitudinal and statutory sanctioning of external whistleblowing, especially as subjects to Dodd-Frank and the ACA. There are a number of issues that pharmaceutical companies should prepare to defend themselves against, as direct consequences of the modern cultural and statutory embrace of external whistleblowing.

Institutional concerns within corporations may arise when corporate culture and processes are exposed to cultural attitudes and modern statutes that encourage reporting misconduct to the government. Office culture may evolve along with mainstream American culture. Employees may be more prone to blow the whistle themselves. To mitigate these new risks, pharmaceutical companies will have to readjust their practices to manage the increased risks of exposure to civil penalties. These companies may look to create a work environment where internal reporting is encouraged to incentivize employees to report wrongdoing to company management before involving a third governmental party.¹⁴² Companies will create compliance programs to ensure that company leadership becomes aware of

139. 17 C.F.R. § 240.21F-2(b)(1)(i), (ii) (2012).

140. SEC Release, *supra* note 96.

141. "Since the new [FCA] passed two years ago, the [Center for Law in the Public Interest] has received more than 350 calls from whistle-blowers. Based on the most solid evidence, Phillips said, the center has filed three complaints and five others are being drafted." 133 CONG. REC. E3538 (daily ed. Sept. 15, 1987) (statement of Rep. Pete Stark).

142. See Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1760 (2007) (revealing that "internal reporting is the most common type of initial whistleblowing. Benefits of internal whistleblowing include facilitating the prompt investigation and correction of wrongful conduct and minimizing the organizational costs of whistleblowing by permitting employers to rectify misconduct confidentially, with little disruption to the employer-employee relationship. Internal whistleblowing also enables the correction of misunderstanding, which reduces the likelihood that the organization and its employees will unfairly suffer harm.").

misconduct internally before too much damage is done.¹⁴³ Part of these compliance programs would be a strong code of conduct adopted from top down.¹⁴⁴ Pharmaceutical companies will also likely have to restructure their internal process for reporting grievances.¹⁴⁵

Complying with Dodd-Frank and the ACA will present financial strains on pharmaceutical companies. Pharmaceutical companies will have to pay for institutional reforms to try to avoid governmental prosecution or individual lawsuits that are allowable under both Acts. If, regardless of the reforms to avoid external whistleblowing, employees do report whistleblowing externally, pharmaceutical companies may have to engage in whistleblower suits from employees who have rights of actions against them for alleged retaliation. In the past, corporations have spent millions of dollars litigating whistleblower lawsuits.¹⁴⁶ The financial impact external whistleblowing would have on pharmaceutical companies is important, because the more money used to adjust to increased exposure to government prosecution, the less money will be spent on drug development and technological advancement. Instead of funding new biotechnological experiments, pharmaceutical companies may spend increased money protecting themselves.

CONCLUSION

This Comment has shown that based on cultural attitudes at any point in time, “[t]o some, whistle-blowers are heroes; to others villains; but, to virtually no one are they inconsequential.”¹⁴⁷ External whistleblowers were once identified as parasitical opportunists, but are now seen as altruistic heroes who are essential in protecting society from fraudulent and adulterated corporate practices and products. While the early perception of an external whistleblower as a “snitch” still carries some weight in our culture, currently, society perceives an external whistleblower more often as a “savior.”¹⁴⁸

143. Ravishankar, *supra* note 19.

144. Roberts & Breen, *supra* note 58, at 3.

145. Ravishankar, *supra* note 19.

146. Ravishankar, *supra* note 19.

147. MICELI & NEAR, *supra* note 5, at iii.

148. Even in the past thirty years where whistleblowers began to gain society's approval, there were many people in society that still viewed whistleblowers with disdain. *See, e.g.*, MICELI & NEAR, *supra* note 5, at 1 (“[A] leading business magazine characterized laws prohibiting discrimination against whistle-blowers as ‘rat protection’” in 1981.); John P. Keenan & Charles A. Krueger, *Whistleblowing and the Professional: The Common Response to Whistle Blowers is Retaliation*, 74 INST. OF MGMT. ACCOUNTANTS 2 (1992) (explaining the results of a study in which many of the employees who responded to the

