

REGULATING CULTURE: IMPROVING CORPORATE  
GOVERNANCE WITH ANTI-ARBITRATION PROVISIONS FOR  
WHISTLEBLOWERS

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ABSTRACT

*A focus on corporate culture, especially at financial institutions, has emerged as a regulatory, public, and media priority in the aftermath of the 2008 financial crisis. With Dodd-Frank, Congress embraced whistleblower statutes as a key instrument to improve corporate culture and governance, and to extirpate undesired and unethical business practices. Despite the clear policy goals, Dodd-Frank's unclear statutory text has created interpretative controversies. Although Dodd-Frank adds anti-arbitration provisions to preexisting whistleblower statutes, it does not include a dedicated, standalone anti-arbitration provision for Dodd-Frank's new whistleblower cause of action.*

*This Article argues that courts should not allow employers to use pre-dispute arbitration agreements to compel whistleblowers to arbitrate their Dodd-Frank claims. To make the case, we review policy concerns for whistleblower actions that favor public actions in public courts. We argue for a pragmatic interpretation of the statute that protects whistleblowers and the public's right to know by exempting Dodd-Frank's whistleblowers from arbitration. The Article draws on existing literature discussing the importance of developing case law through court decisions, enforcement and responsiveness to*

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*reputational risk, and public supervision of corporate governance issues.*

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## INTRODUCTION

In 2010, Johnny Burris, forty-four, began working as a broker at one of JPMorgan's Arizona branches.<sup>1</sup> In his first few years, he earned glowing performance reviews.<sup>2</sup> Still, he had some ethical concerns about certain things JPMorgan asked him to do.<sup>3</sup> He was troubled by internal pressure to push JPMorgan's own expensive and underperforming investment products on his predominantly retired clients over recommendations that were more aligned with their interests.<sup>4</sup> Mr. Burris repeatedly brought the issue to his supervisors and even recorded some workplace conversations to create a record.<sup>5</sup> Shortly thereafter, in late 2012, JPMorgan suspended and subsequently fired Mr. Burris.<sup>6</sup> He then took his concerns and evidence to the Securities and Exchange Commission (SEC) and *The New York Times*, thereby officially becoming a whistleblower.<sup>7</sup> After his termination, Mr. Burris also filed an arbitration claim against JPMorgan, alleging that the company retaliated against him for raising his ethical concerns.<sup>8</sup> On August 12, 2014, the arbitration panel ruled in JPMorgan's favor.<sup>9</sup> More than a year has passed since that ruling, and it now appears that Mr. Burris was onto something.<sup>10</sup> A recently announced settlement revealed that JPMorgan will pay \$307 million to resolve allegations brought against it in connection with its business practices.<sup>11</sup> Because of the SEC's new whistleblower bounty program, authorized by the Dodd-Frank Wall Street Reform and Consumer

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1. James B. Stewart, *He Blew the Whistle, Then Came Blowback*, N.Y. TIMES (Dec. 11, 2015), <http://www.nytimes.com/2015/12/11/business/he-blew-the-whistle-at-jpmorgan-chase-then-came-the-blowback.html> [<https://perma.cc/5B4L-942A>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Press Release, SEC, J.P. Morgan to Pay \$267 Million for Disclosure Failures (Dec. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-283.html> [<https://perma.cc/P6D2-TAKQ>] (describing related settlements totaling \$307 million).

Protection Act of 2010 (Dodd-Frank),<sup>12</sup> Mr. Burris and any other helpful whistleblowers that gave information related to the JPMorgan settlement could be awarded between 10 and 30 percent of the two hundred million dollars collected.<sup>13</sup>

Nations around the world recognize that whistleblowers may be able to change corporate cultures.<sup>14</sup> Indeed, corporate culture has emerged as a regulatory priority in the aftermath of the 2008 financial crisis.<sup>15</sup> As a result, in March 2016 the United Kingdom introduced a new regime meant to increase accountability and reporting.<sup>16</sup> As part of the UK financial regulation reform, financial institutions regulated by the Prudential Regulation Authority (PRA) now must appoint a senior manager to act as the whistleblowers' champion under the Senior Managers' Regime.<sup>17</sup> Additionally, in

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12. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

13. Press Release, SEC, SEC Issues \$17 Million Whistleblower Award (June 9, 2016), <https://www.sec.gov/news/pressrelease/2016-114.html> [<https://perma.cc/EZ54-RN45>] (describing the SEC's second-largest whistleblower award since its whistleblower program began nearly five years ago). The SEC issued a thirty million dollar award in September 2014 and a fourteen million dollar award in October 2013, and on June 9, 2016, the SEC announced that it would award more than seventeen million dollars to a former company employee whose detailed tip substantially advanced the agency's investigation and ultimate enforcement action. *Id.*

14. See Gönenç Gürkaynak & Derya Durlu, *Harmonizing the Shield to Corporate Liability: A Comparative Approach to the Legal Foundations of Corporate Compliance Programs from Criminal Law, Employment Law, and Competition Law Perspectives*, 47 INT'L LAW. 99, 101, 103-04, 119-21 (2013).

15. See, e.g., Emily Glazer & Christina Rexrode, *As Regulators Focus on Culture, Wall Street Struggles to Define It*, WALL ST. J. (Feb. 1, 2015, 7:57 PM), <http://www.wsj.com/articles/as-regulators-focus-on-culture-wall-street-struggles-to-define-it-1422838659> [<https://perma.cc/FH8U-NYWP>]; Robert T. Taylor, *Banks Can Use 'Code of Ethics' to Strengthen Public Trust*, AM. BANKER (Jan. 15, 2016), <http://www.americanbanker.com/bankthink/banks-can-use-code-of-ethics-to-strengthen-public-trust-1078843-1.html> [<https://perma.cc/J6QX-6N8Z>] (discussing the ethical shortcomings that have tarnished the financial services sector and prompted Federal Reserve Bank presidents in New York and Richmond and Federal Reserve Chair Janet Yellen to address the need for better culture and ethical standards among financial institutions).

16. See News Release, Bank of Eng., *New Accountability Regime for Banks and Insurers Comes into Force* (Mar. 7, 2016), <http://www.bankofengland.co.uk/publications/Documents/news/2016/038.pdf> [<https://perma.cc/R7PU-TCF6>].