Our culture and our laws endorse external whistleblowing at the present time because “[b]lowing the whistle, or raising a hue and cry, or living up to the ethical standards that are already embodied in various codes of conduct is part of the antidote to the poisonous abuse of power that is infecting our society.”¹⁴⁹ While many pharmaceutical companies dislike and discourage external whistleblowing, “[t]he courts, professional and citizen groups, the media, the Congress, and honorable segments throughout our society are part of this enabling environment” for whistleblowing.¹⁵⁰ These honorable societal segments believe that without external whistleblowers, companies like TAP may continue to contravene laws and regulations, causing moral, economic and even physical harm to their customers. With external whistleblowers, however, certain misconduct can be stopped.

Given that Americans are now more concerned with deterring and punishing corporate misconduct, Dodd-Frank and the ACA’s whistleblowing provisions are expected to be widely accepted.¹⁵¹ Consequently, these provisions may lead to the passage of similar state and federal laws.¹⁵² Since Dodd-Frank and the ACA have the opportunity to receive far-reaching approval and duplication, society must consider some of the negative consequences of both Acts.

For one thing, some “incompetent or inadequately performing employees” may skip a chance to make an internal report and take information to the government prematurely to attain celebrity, receive a

survey questions noted that they were apprehensive about external reporting of fraud, adulteration, or illegality in their employer’s business).

149. WHISTLE BLOWING, *supra* note 10, at 13-14.

150. WHISTLE BLOWING, *supra* note 10, at 11; *see, e.g.*, WESTIN, *supra* note 8, at 111 (describing an example of a pharmaceutical company discouraging whistleblowing).

151. While I contend that the whistleblower provisions in Dodd-Frank and the ACA will likely be widely accepted, it should be noted that this does not mean that these Acts will be widely accepted in their entirety. To date, the reverse has been true. Both Dodd-Frank and the ACA are controversial as a whole, and have not received broad acceptance. For more details of the controversy surrounding Dodd-Frank, see DAVID A. SKEEL, JR., INST. LAW & ECON., THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 10-21 (2010) (noting that while some people view Dodd-Frank as an “incoherent mess,” others believe the Act’s virtue lies in its adherence to a clear objective to better regulate financial businesses to prevent their failures from damaging the rest of the American economy). For details on the ACA controversy, see Amanda Gardner, *Few Support ‘Individual Mandate’ in Health Care Reform Law, Poll Finds*, U.S. NEWS, Mar. 1, 2011, <http://health.usnews.com/health-news/managing-your-healthcare/policy/articles/2011/03/01/few-support-individual-mandate-in-health-care-reform-law-poll-finds> (“The new poll found that the nation as a whole is still split on how it feels about the Affordable Care Act overall, with 39 percent of respondents opposed to the reform package, 34 percent in favor and 27 percent still undecided.”).

152. Meador, *supra* note 80, at 75.

bounty, or “take up the whistle to avoid facing justified personnel sanctions.”¹⁵³ Internal reporting, the preferable first method for reporting violations, may occur less often. Another negative consequence is that false or inaccurate reports may be made more often.¹⁵⁴ Almost a decade ago, years before Dodd-Frank and the ACA, OSHA considered only twenty percent of whistleblowing claims valid.¹⁵⁵ With more protection and an opportunity to gain celebrity or bounty, OSHA may receive even more invalid claims from workers interested in self-gain. In addition, it would be a negative consequence for plaintiffs’ firms to take advantage of the increased incentives and decreased risks offered by Dodd-Frank and the ACA. Lawyers who “entice employees to become whistleblowers and to turn against their companies in the hope of big bounties” undermine the mutually beneficial reliance that exists in the employee-employer relationship by causing companies to be mistrustful of their staff and staff to be on the lookout for wrongdoing by their company.¹⁵⁶ Moreover, negative consequences may result from the privatization of public enforcement. Shifting the regulatory burden from elected and appointed