17. See News Release, Bank of Eng., *Prudential Regulation Authority Sets Out How It Will Hold Senior Managers Accountable for Failure to Meet Its Requirements* (Feb. 23, 2015), <http://www.bankofengland.co.uk/publications/Documents/news/2015/029.pdf> [<https://perma.cc/KT4V-8S4Y>] (explaining that the senior management accountability initiative is part of the UK's banking reform program following the financial crisis of 2008 and was developed in

order to increase accountability and reporting, financial institutions across the globe have recently started hiring former spies in order to monitor employee behavior and corporate culture more effectively.<sup>18</sup>

In the United States, Congress drafted Dodd-Frank's whistleblower provisions as a tool to change corporate culture and root out fraud, corruption, and unethical business practices.<sup>19</sup> It created an incentive to report unethical and unlawful conduct to the SEC by authorizing a bounty program—allowing the SEC to reward whistleblowers for particularly valuable tips.<sup>20</sup> This Whistleblower Program proved successful: the seventeen million-dollar award from June 2016 brought “the grand total of whistleblower awards to over eighty-five million dollars since the bounty program began in 2011.”<sup>21</sup> Additionally, Dodd-Frank strengthened existing whistleblower protections by exempting whistleblowers from arbitration

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response to recommendations made by the independent Parliamentary Commission on Banking Standards in June 2013).

18. See *What Are Former CIA Agents Doing at Banks?*, BLOOMBERG (Feb. 16, 2016, 11:10 AM), <http://www.bloomberg.com/news/videos/2016-02-16/what-are-former-cia-agents-doing-at-banks> [<https://perma.cc/W8M6-T2X2>].

19. One recent survey found that 23 percent of financial services employees believed it likely “that fellow employees ha[d] engaged in illegal or unethical activity in order to gain an advantage over competitors or others at the company.” ANN TENBRUNSEL & JORDAN THOMAS, UNIV. OF NOTRE DAME & LABATON SUCHAROW LLP, *THE STREET, THE BULL AND THE CRISIS: A SURVEY OF THE US & UK FINANCIAL SERVICES INDUSTRY 4* (2015), <http://www.secwhistlebloweradvocate.com/LiteratureRetrieve.aspx?ID=224757> [<https://perma.cc/986S-QJEN>]. Underscoring the importance of whistleblowing, the United States Court of Appeals for the Fifth Circuit has characterized the statutes as “government’s primary litigation tool for recovering losses sustained as the result of fraud.” *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008).

20. Whistleblower tips have substantially improved the SEC’s investigative capabilities. See Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 357 (2015) (explaining that SEC investigations are many times more effective when guided by whistleblower tips).

21. Cliff Fonstein & Meredith-Anne Berger, *SEC Issues Near Record-Breaking Whistleblower Award*, LEXOLOGY (June 17, 2016), <http://www.lexology.com/library/detail.aspx?g=3439bafb-bc16-4a36-bc7c-f5e019507e9f> [<https://perma.cc/5PWY-8YU6>]; Jordan Thomas, *5 Tips for Potential Corporate Whistle-Blowers*, N.Y. TIMES (Nov. 20, 2015), <http://www.nytimes.com/2015/11/21/business/dealbook/5-tips-for-potential-corporate-whistle-blowers.html> [<https://perma.cc/35E7-6NCA>]; Press Release, SEC, *SEC Awarding Nearly \$2 Million to Three Whistleblowers* (Mar. 8, 2016), <http://www.sec.gov/news/pressrelease/2016-41.html> [<https://perma.cc/7MYK-PT3U>].

under other statutes.<sup>22</sup> These anti-arbitration provisions matter a great deal because different forums often have different procedures, publicity, and outcomes.

Dodd-Frank's whistleblower section may be fairly described as inelegantly drafted. Curiously, although Dodd-Frank added anti-arbitration provisions to preexisting whistleblower statutes, it did not include a dedicated, standalone anti-arbitration provision for the new cause of action for whistleblowers under Dodd-Frank (Dodd-Frank Claim).<sup>23</sup> This Article takes a close look at the impact of omitting an anti-arbitration clause for the Dodd-Frank Claim. If Dodd-Frank's whistleblowers must seek protection in private arbitration instead of a public court, the whistleblower statutes may not achieve their intended goals.<sup>24</sup> For persons like Mr. Burris, this means that they may never have a day in court.

Still, Mr. Burris is not the only person who might suffer the consequences of this puzzling omission. Sending whistleblowers to arbitration may diminish Dodd-Frank's efficacy in ways the legal literature has not yet recognized. In the absence of attention, employers may continue to resolve Dodd-Frank Claims quietly in private arbitration proceedings, denying the public access to the information that would have come to light had the claims been heard in open court. As Dodd-Frank whistleblower cases become more common, courts must determine whether employers may use pre-dispute arbitration agreements to compel whistleblowers to arbitrate their Dodd-Frank Claims.<sup>25</sup> Although some courts treat the

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22. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, § 748, 124 Stat. 1376, 1746 (2010) (codified as amended at 7 U.S.C. § 26(n)(2) (2012)) (prohibiting arbitration of whistleblower suits brought under the Commodity Exchange Act); *id.* § 922, 124 Stat. at 1848 (codified as amended at 18 U.S.C. § 1514A(e)(2)) (prohibiting arbitration of whistleblower suits brought under Sarbanes-Oxley); *id.* § 1028, 124 Stat. at 2004 (codified as amended at 12 U.S.C. § 5518(b)) (granting the Consumer Financial Protection Bureau authority to prohibit arbitration).

23. See Dodd-Frank Act § 922, 124 Stat. at 1845-46 (codified as amended at 15 U.S.C. § 78u-6(h)(1)(A)).

24. See Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 341 (2015) (demonstrating that the value of a claim may change dramatically from one forum to another); Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 287-91 (explaining that legal provisions and the remedies for enforcing them are inextricably intertwined).

25. *Compare* *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492 (3d Cir. 2014) (holding that the omission of a dedicated anti-arbitration provision means that Congress did

omission of a dedicated anti-arbitration clause as dispositive, others read the Sarbanes-Oxley anti-arbitration clause into the Dodd-Frank Claim.<sup>26</sup>

This Article argues that underlying policy concerns strongly favor allowing whistleblowers to litigate Dodd-Frank Claims in court, rather than in private arbitration. It calls for either Congressional action or a pragmatic interpretation of the statute that protects whistleblowers. In making this argument, this Article draws on literature regarding statutory construction and public policy, and provides the first contribution to legal scholarship that describes this important emerging issue of whistleblower policy.