153. WESTIN, *supra* note 8, at 134. For an example of whistleblowers acquiring a large bounty, see TAP Press Release, *supra* note 1 (explaining the millions of dollars whistleblowers Gerstein and Durand acquired). For an example of whistleblowers gaining celebrity, see Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002, <http://www.time.com/time/magazine/article/0,9171,1003998,00.html> (discussing the three whistleblowers that were named People of the Year in 2002: Cynthia Cooper, an auditor for WorldCom, investigated and reported \$3.8 billion in fraud at the company, leading to the prosecution of the largest accounting fraud case in 2002. Coleen Rowley reported the FBI’s internal mishandling of information related to the September 11th attacks. Sherron Watkins, a former Vice President at Enron Corporation, wrote an internal email about misstatements in financial reports that helped the government prosecute the company for accounting fraud). *But see* WHISTLE BLOWING, *supra* note 10, at 147 (“It would be a mistake to assume that whistle blowers always reach the headlines. The opposite is probably closer to the truth.”).

154. Many believe that “[w]ith these new rules [in Dodd-Frank], there is little doubt that whistleblowers who elect to go to the government, rather than attempt to prevent or correct problems internally, will cause companies considerable expense, even where their allegations are unfounded or relate to immaterial violations.” BONDI, *supra* note 100, at 2; *see also* WHISTLEBLOWING: IN DEFENSE OF PROPER ACTION, *supra* note 134, at 53 (“Some observers note that whistleblowing is sometimes done out of vengeance or in order to collect a ‘bounty,’ and it is naïve to see it in a virtuous intent”); Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPREN. BUS. L.J. 123, 127 (2011) (noting that more statutory protection will not increase quality of whistleblowing but will increase the quantity).

155. Ravishankar, *supra* note 19 (citing a 1976 OSHA study finding that only twenty percent of the complaints filed that year were valid).

156. BONDI, *supra* note 100, at 2; *see also* BEHRMAN, *supra* note 14, at 139 (“In many whistle-blowing cases, there is a considerable dispute about the facts or their implications. Moreover, lawyers are skilled at demonstrating that things are not always as they seem.”).

government agency officials with the expertise to investigate misconduct to workers may put too much responsibility in the hands of nonprofessionals who may have ill-motives or be ill-prepared to identify wrongdoing.

Regardless of the negative consequences that may result from the passage of the Dodd-Frank and the ACA whistleblower provisions, the positive consequences that will result from these provisions make their confirmatory reception by the public almost certain. Both Acts' whistleblower provisions coincide with cultural attitudes about whistleblowing, which means that they will likely be supported and followed by most people. Also, Dodd-Frank and the ACA defend individual workers from risked retaliation when supporting the common good by reporting illegal activities that could harm the public; thus, these Acts defend Americans from exposure to unsafe and illegal products or practices. Furthermore, both Acts allow the government to save on investigative costs as well as produce money from successful prosecutions and settlements by maximizing its use of tips.¹⁵⁷ And even though "[n]ot all whistle blowers are correct in what they allege to be the facts of management's conduct," Dodd-Frank and the ACA still give laymen an opportunity to be a part of the solution to the corporate misconduct problem.¹⁵⁸

These modern statutes do not leave it up to pharmaceutical companies to self-regulate.¹⁵⁹ Regulation is put in the hands of the people, the public, and the American workforce, who now have the duty to report, the protection needed after reporting, and the ability to be "saviors" of us all.

157. See Roberts & Breen, *supra* note 58, at 1; Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 281 (2007); Andy Schneider, *Medicaid Policy, LLC, The Role of the False Claims Act in Combating Medicare & Medicaid Fraud by Drug Manufacturers: An Update* (2004); Kostakis, *supra* note 73, at 410.

158. Gerald Vinten, *A Whistleblowing Code for Educational Institutions*, 13 INT'L J. EDUC. MGMT. 150, 155 (1999).

159. WESTIN, *supra* note 8, at 134.