## I. THE POLICY CONTEXT

The controversy over whether Dodd-Frank's whistleblowers belong in court or arbitration must be considered in light of the larger policy issues involved. As the next Section explains, even though the federal default policy favors arbitration, that policy should yield to the need to improve whistleblower protection and public insight into corporate misconduct, particularly when dealing with financial institutions.

### A. A Baseline Federal Default Policy Favors Arbitration

The federal default policy strongly favors arbitration. Enforcing mandatory arbitration agreements conserves the judicial system's limited resources by relieving courts from resolving many time-intensive employment disputes.<sup>27</sup> Although courts once hesitated to enforce pre-dispute arbitration agreements for statutory employ-

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not intend to exempt the Dodd-Frank Claim from arbitration), *with Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089 (JCH), 2015 WL 3771646, at \*7 (D. Conn. June 17, 2015), *granting reconsideration*, No. 3:14-CV-01089 (JCH), 2015 WL 8779559 (D. Conn. Dec. 15, 2015) (“[F]or the same reason that the court concludes that the [Sarbanes-Oxley] claim is outside the scope of the ... arbitration clause, the court similarly concludes that the Dodd-Frank claim is outside the scope of the ... arbitration clause and thus does not need to be submitted to arbitration.”).

26. *Compare Khazin*, 773 F.3d at 492, *with Wiggins*, 2015 WL 3771646, at \*7.

27. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991) (cataloging a 2166 percent rise in employment discrimination filings between 1970 and 1989).



ment claims,<sup>28</sup> this position changed in the early 1990s when courts began accepting mandatory arbitration agreements and alternative dispute resolution gained widespread acceptance.<sup>29</sup> In light of the doctrinal shift towards a default policy of enforcing mandatory arbitration agreements, the only mechanism to guarantee litigants' access to the courts is to include clear provisions in employment laws that preclude mandatory arbitration.<sup>30</sup>

### *B. Federal Policy Encourages Whistleblowing*

In what has been viewed as an unrelated area, whistleblower claims have long been recognized as a top policy priority.<sup>31</sup> Whistleblowers play a critical role in corporate governance, especially in combating corruption and guarding the public from wrongdoing, as well as guaranteeing accountability for the violation of laws.<sup>32</sup> Legal scholarship has identified five techniques that encourage whistleblowing: (1) Imposing and facilitating legal mandates to disclose

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28. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974). Focusing on a Title VII claim, the Court mentioned the limited discovery; the inapplicability of rules of evidence; the arbitrator's lack of "general authority to invoke public laws that conflict with the bargain between the parties;" and possibly limited expertise with employment discrimination lawsuits, as well as the overall informality of an arbitration proceeding as problematic factors in determining that arbitration should be a preferred exclusive remedy. *Id.* at 53, 57-58, 57 n. 18.

29. See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that an arbitration clause required by the New York Stock Exchange and signed by a manager in the securities industry was enforceable and could constitute an exclusive remedy). The Court did not overrule *Gardner-Denver*, but distinguished it. See *id.* at 33-36; see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118-19, 122-23 (2001).

30. See *Gilmer*, 500 U.S. at 26; *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (indicating that a party may use text, legislative history, and underlying purposes of a statute to rebut the presumption that an arbitration "agreement" will be enforceable); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 204 (D. Mass. 1998) ("Instead of overruling *Gilmer* ... Congress could merely follow [Gilmer's] ... suggestion ... and make clear its intent to preclude enforcement of pre-dispute arbitration."), *aff'd*, 170 F.3d 1 (1st Cir. 1999).

31. The federal government has encouraged whistleblowing since the Civil War, when it enacted the False Claims Act to track fraudulent war spending. See False Claims Act, ch. 67, 12 Stat. 696 (1863) (current version at 31 U.S.C. §§ 3729-3733 (2012)). The False Claims Act, which was enacted in 1863, is an American federal law that makes any person who knowingly submits a false claim to the government liable for double or more of the government's damages plus a penalty. See *id.*

32. Kathleen Clark, White Paper on the Law of Whistleblowing 1 (Nov. 1, 2012), <http://ssrn.com/abstract=2176293> [<https://perma.cc/KZP7-YVWD>].

certain types of wrongdoing; (2) prohibiting retaliation against whistleblowers and sanctioning those who do so; (3) providing remedies to whistleblowers that suffer from retaliation; (4) encouraging the establishment of platforms to facilitate whistleblowing; and (5) offering rewards to whistleblowers who report wrongdoings.<sup>33</sup>

Dodd-Frank embraces all of these techniques to encourage whistleblowing and facilitate the flow of information. Specifically, although Dodd-Frank includes few explicit legal requirements to disclose wrongdoing externally,<sup>34</sup> the statute reinforces existing internal disclosure mandates, including requirements that attorneys appearing before the SEC disclose concerns about discovered wrongdoing up the corporate ladder and even to the board.<sup>35</sup> Moreover, elements of the first and second techniques can also be demonstrated in, inter alia, Dodd-Frank's provision that prohibits retaliation against whistleblowers for making disclosures that are required or protected by the Sarbanes-Oxley Act, the Securities Exchange Act, or other laws and rules subject to SEC jurisdiction.<sup>36</sup> The third technique, which is the most important one in the context of arbitration agreements, focuses on providing remedies to suffering whistleblowers. Dodd-Frank employs this technique through

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33. *Id.* at 2.

34. For an example of an external disclosure requirement, see Section 1504 of Dodd-Frank requiring "resource extraction issuers" to disclose payments they make to foreign governments and the United States in annual reports that they file with the SEC and on their websites. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, § 1504, 124 Stat. 1376, 2220-21(2010) (codified as amended at 15 U.S.C. § 78m(q)(2)(A)). These requirements apply to publicly traded energy and mining companies. *Id.*

35. Attorneys "appearing and practicing" before the SEC are required to act as internal whistleblowers under the Sarbanes-Oxley Act and internally report evidence of material violations of the law. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784. An attorney's failure to comply with these requirements will result in penalties and disciplinary action. See *id.* (incorporated by reference to Dodd-Frank). Alternatively, an attorney may report such information to a "qualified legal compliance committee," if present. See 17 C.F.R. §§ 205.2(k), 205.3(c) (2016). For a more complete discussion of these conflicted counselors, see Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. (forthcoming 2016), <http://ssrn.com/abstract=2620365> [<https://perma.cc/JGC8-RZHJ>].

36. See Dodd-Frank Act § 922, 124 Stat. at 1845-46 (codified as amended at 15 U.S.C. § 78u-6(h)(1)(A)); see also Sarbanes-Oxley Act § 806, 116 Stat. at 802-04. The Dodd-Frank Act amended the anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h), by expanding the scope of protected activity and setting a standard statute of limitations of three years. See Dodd-Frank Act § 1079A, 124 Stat. at 2079 (codified as amended at 31 U.S.C. § 3730(h)).

provisions that expand employee protections against employer retaliation as follows: (1) Excluding Sarbanes-Oxley whistleblower claims from the reach of pre-dispute arbitration agreements;<sup>37</sup> (2) granting parties a direct private right of action in federal district court when whistleblowers allege retaliation by their employers;<sup>38</sup> and (3) reinstating employment with the same seniority status that the individual would have had but for the discrimination, as well as compensating for litigation costs and double back pay with interest.<sup>39</sup> The fourth technique—logistically and organizationally facilitating whistleblowing—is demonstrated in provisions that enable retaliated-against whistleblowing employees to bring enforcement actions directly to federal district courts, rather than first going to the Department of Labor,<sup>40</sup> and that increase the statute of limitations to do so.<sup>41</sup> The fifth technique—providing financial incentives—is demonstrated in Dodd-Frank’s provisions that offer awards of 10 to 30 percent of the government’s recovery to individuals who report securities law violations to the SEC or the CFTC if such information results in agency sanctions larger than one million dollars.<sup>42</sup>

### *C. Policy Concerns with Arbitration for Whistleblowers*

Allowing employers to compel the arbitration of Dodd-Frank claims can potentially alter how financial intermediaries address whistleblower complaints, including how financial intermediaries investigate and respond to internal whistleblowing.<sup>43</sup> In certain circumstances, private, quiet arbitration should not be a preferred

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37. See Dodd-Frank Act § 922, 124 Stat. at 1845-46 (codified as amended at 15 U.S.C. § 78u-6(h)(1)).

38. See *id.* § 922, 124 Stat. at 1846 (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(i)).

39. *Id.* (codified as amended at 15 U.S.C. § 78u-6(h)(1)(C)). The Commodities Future Trading Commission (CFTC) provision includes the same remedies, but only allows for a recovery of back pay, without doubling but with interest. See 7 U.S.C. § 26(h)(1)(C).

40. See Dodd-Frank Act § 922, 124 Stat. at 1846 (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(i)).

41. *Id.* (codified as amended at 15 U.S.C. § 78u-6(h)(1)(B)(iii)).

42. See *id.* § 748, 124 Stat. at 1739-41 (codified as amended at 7 U.S.C. § 26(a)(1)-(c)); *id.* § 922, 124 Stat. at 1841-42 (codified as amended at 15 U.S.C. § 78u-6(a)(1) to -6(b)); see also Clark, *supra* note 32, at 4.

43. See generally Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 PEPP. DISP. RESOL. L.J. 203 (2015).

dispute resolution mechanism. Two of the key agencies tasked with enforcing and implementing Dodd-Frank's provisions—the Consumer Financial Protection Bureau (CFPB) and the SEC—have made placing appropriate limits on arbitration key agenda items.<sup>44</sup> In fall 2015, the CFPB determined that although it would not ban consumer arbitration clauses per se, it would seek to exclude many class action claims from arbitration.<sup>45</sup> Similarly, in 2014 Sean McKessy, Chief of the SEC's Office of the Whistleblower, stated that the SEC is “actively looking for examples of confidentiality agreements, separat[ion] agreements, [and] employment agreements that ... in substance say ‘as a prerequisite to get this benefit you agree you're not going to come to the commission or you're not going to report anything to a regulator.’”<sup>46</sup> Signaling its concern about the issue, the SEC has indicated that agreements designed to suppress information will result in penalties for not only the companies that initiated them, but also the “lawyers who drafted” such agreements or language.<sup>47</sup> This statement is meant to warn employers about using an employment agreement as a means to curtail or deter Dodd-Frank reporting and claims.<sup>48</sup>

A variety of other policy concerns also weigh heavily in favor of allowing whistleblowers to litigate their claims in public courts.

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44. See generally Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & Bus. 793 (2015) (discussing mandatory pre-dispute arbitration clauses especially in the context of consumer financial and investor contracts; explaining how they ill serve individuals; and stressing that it is well past time for the CFPB and the SEC to use their authority, provided by Dodd-Frank following the financial crisis, to condition the use of arbitration).

45. See Ken Sweet, *Financial Regulators Move to Restrict Forced Arbitration*, BUS. INSIDER (Oct. 7, 2015, 4:36 PM), <http://www.businessinsider.com/ap-financial-regulators-move-to-restrict-forced-arbitration-2015-10> [<https://perma.cc/4446-D6H6>].

46. See Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW360 (Mar. 14, 2014, 5:16 PM), <http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts> [<https://perma.cc/A9WW-3WZW>] (omission in original) (quoting Sean McKessy, SEC Whistleblower Chief, Remarks at the Georgetown University Law Center Corporate Counsel Institute (Mar. 14, 2014)).

47. *Id.* (quoting Sean McKessy, SEC Whistleblower Chief, Remarks at the Georgetown University Law Center Corporate Counsel Institute (Mar. 14, 2014)).

48. *Id.*

### 1. *Whistleblower Litigation Develops Case Law*

Historically, a major criticism of arbitration has been that it limits the development of case law.<sup>49</sup> Disputes that are resolved through private arbitration do not create binding precedent for future cases. When individuals seek to assert rights in arbitration under new statutes, there may be no court decisions interpreting the difficult-to-parse text, meaning that every claimant or defendant will reargue the same controversies time and time again. Commentators have argued that arbitration has pushed employees suing for civil rights violations into individualized arbitration proceedings, rather than into class actions.<sup>50</sup> This has resulted in a failure to correct systemic civil rights violations in the workplace.<sup>51</sup>

### 2. *Reputational Risk Improves Responsiveness*

During the last few decades, corporate governance scholars have increasingly grown interested in the role of corporate reputation.<sup>52</sup> When whistleblowers publicize disturbing issues, those issues threaten corporate public relations and reputations, and motivate corporate entities, and especially financial institutions, to respond.<sup>53</sup>

Of course, whistleblowers leveling public accusations may harm a corporation's reputation. Although it is extremely challenging for a corporation to change unflattering perceptions about its image after public allegations have been made,<sup>54</sup> studies have shown that the consequences, in terms of publicity, are much worse when those businesses possess "reputational capital,"<sup>55</sup> or a "reservoir of

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49. See *infra* notes 69-70 and accompanying text.

50. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-6 (2000).

51. Cf. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) (recognizing the limitations of private agreements in the face of a regulatory attempt to end disability discrimination); Sternlight, *supra* note 50, at 31.

52. See, e.g., John F. Mahon & Steven L. Wartick, *Dealing with Stakeholders: How Reputation, Credibility and Framing Influence the Game*, 6 CORP. REPUTATION REV. 19 (2003).

53. See generally Wayne H. Decker & Thomas J. Calo, *Impressions of Organizational Responses to Whistleblower Accusations*, 26 CENT. BUS. REV. 17 (2007).

54. See Andrea M. Sjovald & Andrew C. Talk, *From Actions to Impressions: Cognitive Attribution Theory and the Formation of Corporate Reputation*, 7 CORP. REPUTATION REV. 269, 275-78 (2004).

55. Charles J. Fombrun et al., *Opportunity Platforms and Safety Nets: Corporate*

goodwill.”<sup>56</sup> Scholars analyzing this result have argued that corporate reputation is viewed as “both a factor and a consequence of crisis management,”<sup>57</sup> because positive corporate reputation results in more successful crisis management, which in turn results in enhanced reputation.<sup>58</sup>

Limiting arbitration and promoting whistleblower actions may help businesses improve their reputations by driving them to act in a timely manner and to manage their crises successfully. Successful crisis management can also involve avoiding fines or significant legal fees, which in turn supports a corporation’s goodwill and improves its public image.<sup>59</sup> But most relevant to mitigating public relations risks, businesses and whistleblowers are likely to be viewed favorably if they accept and admit guilt.<sup>60</sup> Businesses that deny culpability, or fire the whistleblowers while accusing them of wrongdoing, are viewed more negatively in the public’s eye, especially if the alleged culpability involves an ethical issue.<sup>61</sup>

Finally, even though reputation plays a role for all businesses, it is a critical factor for financial intermediaries. For banks,

[r]eputational risk can be defined as the risk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt-holders, market analysts, other relevant parties or regulators that can adversely affect a bank’s ability to maintain existing, or establish new, business relationships and continued access to sources of funding.<sup>62</sup>

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*Citizenship and Reputational Risk*, 105 BUS. & SOC’Y REV. 85, 86 (2000).

56. See Mahon & Wartick, *supra* note 52, at 19 (quoting Gary H. Jones et al., *Reputation as Reservoir: Buffering Against Loss in Times of Economic Crisis*, 3 CORP. REPUTATION REV. 21 (2000)).

57. Laura Tucker & T.C. Melewar, *Corporate Reputation and Crisis Management: The Threat and Manageability of Anti-Corporatism*, 7 CORP. REPUTATION REV. 377, 382 (2005); see Decker & Calo, *supra* note 53, at 17.

58. Decker & Calo, *supra* note 53, at 17; Tucker & Melewar, *supra* note 57, at 382.

59. See Decker & Calo, *supra* note 53, at 17.

60. *Id.* at 19-20.

61. *Id.*; see also Michael J. Gundlach et al., *The Decision to Blow the Whistle: A Social Information Processing Framework*, 28 ACAD. MGMT. REV. 107, 113-14 (2003) (noting that the literature suggests that a business that acknowledges the truth of a whistleblower’s charges may be judged more favorably than a business that denies the accusations).

62. See BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT’L SETTLEMENTS, ENHANCEMENTS TO THE BASEL II FRAMEWORK 19 (2009), <http://www.bis.org/publ/bcbs157.pdf> [<https://perma.cc/JQE6-LD3W>].

Therefore, a financial institution should be especially concerned with maintaining positive corporate reputations and minimizing reputational risks, as those can lead to credit, market, and legal risks, which can all have horrific effects on a bank's earnings, liabilities, liquidity, and capital.<sup>63</sup>

### *3. Increased Likelihood of Public Enforcement*

The effectiveness of a law depends on the remedies it grants to successful plaintiffs.<sup>64</sup> In the whistleblower context, a reporting employee's ability to utilize the remedies Dodd-Frank provides is key for the law's effectiveness. But if a plaintiff is not able to argue her case and instead is forced into an arbitration proceeding, she may perceive a disadvantage from factors such as a suspected employer bias or limitations as to discovery or where to bring the case.<sup>65</sup> These disadvantages decrease the settlement value of a plaintiff's case and, consequently, undermine the protections offered to whistleblowers under federal laws—specifically under Dodd-Frank—as well as the likelihood of enforcing the law successfully. As a result, some potential whistleblowers may decide to keep the whistle in the drawer.

Similarly, requiring plaintiffs to resolve their cases via arbitration rather than lawsuits undermines federal policy by diminishing the likelihood of public enforcement. When a whistleblower “blows” the whistle, she is heard internally and possibly externally.<sup>66</sup> If the business retaliates and fires the whistleblower for raising ethical issues, a public proceeding increases the likelihood that regulators will hear the whistle's blast.<sup>67</sup> Focusing on this logic, SEC Commissioner Daniel Gallagher stated that it is not surprising that business organizations are trying to structure secretive agreements

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63. *Id.* at 19-20.

64. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1075-76 (2004) (arguing that arbitration is a forum that weakens the rights of employees and that it should be made clear that disputes with whistleblowers should not be subject to mandatory pre-dispute arbitration).

65. *Id.*

66. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 664-67. (1999).

67. See Cherry, *supra* note 64, at 1075-76.

to avoid undesired consequences and sanctions relevant under the law.<sup>68</sup> In the financial intermediation context, part of the reason it has been so difficult to prosecute financial institutions and their executives has been the difficulties the Department of Justice (DOJ) faces in collecting incriminating evidence and materials.<sup>69</sup> To gain access to information, the DOJ has stressed the importance of whistleblowers and how critical they are to bringing successful cases that would develop much-needed case law.<sup>70</sup> Arbitration impairs the DOJ's ability to collect information, to connect with whistleblowers, and to bring cases.

#### 4. *Private Arbitration Limits Public's Ability to Monitor*

Open courts have long been celebrated as a tool for helping the public have confidence in the administration of justice.<sup>71</sup> In 2013, concerned about public interest implications, Justice Kagan stated in a dissent that "arbitration threatens to become ... a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."<sup>72</sup> This comment reflects a view that many business entities now attempt to suppress evidence of wrongdoing by channeling disputes into private arbitration proceedings. Employers have come up with ways to make employees sign various agreements relating to secrecy, including questionable nondisclosure agreements, that require employees to report wrongdoing to supervisors before going outside the organization, and

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68. Aruna Viswanatha, *Big Banks Use Loophole to Avoid Ban*, WALL ST. J. (April 30, 2015, 8:07 PM), <http://www.wsj.com/articles/big-banks-use-loophole-to-avoid-ban-1430436535> [<https://perma.cc/MV96-WQCZ>]. In his comments Commissioner Gallagher mainly referred to the type of settlements the regulators reached with the biggest financial institutions in 2014 and 2015 to pay billions of dollars in penalties in order to resolve various charges, without needing to admit or deny the allegations. *See id.*

69. Eric H. Holder, Jr., U.S. Att'y Gen., U.S. Dep't of Justice, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> [<https://perma.cc/JEH8-NWBS>]. Nizan Geslevich Packin, *Breaking Bad? Too-Big-To-Fail Banks Not Guilty as Not Charged*, 91 WASH. U. L. REV. 1089, 1095 (2014).

70. Holder, *supra* note 69.

71. *See* Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437, 443 (2013) (discussing the public interest in open-court proceedings).

72. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).



arbitration agreements that bar employees from openly discussing their case and benefitting from a whistleblower reward.<sup>73</sup> Nondisclosure agreements are intended to prevent employees from leaving an employer with valuable trade secrets to benefit competitors.<sup>74</sup> But, even if such agreements are enforceable as they were not intended to hide illegal activity, they may violate federal whistleblower laws.<sup>75</sup>

Similarly, it is in the public interest to have open and transparent whistleblowing cases, which expose negative business cultures and norms. As stated by former Attorney General Eric Holder, “No financial fraud case is prosecutable unless we have sufficient evidence of intent—we should seek to better equip investigators to obtain this often-elusive evidence. This means, among other things, ... to incentivize witness cooperation and encourage whistleblowers at financial firms to come forward.”<sup>76</sup> As previously discussed in this Part, forcing whistleblowers into mandatory arbitration has the opposite, chilling effect.

## II. DODD-FRANK’S ODDLY DRAFTED WHISTLEBLOWER PROTECTIONS

Dodd-Frank’s dense and interrelated statutory text has forced the federal courts to wade through interpretive controversies. For example, the Second Circuit and the Fifth Circuit split over how to identify who actually qualifies as a “whistleblower” under Dodd-Frank.<sup>77</sup> Although the Fifth Circuit requires a person to report to the SEC to qualify, the Second Circuit defers to the SEC’s interpretation and recognizes internal reporters as whistleblowers.<sup>78</sup>

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73. See Maura Irene Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements and the Threat of Disqualification, Part II*, 90 NEB. L. REV. 141, 142-43 (2011). See generally Bast, *supra* note 66, at 698-708.

74. See Richard Harroch, The Key Elements of Non-Disclosure Agreements, FORBES (Mar. 10, 2016, 11:45 AM), <http://www.forbes.com/sites/allbusiness/2016/03/10/the-key-elements-of-non-disclosure-agreements/#26331766411b> [<https://perma.cc/8A6H-5V9U>].

75. See Bast, *supra* note 66, at 699-709.

76. Holder, *supra* note 69.

77. Compare *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015) (deferring to the Commission’s interpretation and finding that inside reporting qualifies), with *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013) (holding that inside reporting does not qualify).

78. The Fifth Circuit’s decision has been broadly criticized. See, e.g., Jennifer M. Pacella,

The dispute concerns how much of an impact a Dodd-Frank provision incorporating a portion of Sarbanes-Oxley should have in the term's meaning. The statutory section creating the interlocking relationship between Dodd-Frank and Sarbanes-Oxley reads as follows:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section; [or]

....

(iii) *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.)*, this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>79</sup>

Dodd-Frank's cross-reference to Sarbanes-Oxley has confounded courts because it creates inconsistency within the statutory section. Dodd-Frank defines a whistleblower as "any individual who provides ... information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."<sup>80</sup> This would seemingly indicate that a whistleblower protected under the statute would only be a person that provided information to the SEC. Yet, as one court has observed, Section 78u-6(h)(1)(A)(iii) "is in direct conflict with [Dodd-Frank's] definition of a whistleblower because it provides protection to persons who have not disclosed information to the SEC."<sup>81</sup> To

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*Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 725 (2014) (describing the Fifth Circuit's decision as "alarming" because it "ignores the correct rationale in the decisions of the several district courts that have already addressed the very same issue").

79. 15 U.S.C. § 78u-6(h)(1)(A) (2012) (emphasis added).

80. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, § 922, 124 Stat. 1376, 1841-42 (codified as amended at 15 U.S.C. § 78u-6(a)(6)).

81. *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013), *aff'd in part, dismissed in part*, 566 F. App'x 719 (10th Cir. 2014). The direct conflict occurs because many of the disclosures required or protected under Sarbanes-Oxley are not made to the SEC. *Genberg*, 935 F. Supp. 2d at 1106.

resolve the conflict, the Fifth Circuit adhered to the statutory definition and ruled that only persons that report externally of their organization and to the SEC qualify as whistleblowers.<sup>82</sup> In contrast, the Second Circuit found that this baffling provision created enough ambiguity for it to defer to the SEC's own regulatory definition of "whistleblower"—a definition encompassing internal reporting.<sup>83</sup>

It is difficult to determine how much of Sarbanes-Oxley Congress actually intended to incorporate into Dodd-Frank with Section 78u-6(h)(1)(A)(iii). Specifically, it is not clear if employers may use predispute arbitration agreements to bar public litigation of Dodd-Frank Claims or if that provision also brought over Sarbanes-Oxley's anti-arbitration provision. While in many instances, legislative history would shed light on Congressional intent, legislative history provides no useful guidance here because Congress, reconciling different versions of the bill, hastily added subdivision (iii) without making its intent clear.<sup>84</sup> Remarking on the peculiarity of the section, the Second Circuit characterized it as "a kind of legal Lohengrin; ... no one seems to know whence it came."<sup>85</sup>

### III. POSSIBLE RESPONSES

Given the strong policy justifications for ensuring that whistleblowers have access to open courts, a question remains about how to address the issue in light of Dodd-Frank's flawed statutory text. This Article argues that there are two possible solutions for Dodd-Frank's whistleblowers: either Congressional intervention or a pragmatic, interpretative fix from courts construing Dodd-Frank's dense, interrelated statutory text.

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82. *Asadi*, 720 F.3d at 627-28 (finding that inside reporting does not qualify).

83. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015) (deferring to the Commission's interpretation and finding that inside reporting qualifies).

84. *Id.* at 153 ("[T]here is no mention of the addition of subdivision (iii), much less its meaning or intended purpose, in any legislative materials—not in the conference report nor the final passage debates on Dodd-Frank in either the House or the Senate."); *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089 (JCH), 2015 WL 3771646, at \*6 (D. Conn. June 17, 2015) ("[N]either party presents, nor does the court discern, any clear congressional intent to broaden or narrow the plain meaning of 'arising under' in [Sarbanes-Oxley's anti-arbitration provision].").

85. *Berman*, 801 F.3d at 153 (alteration in original) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds*, *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010)).

### A. *The Congressional Fix*

Congressional action would provide the cleanest way to resolve the controversies. By adding an additional anti-arbitration provision within the same section as the Dodd-Frank Claim, Congress could clearly provide for access to public courts, as it has with so many other whistleblower claims.<sup>86</sup> At the same time, it could also cure the definitional controversy over what type of reporting qualifies an employee as a whistleblower.

Although desirable, the odds of immediate Congressional action appear low.<sup>87</sup> In any event, without the political will generated by a financial crisis, it will most likely be many years before another omnibus reform bill might incorporate this fix.

### B. *The Interpretative Fix*

From a pragmatic perspective, the best way to address the issue in the interim may be a judicial interpretation that reads an existing anti-arbitration provision into the Dodd-Frank Claim. Legal pragmatists recognize that statutory interpretation is a difficult task and argue that it should be informed by taking into account the consequences of a particular interpretation.<sup>88</sup> Other influential voices criticize this approach as cynical and amorphous, dignifying results-oriented reasoning.<sup>89</sup> A pragmatic approach may be more acceptable when courts face particularly challenging interpretative tasks, such as an internally inconsistent statutory section without any legislative history.<sup>90</sup>

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86. See *supra* note 22 and accompanying text.

87. See Lauren French, *Congress Setting New Bar for Doing Nothing*, POLITICO (Mar. 21, 2016, 5:04 PM), <http://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057> [<https://perma.cc/KB6P-NZVF>].

88. Douglas Lind, *The Mismeasurement of Legal Pragmatism*, 4 WASH. U. JURIS. REV. 213, 216 (2012) (“[P]ragmatism is indeed a philosophy that considers consequences to be relevant in matters of deliberation and judgment.”).

89. See David Luban, *What’s Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 43 (1996); Richard H. Weisberg, *It’s a Positivist, It’s a Pragmatist, It’s a Codifier! Reflections on Nietzsche and Stendhal*, 18 CARDOZO L. REV. 85, 85 (1996) (reproaching legal pragmatism for an “amorphous nature”).

90. See Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 683 (2004) (“Only in exceptional circumstances, however, will the pragmatic judge give controlling weight to systemic consequences.”).

The interpretative issue for Dodd-Frank's whistleblowers is whether the statutory cross-reference to Sarbanes-Oxley, that "legal Lohengrin," also incorporates Sarbanes-Oxley's anti-arbitration provision.<sup>91</sup> The anti-arbitration provision that Dodd-Frank added to Sarbanes-Oxley provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute *arising under this section*."<sup>92</sup> This has given rise to a dispute as to what it means to arise under that section. If Dodd-Frank Claims also arise under that section, then whistleblowers may bring court actions. If they do not arise under that section, then employers may funnel the claims to private arbitration proceedings.

In considering this issue, most courts to reach it thus far have chosen to read the statute narrowly and have found that the Sarbanes-Oxley's anti-arbitration provision does not extend to Dodd-Frank Claims.<sup>93</sup> Despite this majority reading, an alternative interpretation has emerged, finding that Sarbanes-Oxley's anti-arbitration provision extends to Dodd-Frank Claims to the extent that those claims also arise under Sarbanes-Oxley.<sup>94</sup>

### *1. The Current Majority View Favors Arbitration*

Most courts have adopted the narrow approach because the relatively short statutory section creating the Dodd-Frank Claim does not include its own anti-arbitration provision within its text.<sup>95</sup> These courts pointed out that in adding the anti-arbitration provision to Sarbanes-Oxley and other existing causes of action, Congress demonstrated that it knew how to provide for forum choice

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91. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds*, *Morrison v. National Australia Bank*, 561 U.S. 247 (2010)).

92. See 18 U.S.C. § 1514A(e)(2) (2012) (emphasis added).

93. *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492 (3d Cir. 2014); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(KPF), 2014 WL 285093, at \*11 (S.D.N.Y. Jan. 27, 2014) (holding that the Anti-Retaliation Provision "does not include a prohibition against predispute arbitration agreements"), *appeal denied*, No. 12 Civ. 5914 (KPF), 2014 WL 1316472, at \*1 (S.D.N.Y. Apr. 1, 2014); *Ruhe v. Masimo Corp.*, No. SACV 11-00734-CJC(JCGx), 2011 WL 4442790, at \*4 (C.D. Cal. Sept. 16, 2011) (same).

94. See *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089 (JCH), 2015 WL 3771646, at \*7 (D. Conn. June 17, 2015).

95. See *Khazin*, 773 F.3d at 492-93; *Murray*, 2014 WL 285093, at \*8-9; *Ruhe*, 2011 WL 4442790, at \*4.

had it wanted to do so.<sup>96</sup> As the Supreme Court has explained, “when Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”<sup>97</sup> By not including an anti-arbitration clause in the text of the Dodd-Frank Claim, Congress seemingly left undisturbed the federal policy strongly favoring arbitration.<sup>98</sup> Although a Congressional choice to allow employers to compel Dodd-Frank Claims into arbitration while exempting many other whistleblower claims from arbitration might appear mystifying, the Third Circuit speculated that the omission of an additional anti-arbitration provision for Dodd-Frank might reflect some legislative compromise.<sup>99</sup>

## 2. *The Minority View Grants Access to Public Courts*

Not all courts have construed the Sarbanes-Oxley anti-arbitration provision narrowly.<sup>100</sup> In a decision from the District Court of Connecticut, which has been appealed to the Second Circuit, Chief Judge Hall focused on what it means for a cause of action to “arise under” a particular statutory section.<sup>101</sup> For guidance construing the language, the court turned to *Jones v. R.R. Donnelley & Sons Co.*, in which the Supreme Court found that a claim arises under any statutory provision that “provides a necessary element of the

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96. See *Khazin*, 773 F.3d at 492-93; *Murray*, 2014 WL 285093, at \*8-9; *Ruhe*, 2011 WL 4442790, at \*4.

97. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009).

98. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing a “liberal federal policy favoring arbitration agreements”).

99. See *Khazin*, 773 F.3d at 493; see also John K. Lisman, *Arbitration Agreement Arbitrage?: Statutory Discrepancy Leads to Third Circuit Victory for Dodd-Frank Whistleblower Defendants in Khazin v. TD Ameritrade Holding Corp.*, 60 VILL. L. REV. 753, 767 (2015) (referring to the omission of an anti-arbitration provision as an “odd discrepancy”).

100. While not directly on point, the Fourth Circuit described the broad scope of Sarbanes-Oxley’s anti-arbitration provision in *Santoro v. Accenture Federal Services, LLC*, declaring that the anti-arbitration clause Dodd-Frank added to Sarbanes-Oxley “represents a clear Congressional command that Dodd-Frank whistleblower claims are not subject to predispute arbitration.” 748 F.3d 217, 222 (4th Cir. 2014). Despite using this broad language for whistleblower claims, the Fourth Circuit decision addressed a different issue—whether Dodd-Frank invalidated *all* pre-dispute arbitration agreements. *Id.* The Fourth Circuit did not address the narrow issue of the discrepancy between the Sarbanes-Oxley whistleblower provision and the Dodd-Frank Claim. *Id.*

101. See *Wiggins v. ING U.S. Inc.*, No. 3:14-CV-1089 (JCH), 2015 WL 3771646, at \*6-7 (D. Conn. June 17, 2015), *appeal filed*, No. 15-2262 (2d Cir. July 16, 2015).

plaintiff's claim for relief."<sup>102</sup> Because Dodd-Frank's legal Lohengrin protects whistleblowers making disclosures protected under Sarbanes-Oxley, those whistleblowers' claims may also arise under Sarbanes-Oxley. If Dodd-Frank Claims arise under Sarbanes-Oxley, they should also be protected by its anti-arbitration provision.<sup>103</sup>

Although it is a close issue, this Article argues that this broader interpretation remains sufficiently faithful to the statute's internally inconsistent text and better serves the statute's objectives. If a claim is made possible by a particular statute, it may be fairly described as "arising under" that statute even if it also arises under a different statute.<sup>104</sup> Here, a whistleblower's Dodd-Frank Claim may be made possible by, and thus arise under, the Sarbanes-Oxley section containing the anti-arbitration provision.

This reading is not without consequences. Granting Sarbanes-Oxley's whistleblowers the right to sue under Dodd-Frank assures that Sarbanes-Oxley's own whistleblower provision will likely see diminished use. Unlike Dodd-Frank, Sarbanes-Oxley requires whistleblower claimants to first exhaust their administrative remedies by filing an administrative complaint with the Secretary of Labor.<sup>105</sup> In addition, it provides only back pay with interest while Dodd-Frank provides for twice "the amount of back pay otherwise owed to the individual, with interest."<sup>106</sup> Given the benefits of increased protections and remedies for whistleblowers, this Article argues a potential shift toward increased use of the Dodd-Frank Claim would be a positive one.

## CONCLUSION

This Article seeks to draw attention to a new Dodd-Frank controversy and the impact it may have on efforts to use whistleblower

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102. 541 U.S. 369, 376 (2004).

103. Of course, the statute protects a variety of conduct, giving rise to the possibility that some Dodd-Frank Claims may arise under Sarbanes-Oxley while others may not, depending on the underlying facts. See Umang Desai, Comment, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 450-52 (2012) (outlining Dodd-Frank's whistleblower and retaliation claims).

104. See *Jones*, 541 U.S. at 383 (recognizing that a cause of action may arise under a statute if the "plaintiff's claim against the defendant was made possible" by the statute).

105. See 18 U.S.C. § 1514A(b)(1)(A) (2012); 29 C.F.R. § 1980.103(c) (2016).

106. Compare 18 U.S.C. § 1514A(c)(2)(B), with 15 U.S.C. § 78u-6(h)(1)(C)(ii).

statutes to improve corporate governance and reform corporate culture in financial institutions. The content of this culture matters.<sup>107</sup>

A focus on culture should be balanced against strengthening disclosure requirements. Indeed, the legal literature describes how increased disclosure advances efficiency and governance.<sup>108</sup> But even though disclosure requirements are helpful in promoting transparency, disclosure requirements may not measure up to substantial regulation that alters negative market incentives or undesired economic incentives.<sup>109</sup> Therefore, although mandating disclosure is a key component of regulating financial markets, relying on it alone as a holistic panacea would be a mistake. Given the importance of business culture in our modern society, and the consequences that such culture and behavioral norms have, it is extremely important to nudge individuals as well as businesses to promote increased norms of accountability and transparency. This is also the message that regulators have been delivering in the years following the financial crisis.<sup>110</sup> Limiting arbitration and enabling whistleblowers to pursue their claims will help promote Dodd-Frank's goals and improve corporate culture.

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107. See Hilary J. Allen, *The Pathologies of Banking Business as Usual*, 17 U. PA. J. BUS. L. 861, 862-64 (2015) (explaining how financial industry culture contributes to systemic risk).

108. See, e.g., Henry T.C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1606-08 (2012).

109. *Id.* at 1715; Martin F. Hellwig, *Market Discipline, Information Processing and Corporate Governance* 6, 7, 19 (Max Planck Inst. for Research on Collective Goods, Preprint No. 2005/19, 2005) (arguing that market discipline works only if market actors have sufficient incentives to fulfill their monitoring role and there are no impediments to information signals).

110. See *supra* notes 11-21 and accompanying text.